



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 166 OF 2005

HELLEN MORAA MAOSA.....1ST PLAINTIFF

ZACHARIA MONGERA MAOSA.....2ND PLAINTIFF

JAMES OBANYI MAOSA Suing for and on behalf of the estate of

MAOSA MOENGA, DECEASED.....3RD PLAINTIFF

VERSUS

CHARLES MAGARE MORWABE.....DEFENDANT

J U D G M E N T

1. The plaintiffs who are the personal legal representatives of the estate of Maosa Moenga (deceased) initially brought a suit vide a plaint dated 8th December 2005 against the 1st to the 10th defendants seeking the following prayers:-

(a) An eviction order and a declaration that the defendants are trespassers on land reference number West Mugirango/Siamani/ 744.

(b) A permanent injunction preventing the defendants from trespassing into, occupying, using, cultivating and or any way dealing with land reference number West Mugirango/Siamani/ 744.

(c) Costs of the suit.

2. The plaintiffs amended the plaint pursuant to leave granted on 25th June 2013 as per the further amended plaint dated 16th June 2013 filed on 28th June 2013 to include one, Charles Magare Morwabe as the 11th defendant. The contents of the plaint and the prayers sought in the further amended plaint remained unchanged and were the same as in the original plaint. The plaintiffs claim is that the deceased Maosa Moenga is the registered owner of land parcel number **West Mugirango/Siamani/744** measuring 8.8hecares (“**the suit property**”) and that the defendants have since 2002 trespassed thereon without any justifiable reason and/or cause. The plaintiffs contend the defendants’ occupation of a portion of the suit property is unlawful and that they ought to vacate from therefrom and/or in default be evicted.

3. Though there has been a multiplicity of interlocutory applications overtime, the main suit never progressed to hearing and on 19th February 2016 the 1st to 10th defendants and the plaintiffs filed a consent letter in the following terms:-

“By consent the suit against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th defendants be and is hereby withdrawn with no orders as to costs as they vacated the suit parcel of land upon conclusion of Kisii High Court Succession Cause No. 190 of 2005.”

This consent was adopted and endorsed by the court on 21st April 2016 whereupon the suit against the 1st to 10th defendants was marked as withdrawn with no orders as to costs. The consent did not incorporate the 11th defendant and hence the suit as against the 11th defendant remained.

4. The suit as against the 11th defendant was fixed for hearing on 30th April 2018 and as the 11th defendant had not filed any defence and/or any bundle of documents, the suit proceeded for hearing by way of formal proof. The 11th defendant was represented by Mr. Nyagwencha advocate during the formal proof hearing. Mr. Zacharia Mongera Maosa testified during the hearing as one of the administrators of the estate of Maosa Moenga (deceased) on behalf of his co-administrators, the 1st and 3rd plaintiffs. He stated that his late father was the registered owner of land parcel **West Mugirango/Siamani/744**. He produced a copy of grant of letters of administration issued in Kisii HC Succession

Cause No. 190 of 2005 (“PEX.1”) and copy of certificate of official search dated 23rd May 2016 (“PEX.2”).

5. The witness explained he had no relationship with the 11th defendant. He stated that the 11th defendant was occupying a portion of his late father’s land which he unlawfully entered into after the death of his father. It was PW1’s evidence that his father never sold any land to the 11th defendant. He further stated that the 11th defendant has built 2 houses on the portion he occupies and has also placed a water tank. He asserted that the 11th defendant has no right to be on the land and prayed that he be ordered to vacate from the land failing which an order of eviction to be issued against him.

6. Upon cross examination of the 2nd plaintiff (PW1) by Mr. Nyagwencha Advocate, the witness confirmed that the 11th defendant was one of the objectors in HC Succession Cause No. 190 of 2005 together with the other 10 defendants and stated that they were ordered to vacate the suit property. The witness further stated the deceased estate had not been distributed to the beneficiaries. The witness stated that the 11th defendant entered the suit land about 1996 but he could not remember when he built on the land. He further stated neither he nor any of his brothers had any land which could have been sold to the 11th defendant as their late father’s estate had not been distributed.

7. The plaintiffs and the 11th defendant filed written submissions as directed by the court. The plaintiffs’ submissions were filed on 28th May 2018 while the 11th defendant’s submissions were filed on 21st June 2018. I have considered the pleadings, the evidence and the submissions by the parties and the issues for determination are as follows:-

(i) Whether land parcel number West Mugirango/Siamani/ 744 is registered in the name of Maosa Moenga (now deceased).

(ii) Whether the plaintiffs are the administrators of the estate of Maosa Moenga (deceased).

(iii) Whether the defendant is a trespasser unto land parcel West Mugirango/Siamani/744.

(iv) Whether the plaintiff is entitled to the reliefs sought?

8. The 2nd plaintiff in his evidence testified that his late father Maosa Moenga was the registered owner of land parcel **West Mugirango/Siamani/744** and tendered in evidence a copy of the certificate of official search dated 23rd May 2016 (“PEX.2”). The search shows the late Maosa Moenga was registered as proprietor of the suit property on 9th May 1973. Under Section 26(1) of the Land Registration Act, 2012, a certificate of title issued to a proprietor is prima facie evidence that the person so registered is the owner of the property and his title is indefeasible. Section 26 provides:-

26(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subjected to challenge, except –

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy any registered instrument, signed by the registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.

9. The certificate of official search was duly signed and sealed by the Land Registrar and there was no other evidence to controvert the evidence that the deceased was the registered owner of the suit property. The court in the premises holds and finds that the deceased, Mosa Moenga was the registered proprietor of land parcel No. **West Mugirango/Siamani/744**.

10. On the issue whether the plaintiffs were the administrators of the estate of Maosa Moenga - deceased, the 2nd plaintiff produced in evidence a copy of the Grant of Letters of Administration Intestate issued on 9th November 2005 as “PEX.1”. The grant of Letters of Administration were issued in Kisii HC Succession Cause No. 190 of 2005 to Hellen Moraa Maosa, Zacharia Mongera Maosa and James Obanyi Maosa who are the plaintiffs in the instant suit suing on behalf of the estate of Maosa Moenga (deceased). The instant suit was commenced vide a plaint dated 8th December 2005 filed in court on 13th December 2005. As at the time the suit was filed, the plaintiffs had already been appointed as administrators of the deceased estate and they therefore had capacity to represent the estate of the deceased. Thus, on the second issue the court finds and holds the plaintiffs are duly appointed administrators of the estate of Maosa Moenga and they have capacity to represent the estate.

11. On the third issue, whether the 11th defendant has trespassed onto the suit land owned by the deceased estate, the court notes that there was no evidence tendered to demonstrate that the defendant had a relationship with the deceased to qualify him as a beneficiary of the deceased estate. The 2nd plaintiff testified that the defendant had no relationship with the deceased. This evidence was not rebutted. There is evidence on record vide the ruling delivered by Musinga, J. on 16th June 2009 in Kisii HC Succession Cause No. 190 of 2005 that the 11th defendant together with the 1st – 10th defendants whose suit was withdrawn had objected to and had applied for the annulment and/or revocation of the grant of Letters of Administration issued to the plaintiffs in the succession cause. The judge in dismissing the objectors application observed as follows:-

“...It matters not that the deceased’s son (Evantus Nyangwara Maosa) was purporting to sell what he verily believed was

his share of the deceased's estate. As long as he was not holding a confirmed grant of representation, the deceased's son could not lawfully sell any portion of his late father's property. The objectors can be prosecuted for intermeddling with the deceased's estate.

The objectors' application lacks legal basis and must be dismissed with costs, which I hereby do. The objectors should pursue the estate of Erastus Nyangwara Maosa for refund of their money since they have no right over any portion of the deceased's property."

12. Once the defendant's objection and/or application in the succession cause was disposed of as above, the defendant's interest in the deceased estate were finally determined and in the absence of any appeal against the ruling by Musinga, J. his determination remains. The defendant's occupation of any portion of land parcel number **West Mugirango/Siamani/744** which belongs to the estate of Maosa Moenga (deceased) remains unlawful and the administrators of the deceased estate were entitled to initiate the present action to obtain vacant possession of the suit property from the defendants. As per the consent filed herein the 1st to the 10th defendants have vacated the suit property following the ruling in the succession case resulting in the withdrawal of the suit against them.

13. The 11th defendant has not vacated and has some two houses on the property. The court finds and holds that the 11th defendant's occupation and possession of a portion of the suit property is unlawful and constitutes trespass on the property. The 11th defendant never filed any defence and there is no evidence that can justify his occupation. If he dealt with a son of the deceased who held no grant as the evidence suggests, such person had no authority and/or capacity to deal with the estate of the deceased. Only a duly appointed administrator of a deceased estate has authority to deal with the estate of a deceased person in terms of Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya.

14. On the basis of the evidence adduced by the plaintiffs, I am satisfied that the plaintiffs have proved their case against the 11th defendant on a balance of probabilities and are entitled to the reliefs sought. I accordingly enter judgment in favour of the plaintiffs as against the 11th defendant on the following terms:

- 1. That the defendant, Charles Magare Morwabe, is in trespass on land parcel No. West Mugirango/Siamani/744 and is hereby ordered to vacate and deliver vacant possession to the plaintiffs within 30 days of being served with the decree herein.**
- 2. That in default of compliance with (1) above, an order of eviction for the forcible removal of the defendant to be issued on application by the plaintiffs.**
- 3. An order of permanent injunction is hereby issued restraining the defendant from re-entering, occupying, cultivating and or in any manner dealing with or interfering with land parcel No. West Mugirango/Siamani/744.**
- 4. Costs of the suit awarded to the plaintiffs as against the 11th defendant.**

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 28TH DAY of SEPTEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ollando for Oguttu for the 1st, 2nd and 3rd plaintiffs

Ms. Muguche for Nyawencha for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE