



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CIVIL SUIT NO. 136 OF 2013

JOYCE ESERI MISIKO *alias* ESERI OMUSINDOBOLE.....PLAINTIFF

VERSUS

MARTIN BARASA.....1ST DEFENDANT

PRISILLA MALESI.....2ND DEFENDANT

JOSEPH LUVISIA.....3RD DEFENDANT

VIOLET KHAKESA.....4TH DEFENDANT

RINA OMBOKO.....5TH DEFENDANT

KUUGUNI WEIKEDABA.....6TH DEFENDANT

SAMUEL KIPTISIA.....7TH DEFENDANT

MARTIN KUUDU.....8TH DEFENDANT

TEELA KIPSANGA.....9TH DEFENDANT

THOMAS KHAYALA.....10TH DEFENDANT

ELISHA KIBERENGE.....11TH DEFENDANT

SAMSON KIBIWOTT KILACH.....13TH DEFENDANT

JUDGMENT

***Joyce Eseri Misiko* alias *Eseri Omusindobole* (hereinafter referred to as the Plaintiff) has come to court against the defendants by way of Plaintiff dated 27.9.2012 but amended on 6.5.2013 pursuant to the court order of 24.4.2013. The Plaintiff asserts that she is the administratrix of the estate of Lydia Maliatso Misiko having been granted the same vide Kakamega High Court Succession Case of 396 of 1994. The Plaintiff asserts that she the registered owner of all that parcel of land known as Uasin Gishu/Ngenyilel S. Scheme/361 measuring 9.5 hectares by way of transmission. The Plaintiff avers that by a certificate of confirmation issued on 22nd July, 2010 the said IR No. Uasin Gishu/Ngenyilel S. Scheme/361 is to be distributed as follows to the beneficiaries: -**

- a) Truphena Anyonje 2 ½ Acres
- b) Anne Misiko 2 ½ Acres
- c) Dorcas Emali 2 ½ Acres
- d) Joyce Misiko 2 ½ Acres

- e) Ruth Misiko 2 ½ Acres
- f) Christine Misiko 2 ½ Acres
- g) Monicah Misiko 2 ½ Acres
- h) Everline Misiko 2 ½ Acres
- i) Juliet Misiko 2 ½ Acres

The Plaintiff avers further that she is unable to discharge her duties as the administratrix of the Estate of Lydia Maliatso Misiko and distribute the suit land to the beneficiaries as the Defendants, their servants, agents and or employees have without any lawful justification and or reason encroached onto the Plaintiffs parcel of land and have refused to move away therefrom. The Plaintiff's claim against the Defendants is therefore for a declaration that the Defendants are trespassers onto land parcel Uasin Gishu/Ngenyilel S. Scheme/361 and that the Plaintiff is the legal owner of all that parcel of land known as Uasin Gishu/Ngenyilel S. Scheme/361,

The Plaintiff prays for an order of eviction against the Defendants, their agents, servants and or employees from land parcel Uasin Gishu/Ngenyilel S. Scheme/361 and that upon the Defendants vacating the land parcel Uasin Gishu/Ngenyilel S. Scheme/361 the Plaintiffs prays for an order of permanent injunction restraining the Defendants from trespassing into the Plaintiffs land parcel Uasin Gishu/Ngenyilel S. Scheme/361 and or in any other way interfering therewith. The plaintiff ultimately prays for the costs and interest of this suit.

The defendants filed a defence the amended plaint whose gist is a denial and opposition to the schedule of distribution in paragraph 5 of the plaint and aver that they said beneficiaries are not entitled to the Suitland as the grant was obtained by fraud and the deceased did not own or occupy the said land parcel. The Defendants deny that they have unlawfully encroached onto land parcel Uasin Gishu/Ngenyilel Settlement and aver that their occupation of the said parcel is lawful and merited and has being continuous and they cannot be said to be invaders/trespassers.

The Defendants further state that they are legal beneficiaries of the original allottee and the owner of the said parcel being one Kili Arap Rono, now deceased and the 13th Defendant is also a Co-executor to his estate.

The Defendants also aver that if any transfer was effected from the original allottee to the Plaintiff, or any other person, the same was effected fraudulently without the knowledge, authority or consent of the owner Kili Arap Rono or his personal representatives.

The particulars of fraud by the plaintiff according to the defendants are: -

- a) **Falsely affecting transfer without the allottee's knowledge or consent.**
- b) **Failure to obtain relevant consent to effect transfer.**
- c) **Failure to disclose the identity of the transferor.**
- d) **Transferring land after the death of the owner Kili Arap Rono without conduction succession proceedings.**
- e) **Listing land parcel number Uasin Gishu/Ngenyilel Settlement Scheme/361 as part of the assets of another deceased person other than the estate of Kili Arap Rono and thereby obtaining certificate of confirmation of grant transferring the land to themselves without involving the beneficiaries of the estate of Kili Arap Rono who have been and are in occupation of land in issue.**

The defendants further aver that they have been in continuous, uninterrupted and peaceful occupation of land parcel number Uasin Gishu/Ngenyilel S.Scheme/361 for a period of over 21 years. Their occupation has been open, as of right and adverse to the Plaintiff. The defendants also state that the Plaintiff's claim over the suit parcel of land has been extinguished by passage of time and the suit is statute barred by the Limitation of Actions Act.

In the foregoing circumstances, the Defendants state that the Plaintiff is not entitled to any orders sought as the defendants are on the Suit land lawfully having rightfully inherited the same from the Original allottee Kili Arap Rono and purchased the land from the beneficiaries/executors the 13th defendant included. No demand of notice of intention to sue was given as required by law. In answer to paragraph 10 of the plaint, the defendants state that this suit is Res Judicata as the same issues were dealt in Eldoret CMCC No. 422 of 1996 when the suit against the 14th Defendant over the suit land was dismissed by the court with costs.

In the reply to the defendants' defence, the plaintiff denies that the defendants are beneficiaries of the estate of the late Kili Arap Rono. The allegations of fraud and the particulars are denied. The Plaintiff denies that the defendants have been in continues, uninterrupted and peaceful occupation of the suit land for a period of over 21 years and further denies that their occupation has been open, as of right and adverse to the plaintiff.

The plaintiff denies that the suit is time barred by virtue of the limitation of Acts. Last but not least the plaintiff denies that the suit is res-judicata.

When the matter came up for hearing **PW1, Joyce Eseri Misiko alias Eseri Omusindobole**, the Plaintiff herein testified that she is a teacher

by profession living in Turbo in Uasin Gishu County. She has brought the suit herein on behalf of Lydia Malietso Misiko(Deceased). She produced the Certificate of Confirmation of Grant to demonstrate that she is the administratrix of the Estate of the deceased. She produced the Certificate of Official Search. She states that the suit land is in her name as the administratrix. The land belonged to their grandmother, it was transmitted to their mother and later to their brothers. She produced a letter from the Settlement Fund Trustees as evidence that the land belonged to their mother. They obtained consent of the Land Control Board. The defendants took the land during Tribal clashes triggered by election in 1992.

During cross examination, she states that the land belonged to Kili Arap Rono who sold it to her grandmother in 1968. She claims that the defendants invaded the land in 1992 and burnt their house. She reported to the chief and the chief took the matter to the Settlement Fund Trustees. That was close of the Plaintiffs case.

The defence asked for time to engage an advocate. Wasted the courts time on several occasions and finally engaged Mr. Mwaka as their advocate and the defence case took off on 27.7.2017.

During defence hearing, **Dw1. Samson Kibiwott Arap Kilech** testified that he lives at Ngenylel in Turbo, sub county. He is a farmer by profession. Kili Arap Rono was his father who died on 5.2.1992 at Tinderet. The suit land belongs to his father as he was given by Settlement Fund Trustees after paying all the money. He produced a Memorandum of Satisfaction. The land was initially registered in the name of the Settlement Fund Trustees. He produced a Certificate of Confirmation of Grant dated 6.12.1995. He has been paying rates up to 2015. He has a letter from the District Land Settlement Officer dated 13.4.2005. He states that the land is in the land lawfully as the land belongs to his father and that the plaintiff was registered through forgery. He claims that his father did not sell the land. On cross-examination by Mr. Mwinamo learned counsel for the plaintiff he admits that he has no title deed to the land. He does not know how the plaintiff was registered.

DW2 Sammy Kerich, states that the land belonged to his father Kili Arap Rono and that his father did not sell the land. he has lived in the land since he was born. He also states that he does not have a title deed.

DW3 Mr. Joseph Luvisia, a businessman bought part of the land from Samson Kilach in the year 2001. He did not produce the sale agreement.

DW4 is Martin Barasa Kundu, a businessman. He bought part of the land in 1999 but does not have the sale agreement.

DW5 is Elisha Kiberege, a businessman. He bought 0.1 acres of the land in 2003 and has been in possession for 10 years. He does not have the agreement of sale.

The Plaintiff submits that she has proved her case on a balance of probability as required by law. She has produced the certificate of official search which shows that she is the registered proprietor and therefore should be granted the orders sought. The defendants are occupying the land in dispute suing force and that they are not in peaceful occupation. The plaintiff further argues that she was registered as proprietor pursuant to a grant in Kakamega Succession Cause NO. 396 of 1994 (Estate of Lydia Malietso Misiko) by way of transmission and is pursuing the interest of the beneficiaries of the Estate in line with Sections 71(1) and (3) of the Law of Succession Act.

The defendants on their part submit that the certificate of confirmation of grant issued to the Plaintiff in Kakamega High Court Succession case NO. 396 of 1994 was issued on 22.7.2010, 6 years after the 13th defendant and his co-executor had been issued with a certificate of confirmation of grant over the same suit land on the 6.12.1995. The defendants argue that once property devolves to a person through succession cause the same cannot be subjected to another succession proceedings. The defendant submits that the plaintiff obtained title to the land fraudulently. Moreover, the defendant submits that the suit is res-judicata as No. Eldoret Chief Magistrate's Case No. 422 of 1996 dealt with the same issues and was dismissed.

I have considered the plaintiff's evidence on record and submissions of parties and do find that there is no dispute that the property was initially owned by Kili Arap Rono according to the records of the Settlement Fund Trustees.

The dispute is whether Kili Arap Rono sold the land to Eseri Omusondobole Mbunjiro. No evidence of sale was produced to demonstrate that there was a sale of the property. However, it is a fact that until the year 2000, the property was still registered in the names of Settlement Fund Trustees and therefore any sale of the property was an in-house arrangement between Settlement Fund Trustees, Kili Arap Rono and Eseri Omundibole Mbunjiro and therefore going by the letter dated 25.2.2000 this court finds that the property was sold by Kili Arap Rono to Eseri O. Mbujiro sometimes in 1971 and the latter was documented in the Settlement Fund Trustees office as the owner of the property on the 3.10.1980.

The property was transferred to Mrs. Lydia Malietso Misiko on 20.4.1988. This court finds that the transfer being referred to in this letter is not the legal transfer of property as per the law but it loosely means Mrs. Lydia Malietso Misiko was entitled to the property though the property was still registered in the names of Settlement Fund Trustees.

On the 6th day of December 1995, in the High Court of Kenya at Eldoret, in the matter of Succession Case No. 183 of 1993, In the matter of the Estate of the Late Kili Arap Rono, issued a confirmation of grant in the said Estate of Kili Arap Rono to John Malakwen Kir and Samson K. Kilech. The confirmation of grant was made by the court on 13.10.1995 pursuant to the provision of section 71(1) and 3 of the Law of Succession Act. However, John Malakwen Kir and Samson K. Kilach never registered the confirmation of grant with the registrar of lands and therefore there was no transmission of the property to the said administrator.

On the 22.7.2010, another Certificate of Confirmation of Grant was issued in respect of the parcel of land in the High Court of Kenya at Kakamega in Succession Cause NO. 396 of 1994 in the Matter of the Estate of the late Lydia Malietso Misiko. The confirmation was made on the 28.4.2010, pursuant to section 71(1) and (3) of the Law of Succession Act.

Joyce Eseri Misiko alias Eseri Omusindobole was registered as the proprietor of the land on the 25.4.2012. Prior to registration of the property in the name of the Plaintiff, the same was still registered in the names of Settlement Fund Trustee.

The defendants in their defence invoke the principle of adverse possession. The defendant cannot claim adverse possession against the plaintiff as time begins running against the plaintiff on 25.4.2012 when she became the registered owner. ***In the Court of Appeal case of Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR Hon Justice Makhandia*** held that adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

Section 7 of the Limitation of Actions Act provides for this doctrine thus

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The Limitation of Actions Act makes further provision for adverse possession at Section 13 that:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

It is clear that the defendants cannot benefit from this law as the plaintiff was registered as the proprietor of the land on 25.4.2012 and the suit was filed on the 28th September 2012 before the expiry of 12 years. Moreover, before being registered in the plaintiff's name, it was property of Settlement Fund Trustees and therefore public land as opposed to private land. The property became private land upon allocation to the plaintiff. Section 41 of the Limitation of Action Act Cap 22 Laws of Kenya excludes public land from the application of the Act. The section provides as follows: -

41. Exclusion of public land

This Act does not—

(a) enable a person to acquire any title to, or any easement over—

(i) Government land or land otherwise enjoyed by the Government;

(ii) mines or minerals as defined in the Mining Act (Cap. 306);

(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);

(iv) water vested in the Government by the Water Act (Cap. 372);

(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or

(vi) land vested in the trustees of the National Parks of Kenya; or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act

On res-judicata, this court finds that the plaintiff was not a party in Eldoret CMCC No. 422 of 1996. Moreover, the case was not determined on merit. The principle of Res-judicata does not apply.

The Plaintiff is the registered proprietor to the suit land as the administratrix of the Estate of the deceased. Being registered as the administratrix of the Estate of the deceased, she acts as a trustee of the said beneficiaries of the Estate.

Under Section 24(b) of the Land Registration Act, the registration of a person as a proprietor of a lease vests in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant to the title. Under Section 25(1) the rights of a proprietor are indefeasible except as provided in the Act and are held by the proprietor, together with all privileges and appurtenances belonging to the title, free from all other interests and claims whatsoever but subject only to the encumbrances and overriding interests specified in Section 25(1) (a) and Section 28 of the Land Registration Act and to the duty and obligations of the proprietor holding title as a trustee. Indeed Section 26(1) of the Land Registration Act provides as follows: -

“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 to that proprietor shall not be subject 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.”

The plaintiff is the registered proprietor of the property. There is no evidence of fraud, misrepresentation where the plaintiff is party, or any illegality, procedural impropriety or corrupt Scheme. I do find that the plaintiff is entitled to the said property as the administratrix of the estate of the deceased to administer the property in the interest of the beneficiaries of the estate.

I do find that the defendants are trespassers on the said parcel of land and that the Plaintiff is the legal owner of all that parcel of land known as Uasin Gishu/Ngenyilel S. Scheme/361 therefore do make a **declaration** that and that the Defendants are trespassers on the said land and do hereby make an **order of eviction** against the Defendants, their agents, servants and or employees from land parcel Uasin Gishu/Ngenyilel S.Scheme/361 upon the plaintiff issuing a 60 days’ notice. Last but not least, I do grant **a permanent injunction** restraining the Defendants, their agents, servants and or employees from trespassing into the land parcel Uasin Gishu/Ngenyilel S. Scheme/361 or in any other way interfering with the land parcel upon vacating the property. The land to be distributed in accordance with the Certificate of Confirmation of Grant dated 22.7.2010. Costs of the suit to the plaintiff and interest at court rates. Orders accordingly.

Dated, delivered and signed at Eldoret this 7th day of September 2018

A. OMBWAYO

JUDGE