

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 278 OF 2014

VERONICAH AMBAISI.....PLAINTIFF

VERSUS

FRANCIS JOMO SHIKHULE.....1ST DEFENDANT

SKOLASTIKA IMBOSA.....2ND DEFENDANT

FELIX KHAYUMBI MINYATA.....3RD DEFENDANT

JUDGEMENT

The plaintiff avers that her father Musa Ombayo now deceased purchased a portion of land measuring 0.20 ha from land parcel registration number Butso/So/Shikoti/13352 from the defendant in 1996. The deceased Musa Ombayo took possession of the said land and was staying on the same until his demise on the 10th of June, 2007. In the year 2010, the defendant trespassed upon the said land and has been trying to dispose off the same to 3rd parties without the plaintiff's consent. The plaintiff avers that the actions of the defendant are unlawful as the deceased's family consisting of four houses have nowhere to go and are supposed to be settled on the same. The plaintiff's claim against the defendant is for an order of transfer of 0.20 ha to the deceased for purpose of succession. The plaintiff's claims against the defendant is for an order of injunction restraining the defendant, his agents and/or servants from interfering with the deceased's family quiet use and possession of the suit property. The plaintiff prays for judgment against the defendant for:-

- (a) An order that the 1st defendant do sign transfer form in favour of the plaintiff and/or in the alternate the Deputy Registrar do sign transfer documents.
- (b) Thereafter an order of eviction do issue against the 2nd and 3rd defendants from the said portion.
- (c) Costs and Interest.

PW1 produced a copy of the land sale agreement, mutation forms and letter of consent to prove that the sale existed. Her father was buried on the said portion of land as per her evidence and the 2nd defendant is her step mother. She confirms that succession has not been done for her father's estate. PW2 and PW3 who are both brothers to the deceased Musa Ombayo confirms that the latter bought the land from the 1st defendant and that all the beneficiaries should inherit the same.

The defendants were served but failed to attend court or file any papers in their defence. The plaintiff's evidence was not challenged.

This court has considered the evidence and the submissions in this case. It is the plaintiff's evidence that her father bought the land from the 1st defendant and the latter never transferred the same to the deceased Musa Ombayo. They are seeking for the same to be transferred. The jurisdiction to order for specific performance is based on the existence if a valid and enforceable contract. The plaintiff has clearly demonstrated to this Honourable court that indeed, the contract between the deceased and the defendant existed, is valid and capable of being enforced. They even prepared the transfer documents. The plaintiff case has not been challenged. Be that as it may, it has come out in evidence that the plaintiff is not the only beneficiary of the deceased Musa Ombayo and the land cannot be transferred to her alone and ought to be transferred to the estate of Musa Ombayo to enable succession proceedings to be undertaken. Eviction orders will not be granted at this time as it has come out in evidence that the 2nd defendant is a step mother and has beneficiary interest in the estate. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. An order that the 1st defendant do sign transfer a portion of land measuring 0.20 ha from land parcel registration number Butso/So/Shikoti/13352 in favour of the deceased Musa Ombayo and in default the Deputy Registrar do sign transfer documents and thereafter succession proceedings to be undertaken.
2. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE