



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 42 OF 2015

PHILEMON WACHARA ONDELE.....PLAINTIFF

VERSUS

ISAAC JUMA OSEWE.....DEFENDANT

JUDGMENT

By an originating summons dated 18th February 2015 the applicant herein sued the Respondent claiming that he had acquired KISUMU/PANDPIERI/1232 by way of adverse possession and sought for the following orders:

- 1) That the applicant be declared the absolute owner of the suit land parcel No. KISUMU/PANDPIERI/1232.
- 2) That the Respondent be ordered to execute all documents of subdivision and transfer of land parcel No. KISUMU/PANDPIERI/1232. In favour of the Applicant, failure to which the Deputy Registrar of the court be empowered to execute the same on behalf of the Respondent enabling the Land Registrar Kisumu County to register the suit land parcel in the name of the applicant.
- 3) That the respondents, his agents, servants and or any other person claiming through him be ordered to give vacant possession of the portion of the suit parcel of land.
- 4) That the respondents, his agents, servants and or any other person claiming through him be restrained by an order of injunction from interfering with the suit land and or alienating and further sub - dividing
- 5) That in the alternative the Honourable court be pleased to issue an order directing the surveyor to subdivide plot NO. KISUMU/PANDPIERI/1232 and the Deputy Registrar Kisumu High Court to execute all the relevant documents for subdivision and transfer in favour of the applicant herein.

The Originating Summons was supported by the affidavit of the Applicant PHILEMON WACHARA ONDELE sworn on 18th February 2015. The respondent was served with the summons but did not file any response therefore the matter proceeded by way of formal proof.

Plaintiff's Case

The plaintiff gave evidence and stated that the defendant transferred the suit land to his name without considering the other beneficiaries. He adopted his witness statement as his evidence in chief before the court. He stated that he was staying on the suit land with the late Francisca Olale Odele his grandmother.

It was his evidence that both his parents are deceased and that they lived with the defendant on the suit land with their grandmother who was the owner of the suit land. The plaintiff stated that he went to the Lands office and conducted a search which he produced in court indicating that the suit land was transferred to the defendant on 25th September 2009. He also produced an extract of the green card, caution and a letter from the area chief.

PW1 also stated that he tried resolving the matter amicably with his brother who is the defendant herein but he was not ready to listen. He also gave evidence that one of his uncles was outside the court but was not able to express himself as he is a stammerer and the other one is mentally challenged. He stated that the defendant is in occupation of the suit land. He prayed for judgement to be entered in his favour as prayed for in the originating summons.

Plaintiff's Submissions

Counsel for the plaintiff filed written submissions and stated that the plaintiff brought the suit against the defendant on his own behalf and on behalf of the two surviving uncles who are challenged as stated above.

Counsel submitted that the issues for determination are the relationship between the parties to the suit, the estate and other beneficiaries, whether the plaintiff and other beneficiaries are entitled to a share in the estate of their grandmother, and whether there are any reliefs available to the parties.

On the first issue Counsel reiterated the plaintiff's evidence that he is a brother to the defendant and that he has two uncles who are challenged in one way or another. Counsel cited section 38 of the law of succession Act which states that **"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children"**;

It was further Counsel's submission that the parties are beneficiaries of the estate of their grandmother, their parents having predeceased her leaving them with the said grandmother.

Counsel cited the case of ***In the matter of the estate of Patrick Mungai Kigeya (deceased) HCSC No. 1374 of 2000*** where a protest to confirm grant of letters of Administration was made by a son who claimed that the estate of the deceased should not be divided equally between all the children, their mother having predeceased them. He contended that one of the assets was acquired with money that he had given to his father and further that the deceased had bequeathed the property to him. Court took the view that there was not enough evidence to support his contention and preceded to hold that Section 38 of the Law of Succession Act was explicit that the estate of the deceased intestate who is survived by children only should be shared between the children in equal shares.

Counsel further submitted that going by the provision of Section 39 of the Law of Succession, the uncles were supposed to have shared the estate equally amongst all the beneficiaries but since this was not done, the defendant is inter-meddling with the estate of the deceased by transacting without taking out letters of administration.

It was also the plaintiff's Counsel's submission that the remedies for the plaintiff are an order for the cancellation of entry in the land registry nullifying the title deed in the name of Isaac Juma Osewe and revert ownership of the estate to the name of Francisca Olale Ondele (deceased) and order that the parties take out letters of administration through the proper procedure.

Analysis and determination

This is a claim by the plaintiff that he has acquired the suit land by way of adverse possession and as such the court should declare him as the absolute owner of the suit land. The issues for determination are as to whether the plaintiff has proved the ingredients of adverse possession. The Ingredients of adverse possession were discussed by the Court of Appeal in ***Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR*** where the court stated:

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 nor 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. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

"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."

In the current suit the plaintiff is not clear whether he wants to prove that he has acquired the suit land by adverse possession or that the defendant transferred the suit land in his name fraudulently without filing a Succession Cause. The evidence adduced before the court does not support a case for adverse possession. The green card produced in court indicates that the title was transferred to the defendant in 2009, the plaintiff did not state when the grandmother who was the owner of the suit land passed on and whether she died intestate before transferring the land to the defendant.

The plaintiff stated that the two surviving uncles are challenged by mental illness and incapacity as a stammerer. There is a well laid down procedure for bringing suits in respect of such persons whether by acting as a guardian ad litem or next friend.

Orders for the appointment of a person to manage the estate of any person suffering from a mental disorder are provided for under Section 26 of the Mental Health Act, which provides as follows :-

S. 26 Order for custody, management and guardianship

The court may make orders-

*(a) for the management of the estate of any person suffering from mental disorder; and
(b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.*

(2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.

(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

From the evidence and submission of Counsel it is clear that the plaintiff is claiming a share of the estate of his grandmother on his own behalf and on behalf of his incapacitated uncles. Counsel further submitted that the plaintiff wants the court to order for the filling of succession for the benefit of all the beneficiaries.

There is no evidence that the plaintiff filed this suit on his behalf and on behalf of the uncles. There was no such authority sought and granted by the court as provided for by law and procedure. The orders the plaintiff is seeking for are that he be declared the absolute owner of the suit land and not to share with the defendant and the uncles.

The plaintiff produced a letter by the defendant in response to a letter by NALEAP whereby the defendant claimed that the suit land was transferred to him while the grandmother was still alive which the plaintiff did not adequately respond to.

At one point I thought I was dealing with a succession cause as the issues were essentially determining whether the plaintiff and the uncles are entitled as beneficiaries of the estate of Francisca olale ondele.

The court took the trouble of questioning one of the uncles who was said to be a stammerer and had been asked to wait outside the court. I established that he was not badly off and could communicate without a lot of trouble.

I have considered the evidence on record, the exhibits produced, Counsel's submission and judicial authorities and I have come to the conclusion that the plaintiff has failed to prove that he has acquired the suit land by way of adverse possession. It should be noted that even if a suit is not defended, it is incumbent upon the plaintiff to prove his case on a balance of probabilities. It is unfortunate that the plaintiff had a field day but still could not prove his case. The plaintiff's suit against the defendant is therefore dismissed with no orders as to costs as they are allegedly brothers.

DATED and DELIVERED at KISUMU this 3RD DAY OF DECEMBER, 2018.

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of Ms. Bagwasi holding brief for Madialo for Plaintiff, Court assistant Joanne, and in the absence of the defendant.

M. A. ODENY

JUDGE