



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 86 OF 2012

JOSEPH CHERUIYOT CHEBIRIR.....PLAINTIFF

VERSUS

CHARLES MOSE SITIMA.....1ST DEFENDANT

CASPER ABIMA.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff instituted the present suit vide a plaint dated 8th March 2012 filed in court on the same date. The plaint was amended with leave of court on 21st June 2012 to enjoin Casper Abima, who is a son of the 1st defendant as the 2nd defendant. The plaintiff's case is that he is the administrator of the estate of Moraa Momanyi (deceased) vide letters of administration issued on 25th November 2011 in Kisii HC Succession Cause No. 478 of 2011. The plaintiff claims that the defendants in August 2010 unlawfully and without any justifiable cause entered onto the deceased land parcel **North Mugirango/Magwagwa I/890** (hereinafter referred to as "**the suit property**") and commenced construction of a permanent structure thereon without the consent of the plaintiff. The plaintiff claims that he reported the matter to the provincial administration but the defendants ignored summons and continued their acts of trespass onto the deceased property. The plaintiff seeks judgment for an order of permanent injunction against the defendants to restrain them from trespassing onto and/or constructing any structures thereon. The plaintiff also seeks an order of eviction against the defendants.

2. The defence filed by the 1st defendant dated 28th March 2012 and subsequently amended on 26th June 2012 constituted merely denial of the plaintiff's averments. The 1st defendant averred that the plaintiff was a stranger in the suit property and the orders he sought against the defendants ought not to be granted. The 2nd defendant replicated the defence filed by the 1st defendant.

3. Although the record shows the plaintiff filed simultaneously with the plaint an application for injunction against the defendants and that the 1st defendant filed an application dated 3rd December 2013 seeking to have the suit against him struck out on the basis that the suit did not disclose any cause of action and was scandalous, frivolous and/or vexatious and was otherwise an abuse of the process of the court, these applications had not been disposed of as at 4th December 2013 when the hearing opened before **Okong'o, J.** I will take it that the applications were dispensed with to permit the hearing of the case to proceed on its merits.

4. The plaintiff testified and was the sole witness in support of the plaintiff's claim. The plaintiff testified

that he was the son of Moraa Momanyi (now deceased) and that his mother was the registered owner of land parcel number **North Mugirango/Magwagwa I/890** measuring 0.9Ha. He stated that he and his late mother were residing in the suit property but in or about 1956 he moved with his mother to Loreti where the plaintiff resides to date. The plaintiff stated that when he and his mother moved to Loreti his step brother, **Onuko Momanyi**, was left cultivating and using the suit property at Bisembe with the permission of his mother and that the said Onuko Momanyi used to share the crops cultivated thereon with his (plaintiff's) mother. The plaintiff further testified that even after his mother's death in or about 1993 Onuko continued to cultivate the land. He stated that Onuko died in 2005 and his wife continued cultivating on the land until she died in 2010. The plaintiff stated that it was after the death of Onuko's wife in 2010 that the 1st defendant entered onto the land and put up a structure and started cultivating thereon which prompted the plaintiff to report the matter to the elders who arbitrated the matter and directed the 1st defendant to move out but he refused to oblige which necessitated the plaintiff to revert to the court for assistance.

5. The plaintiff further stated when he approached the court he found that one **Gekara Ogeto** had applied for and obtained a grant for his late mother's estate. The plaintiff stated that he applied to have the grant issued to the said Gekara Ogeto revoked and that the court in Kisii Succession Cause No. 478 of 2011 vide an order given on 25th November 2011 produced as "**PEX.1**" revoked the said grant issued to Gekara Ogeto. The order was in the following terms:-

1. That the summons for annulment and/or revocation of grant dated 10th October, 2011 be and is hereby allowed in the following terms:-

(a) The grant of letters of administration intestate given in respect of the estate of the late Moraa Momanyi given to Gekara Ogeto the petitioner/respondent herein by the Senior Principal Magistrate Court at Nyamira vide Succession Cause No. 1 of 2011 be and are hereby revoked.

(b) Fresh grant letters of administration intestate do issue to Joseph Cheruiyot Chebirir the applicant herein.

(c) That there be no order as to costs.

6. The plaintiff was accordingly issued with a grant of letters of administration intestate dated 2nd March 2012 in Kisii HC Succession Cause No. 58 of 2012 produced in evidence as "**PEX.2**". The plaintiff further produced a copy of certificate of official search dated 12th January 2011 in respect of land parcel **North Mugirango/Magwagwa 1/890** as "**PEX.3**" which shows Moraa Momanyi (deceased) was registered as owner of the suit property on 13th July 1973.

7. In cross examination by counsel for the defendants the plaintiff reiterated that Onuko Momanyi was his step brother and that he only used to cultivate on the suit property and never put up a home thereon. He further stated the suit property shares a common boundary with the 1st defendant's parcel of land. The plaintiff denied being aware that the defendants had purchased the suit property.

8. Both defendants testified as DW1 and DW2 and called two additional witnesses one **Barnabas Nyantika Onuko** (DW3) and his wife **Jane Nyantika** (DW4). The 1st defendant testified that the plaintiff was a stranger to him and he did not know him stating that he only met him in court during these proceedings. The witness stated that the property belongs to the Onuko family and that it borders his parcel of land. He stated that around the 1950's he heard that a lady known as Moraa Momanyi had been on the property briefly and left. He claimed he never met her. The 1st defendant stated the 2nd defendant is his son and that he bought the suit property from Barnabas Nyandika Onuko and he has put up a permanent house on the property. He further stated over the years the family of Onuko Momanyi was using the suit. In cross examination the witness stated he was not aware the property belonged to Moraa Momanyi (deceased). He also stated he had no knowledge that Moraa Momanyi (deceased) had any arrangement with Onuko Momanyi respecting the property. He further stated he did not know whether

Barnabas Nyantika Onuko was the registered owner of the property. He affirmed it was his son, the 2nd defendant who had constructed a house on the suit property and not himself stating that he merely visited the site from time to time when the construction was ongoing.

9. The 2nd defendant, DW2 stated that the suit property was registered in the name of Niora Momanyi whom he had never seen. He stated the property was beign used by the family of Onuko Momanyi who is now deceased. He stated after the death of Onuko Momanyi on 10th December 1980 his son Barnabas Nyantika and his wife Jane Nyantika (DW3 & DW4 respectively) were the ones using the suit property. The 2nd defendant stated that he agreed with Barnabas Nyantika to sell to him a portion of the suit property (upper portion). The 2nd defendant stated he did not know the plaintiff and had not met him before the institution of the suit.

10. The 2nd defendant further testified that another person one Gekara Ogeto surfaced and claimed the land belonged to his mother and he obtained a grant of letters of administration and had the property transferred to his name. The 2nd defendant stated that he constructed a house on the portion he purchased from Barnabas Nyantika and he averred that he has had quiet and peaceful occupation since he purchased the property.

11. The 2nd defendant in cross examination stated that at the time he purchased the suit property, the property according to the search that he had obtained was in the name of Niora Momanyi and not Moraa Momanyi. A later search showed that the suit property was registered in the name of Gekara Ogeto. The 2nd defendant further stated he is aware that the plaintiff challenged the grant issued to Gekara Ogeto and had the same revoked. He, however stated that the plaintiff obtained the grant after he had purchased his portion of land from Barnabas Nyantika.

12. The 3rd defendant testified that the suit property belongs to his grandmother, Niora Momanyi who he stated he did not know where she disappeared to. He stated that he had never seen his said grandmother. He affirmed it was his father who was using the suit land and thereafter he and his wife continued using it. The witness stated that Niora Momanyi was his father's step mother. The witness further stated he sold a portion of the suit land to the 2nd defendant where the 2nd defendant has put a house.

13. The witness denied any knowledge of the plaintiff stating that he met him for the first time in court during these proceedings. He denied the plaintiff has ever been to the suit property and stated he did not know of any relationship the plaintiff has with Niora Momanyi (deceased). The witness stated his father had planted the tea and coffee on the suit property. He claimed no one knew the plaintiff in their family. He stated his father died in 1980 and not in 1995.

14. The witness in cross examination stated that he did not know how Niora Momanyi who was his father's step mother got to be registered as the owner of the suit property. He averred that his father had not told him Niora Momanyi had land registered in her name. He contended that even though the suit land was registered in the name of Niora Momanyi it belonged to his grandfather. The witness further stated he sold a portion of the land to the 2nd defendant before he had done a search at the land's office in 2010 claiming that the land had been left to him by his father.

15. The 4th defence witness, Jane Nyantika (DW4) basically repeated what DW3, her husband had testified. The gist of her testimony was that the Onuko family had been using the suit property since she was married into the home in 1980. She affirmed DW3 sold a portion of the suit land to the 2nd defendant who has built a house thereon. She, like her husband and the 1st and 2nd defendants denied knowing the plaintiff who she stated was a stranger who was unknown to her family.

16. After the conclusion of the evidence the parties exchanged written submission. The defendants filed their written submissions on 30th October 2014 and the plaintiff filed his on 8th May 2015. I have reviewed the pleadings, the evidence by the parties, the sets of agreed issues filed by the parties (separately) and the parties submission and the issues that arise for determination are as follows:-

- (1) **Whether land parcel No. North Mugirango/Magwagwa I/890 was registered in the names of the late Moraa Momanyi?**
- (2) **Whether the plaintiff is the administrator of the estate of the late Moraa Momanyi?**
- (3) **Whether the defendants' occupation and possession of the suit land is lawful?**
- (4) **Whether the doctrine of adverse possession is applicable in regard to the suit property and if so whether the title to the suit land in favour of the registered owner has been extinguished?**
- (5) **Whether the 1st defendant has been wrongly enjoined to the suit?**
- (6) **What orders should the court make?**

17. Analysis and determination:

I have set out the pleadings and the evidence adduced by the parties in support of their respective cases. The land the subject matter of the sale as per the evidence tendered by the plaintiff was registered in the name of Moraa Momanyi. The plaintiff in his evidence produced a copy of the certificate of official search dated 12th January 2011. (PEX.3) which shows the deceased was registered as the owner of land parcel **North Mugirango/Magwagwa I/890** on 13th July 1973. A copy of the Registry Index Map (RIM) showing the delineation of the land was also produced as (PEX.4). The 2nd defendant, DW3 and DW4 in their testimony stated that the suit property was registered in the name of Niora Momanyi and not Moraa Momanyi as claimed by the plaintiff. Although they claimed they had obtained a search certificate which showed Niora Momanyi was the registered owner they did not produce any such certificate in evidence. In the filed witness statements by the 2nd defendant, DW3 and DW4 all dated 26th June 2012 they all affirm Moraa Momanyi was the registered owner of the suit property. It is my view and finding that there was no person known as Niora Moraa registered as owner of the suit property and that the person who was so registered was Moraa Momanyi (deceased) as evidenced by **"PEX.3"**. I therefore answer issue number (1) affirmatively.

18. In regard to issue number (2) the plaintiff gave evidence that when he discovered one Gekara Ogeto had unlawfully obtained grant of letters of administration to the estate of his mother, Moraa Momanyi (deceased) he applied for the annulment and revocation of the said grant of letters of administration and the same were revoked vide the High Court Succession Cause No. 478 of 2011 (Kisii) given on 25th November 2011 as per **"PEX.1"**. The court in the succession cause further directed fresh issuance of letters of administration to the plaintiff. Accordingly the plaintiff was issued with grant of letters intestate to the estate of Moraa Momanyi on 2nd March 2012 in Kisii HC Succession Cause No. 58 of 2012 as per **"PEX.2"**. The defendants and their witnesses denied any knowledge of the whereabouts of Moraa Momanyi. Indeed neither the defendants and/or the 3rd and 4th witnesses had ever seen Moraa Momanyi. On the basis of the evidence adduced by the plaintiff and notably having regard to **"PEX.1 and 2"**, I have no reason to dispute that Moraa Momanyi is deceased and the plaintiff is presently duly appointed administrator of her estate by virtue of the letters of administration issued to him (**"PEX.2"**). The succession court was the appropriate court to determine who ought to have been appointed as administrator of the deceased estate which it did.

19. The details under which Gekara Ogeto got to be appointed as administrator are scanty but then the succession court must have gotten satisfied that the letters of administration that had been issued to him were not properly issued to annul and revoke the same. Equally it is unclear how the said Gekara Ogeto got the suit property registered under his name but the copy of certificate attached to the 1st defendant's notice of motion dated 3rd December 2013 shows the registration was pursuant to RL 19 as a consequence of the succession cause that Gekara Ogeto had initiated as petitioner. The grant issued in his favour having been revoked it would follow that the transfer would be ineffectual. The plaintiff may have to pursue the deregistration of the land in the said Gekara Ogeto's name, if it was not done through the succession court.

20. I would accordingly answer issue number (2) affirmatively as appointment of the plaintiff as administrator of the estate of Moraa Momanyi has not been challenged. Any challenge of the grant of letters of administration would only be in the court which issued the same. DW3 in his evidence appeared to suggest the plaintiff was not a son to Moraa Momanyi and therefore not entitled to inherit the suit property. The issue and question of beneficiaries could only be determined in the succession cause as it is the court with the jurisdiction to determine who the lawful beneficiaries of the suit property are.

21. As relates to issues number (3) and (4) the 2nd defendant as I understand from his evidence is on the one hand saying that he is a lawful purchaser of a portion of the suit land from DW3 and on the other hand is saying that the plaintiff's claim if any is time barred and/or has been extinguished by the application of the doctrine of adverse possession. I have held that Moraa Momanyi (deceased) was at any rate the registered proprietor of the property in 2010 when the 2nd defendant purported to purchase a portion of the same from DW3. The plaintiff in his evidence stated that his late mother allowed DW3's father who was her step brother to use her land after she moved with her son, the plaintiff herein to Loreti, Kericho. This evidence by the plaintiff is uncontroverted. It is instructive that the plaintiff's mother's step brother, the said Onuko Momanyi never constructed a house on the suit property. The 2nd defendant's father equally never constructed a house in the suit property. This in my view is consistent with the family of Onuko Momanyi having only been allowed use of the land and not to build thereon.

22. DW3 stated in evidence that after his father died he continued using the land and he did not know the land was registered in the name of Moraa Momanyi (Niora Momanyi). Although he claimed the land was left to him by his father, DW3 at the time he allegedly sold the portion of the land to the 2nd defendant did not know who the registered owner was. He had not made any application for any letters of administration to administer his late father's estate. One then wonders how he could purport to sell the property to the 2nd defendant, yet he was not the registered proprietor and did not even know who the registered owner was?

23. It is trite law that the property of a deceased person can only be dealt with by the personal legal representative of such deceased person. Any transaction touching or relating to a deceased person's estate entered into by a person who is not authorized to act for or represent the estate of a deceased person is void abinitio and cannot be given effect to. Under Section 45 (1) of the Law of Succession Act, Cap 160 Laws of Kenya such a person would be an intermeddler and is guilty of an offence under Section 45 (2) (a) of the Act.

Section 45 of the Law of Succession Act provides thus:-

45(1) Except so far as expressly authorized by this Act, or by other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

45(2) Any person who contravenes the provisions of this section shall-

a. Be guilty of an offence and liable to a fine not exceeding ten thousand or to a term of imprisonment not exceeding one year or to both such fine and imprisonment, and

b. Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration.

24. DW3 definitely knew he was not the owner of the suit property since he had no documents of ownership to it. As per his evidence he did not know who the registered owner was at the time he sold a portion to the 2nd defendant. Even assuming he believed the suit property belonged to his deceased father, he had not sought or taken out any letters of administration to be able to deal with the property of the deceased person. He simply had no authority to deal with the property of a deceased person.

25. Section 82 of the Law of Succession Act (Cap 160 Laws of Kenya) confers powers to legal personal representatives of deceased persons to deal with the assets of the estate. It provides inter alia as follows:-

82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-

(a) To enforce, by suit or otherwise, all of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.

(b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best.

Provided that:-

i. The purchase by them of any such assets shall be voidable at the instance of other person interested in the asset so purchased;

ii. No immovable property shall be sold before confirmation of the grant.

26. In the premises DW3 had no capacity to offer for sale the suit property to 2nd defendant and consequently such sale was void ab initio and of no consequence. It thus follows that the consequent occupation and possession of a portion of the suit property pursuant to the void sale was unlawful as the sale was not effected by the personal legal representative of Moraa Momanyi (deceased) who was the registered owner of the property. The 2nd defendant is also not entirely blameless. He did not ascertain who the registered owner of the suit property was and whether DW3 had the authority to deal with the property. As a purchaser he had the duty and obligation to carry out a due diligence and if he failed to do so he stands to bear the consequences.

27. The defendants have argued that the title of the registered owner had become extinguished and have argued the doctrine of adverse possession was applicable. The plaintiff has pleaded that the father of DW3 was permitted by his mother who was the registered owner to use the suit property. As I observed earlier in this judgment this averment has not been dislodged. If the entry, possession and use was with the permission of the owner, and I find this was the case, then the doctrine of adverse possession cannot be applicable. The possession was not adverse since it was with the permission of the owner. As soon as the activities on the suit land became hostile when the 2nd defendant commenced construction of a permanent structure on the suit property, the plaintiff resisted that activity and it precipitated the present suit.

28. It is also worth noting that the defendants only came into the suit property in 2010/2011 and in my view would not be entitled to rely on the possession by other persons to claim adverse possession. It is those other persons who would be entitled to plead adverse possession. The person through whom the defendants claim, the said DW3 had no title to the suit property which he could pass to the 2nd defendant. Arising from what I have discussed above issues numbers (3) and (4) are answered. That the occupation and possession by the 2nd defendant is unlawful and that the doctrine of adverse possession is inapplicable in the circumstances of this suit.

29. That leaves me with the issue whether the 1st defendant was properly enjoined to these proceedings and what orders to make. The plaintiff as per the evidence was not resident in the suit property and it is possible that when he found a building coming up in the suit property, and the 1st defendant, is the person who was occasionally seen at the site and the 2nd defendant who as per the evidence was working in Nairobi and not resident on his father's land, the plaintiff was perfectly entitled to assume the 1st defendant had something to do with the house that was being constructed. While the evidence established that it was the 2nd defendant who was in fact constructing a house on the suit property the plaintiff may have been unaware at the time of filing suit. Once it became apparent to the plaintiff the 2nd defendant

may be liable, the plaintiff sought and was granted leave to enjoin the 2nd defendant as a party. The law permits a plaintiff when in doubt from whom he is entitled to relief to enjoin two or more persons as defendants so that the issue of liability may be determined.

Order 1 Rule 7 provides thus:-

“Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.”

Thus although the evidence as adduced has vindicated the 1st defendant from being culpable his inclusion as a party was necessary to enable the court to determine culpability as between him and the 2nd defendant.

30. Having evaluated all the evidence and the material placed before the court, I am satisfied the plaintiff has proved his case on a balance of probabilities. However, although I have found and held the occupation and possession by the 2nd defendant of a portion of the suit property is unlawful, I will permit the 2nd defendant and the plaintiff to negotiate an amicable settlement within the next 120 days from the date of this judgment and failing any settlement the 2nd defendant shall vacate the suit premises. I accordingly enter judgment in favour of the plaintiff on the following terms:-

- 1. That the occupation and possession by the 2nd defendant of land parcel North Mugirango/Magwagwa I/890 and/or portion thereof is unlawful.**
- 2. The court directs the plaintiff and the 2nd defendant to engage in consultations and/or negotiations to reach a settlement out of court within the next 120 days from the date of this judgment.**
- 3. In the event the negotiations fail to yield any settlement as under (2) above the 2nd defendant shall yield vacant possession of the portion of land parcel North Mugirango/Magwagwa I/890 to the plaintiff failing which an order of eviction against the 2nd defendant shall issue on application by the plaintiff.**
- 4. Each party will bear their own costs of the suit.**

Judgment dated, signed and delivered at Kisii this 24th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 2nd defendants

..... Court assistant

J. M. MUTUNGI

JUDGE