



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 139 OF 2015

JOSEPH ONYONI MOMANYI.....PLAINTIFF

VERSUS

JASPER NYAKOE MONGARE 1ST DEFENDANT

COUNTY LAND REGISTRAR NYAMIRA.....2ND DEFENDANT

R U L I N G

1. The 1st defendant/applicant by a Notice of Motion dated 4th July 2016 made under Order 2 Rule 15(1) (a), (b) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act inter alia prays for orders that:-

- 1. The court be pleased to strike out and/or dismiss the plaint herein with costs.**
- 2. That there is no cause of action in the plaint and the same is scandalous, frivolous and vexatious.**
- 3. Costs of the application be provided for.**

The application is supported on the following grounds set out on the body of the application:-

- a. That the applicant is the legal registered owner of the land parcel No. West Mugirango/Bonyamatuta/84.**
- b. That the applicant has been in possession of the said land since 1978 without any interruption.**
- c. The land was sold to the applicant by the plaintiff's father in 1978 but upon his demise in 1998 his son the plaintiff herein, filed Kisii Succession Cause No. 460 of 2008 fraudulently including the applicant's parcel of land as part of the deceased's estate.**
- d. That the applicant then moved the court seeking revocation of the grant issued to the plaintiff and the same was revoked on 13th February 2015.**
- e. That the ownership of the suit property was finally determined and there being no pending appeal the instant suit is res judicata.**
- f. The instant suit is frivolous and an abuse of the court process.**

2. The 1st defendant/applicant swore an affidavit dated 1st July 2016 where he deponed that the plaintiff had misled the succession court that land parcel **West Mugirango/Bonyamatuta/84** formed part of the plaintiff's deceased father's estate. That following the applicant's application in the succession cause the grant issued and confirmed in favour of the plaintiff which had indicated the suit land as part of the plaintiff's father's deceased estate was revoked and the court declared the suit property herein not to be part of the deceased estate.

3. The applicant annexed to his affidavit the abstract of title (green card) in respect of the suit property which shows the 1st defendant/applicant was registered as the owner of the suit land on 20th September 1978, copy of the order granted by Hon. Lady Justice Sitati on 13th February 2015 in the High Court Succession Cause which was in the following terms:-

1. That the grant of letters of administration dated 27th July 2010 issued to Joseph Onyoni Momanyi but confirmed on 23rd July 2010 by this honourable court is hereby revoked, annulled or amended to exclude LR No. West Mugirango/Bonyamatuta/84 as part of the estate of the deceased.

2. That this Honourable court hereby declares that LR No. West Mugirango/Bonyamatuta/84 was not the estate of the deceased as at 25th January, 1999.

4. The 1st defendant/applicant further annexed as "JNM4" a letter from the land registrar, Nyamira addressed to Hon. Attorney General dated 21st March 2016 where he confirmed the suit land was transferred to the 1st defendant on 20th September 1978 and he was issued with a certificate of title. The land registrar vide the letter at paragraph (8) affirmed that the land was justifiably registered in favour of the 1st defendant as there was a duly registered transfer form, letter of consent and application for consent forms duly approved. On the basis of the documentary evidence tendered, the 1st defendant contended there were no pending issues for this court to determine and averred the suit was an abuse of the court process and ought to be struck out.

5. The plaintiff filed grounds of opposition dated 22nd September 2016 in opposition to the 1st defendant's application. Inter alia the plaintiff set out the following grounds:-

1. That the application lacked merit as it was anchored on technicalities.

2. That the suit should be heard and determined on merit more so since the matter involves land.

3. That the suit alleges issues of fraud which can only be determined by way of hearing viva voce evidence.

4. That no evidence has been tendered in court to show that the suit is res judicata, time barred and/or abuse of the court process.

6. The plaintiff by the plaint pleaded that his father who passed away on or about 25th January 1991 (death certificate shows death occurred on 25th January 1999) was the registered owner of the suit property since 1976. The plaintiff further stated that he discovered the 1st defendant had fraudulently been registered as the owner of the suit property on or about 8th February 2013 when he visited the land registry at Nyamira with the object of registering a certificate of confirmation of grant issued in the succession cause referred to hereinabove. The particulars of the alleged fraud were inter alia that the 1st and 2nd defendants caused the transfer of his deceased's father's land without his father's consent and/or the family's knowledge. That the transfer to the 1st defendant was deceitful as it was effected without the plaintiff's consent and/or knowledge.

7. The 1st defendant by his filed defence stated that the plaintiff's deceased father lawfully transferred the suit property to him in 1978 and that he has since 1978 occupied and possessed the land without any interference whatsoever until after the death of the plaintiff's father. The plaintiff in his filed witness statement in part states:-

“I am the plaintiff in this matter and I am the only son of Mzee Momanyi Onyoni who is now (deceased). That my deceased father was/is the registered owner of land parcel No. West Mugirango/Bonyamatuta/84.

That I was born in 1943 at Kebirigo Songonga village, where I stayed until 1976 when I left to Kericho for work as a rumber and moved with my entire family leaving behind my parents at home Kebirigo parcel of land of West Mugirango/Bonyamatuta/84.

That my father followed me to Kericho in 1977 after having fallen sick.”

8. For his part the 1st defendant in his witness statement stated in part states as follows:-

“I bought the suit land West Mugirango/Bonyamatuta/84 in the year 1978 from the deceased Momanyi Onyoni. The land was approximately 2.0Hectares. I bought a whole parcel of land from the deceased.

I have been staying on the suit land from the year 1978 to date. My children were born here and they consider this land home. The plaintiff herein took me to the formerly Nyamira Land Disputes Tribunal in the year 2008 but the panel made a decision that the claim he presented had no merit and it was dismissed with costs. Further, in the year 2013 May, when my wife died, the plaintiff proceeded to court to seek an injunction stopping me from burying her on the suit land but the court allowed me to proceed with the burial since the court confirmed it was my land.”

9. I have referred in extenso to the pleadings and aspects of the evidence as I am aware in an application such as the present one where it is sought to strike out the suit on the basis that it discloses no cause of action, is frivolous and/or vexatious, there is need to make an evaluation of the available evidence in order to make a determination.

10. The parties filed what are rather scanty submissions which I have reviewed and considered and taken account of.

11. It is not in dispute that the 1st defendant was infact registered as the owner of the suit property on 20th September 1978 and was issued with a certificate of title as is confirmed by the abstract of title and by the letter from the land registrar, Nyamira referred to hereinabove. The 1st defendant has occupied and possessed the land since 1978 and has even utilized the land as security for banking facilities from Kenya Commercial Bank Ltd as is evident from the abstract of title (green card). The plaintiff affirms that his deceased father ceased to occupy the land from 1977 when the plaintiff states his late father moved to Kericho and joined the plaintiff who was then resident at Kericho. The plaintiff states the father died in 1991, although as per the petition for the Letters of Administration and the death certificate, which I have scrutinized and verified in HC Succession Cause No. 460 of 2008, the date of death of the plaintiff's father is shown to have been 25th January 1999. The order revoking the grant issued on 13th February 2015 appears to have noted the anomaly as per Order (2) where the court declared that the suit property was not the estate of the deceased as at 25th January 1999 (the date of the plaintiff's father's death).

12. Thus from 1978 upto 1999 when the plaintiff's father died (a period of over 20 years) the 1st defendant was in occupation and possession of the suit property. During that period neither the plaintiff's father nor the plaintiff made any effort or attempt to recover the land from the 1st defendant. The plaintiff's suit is definitely statute barred by reason of Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya which provides:-

7. 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.”

13. It is infact intriguing that the plaintiff filed a succession cause claiming the suit land was part of his late father’s estate when at the time he filed the cause, the property was infact registered in the name of the 1st defendant. The succession cause infact ought not to have been accepted without evidence by way of either a copy of title or certificate of official search from the land registry confirming who the owner of the property was. No doubt the plaintiff was embolded when he got what turned out to be an irregular grant and it cannot be ruled out that was the trigger for the instant suit. The plaintiff’s claim before the Land Disputes Tribunal and the Chief Magistrate’s Court when he sought to bar the 1st defendant from burying his wife in the suit property were found to be wanting. Equally the present suit is misconceived and cannot be sustained. The suit amounts to an abuse of the court process as it discloses no reasonable cause of action.

14. I find and hold that the 1st defendant’s Notice of Motion dated 4th July 2016 has merit and I accordingly grant the same. The plaintiff’s suit herein is ordered struck out. I award the costs of the application and the suit to the 1st defendant.

Ruling dated, signed and delivered at Kisii this 12th day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Arumba for Sonye Ondari for the 1st defendant

Milcent court assistant

J. M. MUTUNGI

JUDGE