



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CAUSE NO. 1149 OF 2016

FORMERLY KISII HCCC NO. 104 OF 2010

PACIFICA KWANBOKA KONE.....1ST PLAINTIFF

JOHN O. KONE.....2ND PLAINTIFF

(Both suing on behalf of the estate of Kone Oyugi as legal representatives and administrators)

-VERSUS-

JUSTICE MASESE MOCHACE.....1ST DEFENDANT

STEPHENE R. MASESE.....2ND DEFENDANT

JUDGEMENT

The Plaintiffs' herein vide a Plaint dated 19th April, 2010 filed the suit herein against the Defendants seeking an order of specific performance, in order to transfer land parcel No. **NYARIBARI CHACHE/B/B/BOBURIA** and a declaration that the contract between the plaintiff and Defendant was frustrated and enforceable.

The Defendants filed a statement of defence denying the claim and further a counter claim seeking eviction and upon such eviction a prayer for permanent injunction against the plaintiffs' claiming the suit land. The Plaintiff denied the laid counterclaim.

When the suit came up for hearing both parties testified. The Plaintiffs' are the wife and son of one Kone Oyugi who is deceased. They produced a death certificate and grant of letters of representation who appointed them as the administrators of the estate of the late Kone Oyugi.

The Plaintiffs' testified on how sometime in 1984 the deceased agreed to exchange his land registered as **NYARIBARI CHACHE/B/B/BOBORIA 4112** with the 1st Defendant who in that mutual exchange gave him land parcel No. **NYARIBARI CHACHE/B/B/BOBORIA/3345** and at no further consideration.

The Plaintiffs' aver that the suit land was transferred to them the Defendants became hostile to them and hence could not enjoy both occupation and quite possession thereof.

The defendants testified and called no witness. It is testimony that sometime in 1984 he and the late Kone Oyugi exchanged their respective parcel of land. He stated that he did not have his name registered on the land Kone Oyugi gave him but to that of the 2nd Defendant. He further avers that problems on the transaction emerged after the death of Kone Oyugi who wants him to return the land that they exchanged. The 2nd defendant in his evidence basically retaliated that of the 1st defendant.

I have read the pleading herein and have heard oral testimony from the plaintiffs and defendants. I have also read the submission by counsel for the defendants.

It is not disputed by the parties that there was some sort of exchanging of land between one Kone Oyugi who is now deceased and the 1st defendant. It is not also disputed that the suit land is currently registered in the name of the defendants.

The Plaintiffs have not shown any act of fraud, misrepresentation or incapacity on the part of the deceased and the 1st defendant when they contracted to exchange their respective parcels.

The plaintiff had commenced the suit in 2010 when the transaction which forms the substitution of the suit herein was concluded in 1984. The length of time in which the plaintiff sought the intervention of the court is long and no explanation for this inordinate delay was given. Be that as it may where the transaction involving Oyugi Kone and the 1st defendant was done in 1984 the deceased had died in 2003 and in my view it was true what the plaintiff are saying he himself ought to have brought proceedings to claim his land.

In view of the above it is my considered opinion that the suit as instituted offends section 4 of the limitations of Actions Act.

With respect to the contract that the parties had entered as I stated earlier the plaintiffs have not on a balance of probability that the court should intervene and have the contract entered into frustrated. To my mind even though the said contract was entered 25 years ago the same was entered freely, no evidence of coercion, fraud or misrepresentation has been placed before to revoke the same.

The upshot of the above is that the plaintiff has failed to proof his case on a balance of probabilities and that I dismiss the same with costs.

On the counter claim I am satisfied that the defendants have proved the same and I accordingly allow the counterclaim in terms of prayer 1. However, I direct that enforcement of this prayer be commenced after 120 days from the date of this judgement and in strict compliance with section 156 (a) to (g) of the Land Act as amended in 2016.

Orders accordingly.

Dated, Signed and Delivered in open court at KISII on this 19TH day of OCTOBER, 2017

Mohammed Noor Kullow

Judge