



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 144 OF 2016 (O.S)

ROSEMARY NJOKI MUROKO.....APPLICANT

VERSUS

KIURA CHARLES MUCIRA.....RESPONDENT

JUDGMENT

Determining disputes in which parties are acting in person can be a cause of considerable difficulties to the presiding Judge or Magistrate. Pleadings will in most cases be poorly drafted making it difficult to comprehend the remedies sought by the parties. Then the trial itself can be a nightmare with the parties unable to articulate their respective cases.

Those challenges notwithstanding, the Court is still enjoined to serve justice to the parties as best as it can because that is its primary role. This case is a perfect example of such scenarios which, unfortunately, are a common feature of litigation particularly in rural Courts such as the one where I preside and where many litigants are unable to afford legal services.

The plaintiff herein **ROSEMARY NJOKI MUROKO** is the wife to **HARUN NDUBI** (the deceased) who was the registered proprietor of land parcel No. NGARIAMA/THIRIKWA/1411 (the suit land) since 1995. It is the plaintiff's case that she and her four (4) children reside on the land and also grow crops. However, the deceased died on 14th November 2015 in suspicious circumstances and his body was found dumped at the Kianyaga Show ground. In 2009, the plaintiff lodged a caution on the suit land upon discovering that it was registered in the defendant's names as she suspected that the transaction was done fraudulently. She therefore filed this Originating Summons on 19th September 2016 and seeks the following orders:

(a) That the plaintiff be ordered to have become entitled by adverse possession of over 12 years to all that parcel of land No. NGARIAMA/THIRIKWA/1411.

(b) That the plaintiff be registered as the sole proprietor of the said land parcel No. NGARIAMA/THIRIKWA/1411.

(c) That the District Land Registrar Kirinyaga do register the plaintiff as the proprietor of land parcel No. NGARIAMA/THIRIKWA/1411

(d) That the defendant do pay costs of this case.

The Originating Summons was supported by the plaintiff's affidavit whose contents I have already summarized above. Annexed to the affidavit is a copy of the register to the suit land showing that it was

registered in the defendant's names on 13th June 2013.

The defendant filed a replying affidavit in which he deponed, inter alia, that he bought the suit land from the deceased sometime in 2009 as per the copy of sale agreement annexed thereto and dated 13th October 2009. That the plaintiff does not live on the land and she was aware about the transaction and therefore this Originating Summons is an afterthought.

Directions were taken on 14th June 2017 and the trial commenced on 20th December 2017 when the plaintiff testified and called two witnesses. The defendant was the only witness for the defence.

The plaintiff asked the Court to adopt her affidavit as her evidence much of which I have already referred to above. She denied the defendant's suggestion that she and her late husband accepted money and a vehicle in return of the suit land adding that any such transaction was done without her knowledge. Upon cross-examination by the Court, she said that they have lived on the suit land since 1996 when the deceased obtained the land in exchange for another parcel and that the defendant does not live there. She added that although she cultivates the suit land, she has had to move to the Police Station for security following attacks by unknown people at night.

Her witnesses **PETER MUREITHI NGICHABI** (PW2) and **STEPHEN MURIGU WACHIRA** (PW3) also asked the Court to adopt their statements as evidence. PW2 told the Court that he was the one who transferred the suit land to the plaintiff's husband in the 1990's in exchange for another parcel of land. He added that the plaintiff's family has been residing in the suit land since then but that she moved to Chief's Camp due to insecurity. PW3 who is a neighbour to the plaintiff told the Court that the plaintiff and the deceased obtained the suit land from PW2 in exchange for another parcel and that the deceased was buried thereon when he died in 2015.

In his defence, the defendant **KIURA CHARLES MUCIRA** who also asked the Court to rely on his replying affidavit told the Court that in 2009, he was informed by a land broker that someone was interested in his Matatu No. KAT 567C in exchange for land. He was then introduced to the plaintiff and the deceased who agreed to the deal. They went to an advocate's office where an agreement was drawn but when he went to the Lands office, he found that there was a restriction on the suit land which the plaintiff and the deceased had agreed to give him in exchange for the Matatu. When he confronted the deceased, he was told to add more money. The defendant therefore got his broker to remove the restriction and transfer the suit land to him. He was later summoned to the Police Station but they discussed the matter with the deceased and settled it. However, after the demise of the deceased, the plaintiff filed this suit. The defendant urged this Court to dismiss the suit so that he can take possession of the suit land.

I have considered the evidence by both parties including the rival affidavits filed herein and annexures thereto.

The plaintiff's case is hinged on adverse possession of the suit land on which, as per her supporting affidavit, she has resided since 1995 which means that by the time this suit was filed on 19th September 2016, she had been in occupation thereof for twenty one (21) years. That suit land has however since 13th June 2013 been registered in the names of the defendant as per the copy of register annexed to the plaintiff's Originating Summons. The defendant's case however is that he obtained the land from the deceased in exchange for a vehicle No. KAT 567C as shown in the agreement dated 13th October 2009 and which is annexed to his replying affidavit. That agreement did not involve the plaintiff who has insisted all through the trial that she had no knowledge of the same. It is clear from the totality of the evidence by both sides that although the defendant obtained the suit land through an exchange with a motor vehicle, he never actually went into occupation of the same. Indeed at the end of his testimony, he asked the Court to dismiss the plaintiff's suit so that he could "**take possession of the land**". The plaintiff on the other hand informed the Court that although she does not live on the suit land following night attacks on her and her family, she added that the defendant does not reside on the suit land.

A party seeking orders to be registered as proprietor of land in place of the owner through adverse possession must prove that he is in exclusive possession of the land openly and as of right without interruption for a period of twelve (12) years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – **TITUS KASUVE VS MWAANI INVESTMENTS LTD & OTHERS C.A CIVIL APPEAL No. 35 of 2002 (2004 1 K.L.R 184)**. It is clear from the register that the deceased became the proprietor of the suit land on 1ST AUGUST 1995 after acquiring it in exchange for land parcel No. NGARIAMA/THIRIKWA/127. Entry No. 4 of the said register corroborates the evidence of PW2. It is also clear from the evidence that the plaintiff and her family have resided on the suit land since then and even the deceased was buried there following his death on 14th November 2015. It is not clear from the evidence when the plaintiff moved to the Chief's Camp following attacks on her family but the fact that she buried her husband on the suit land shows that she has remained in possession and occupation thereof for a period well in excess of the twelve (12) years period provided by law. There is no evidence that the defendant took possession of the suit land from the plaintiff or the deceased when he acquired it through exchange for a motor vehicle on 13th October 2009 or even after it was registered in his names on 13th June 2013. He did not assert his ownership of the suit land by filing any suit or making any entry. Indeed, the Court has heard evidence that the plaintiff and her family only moved from the suit land to the Chief's Camp for their security following night attacks. The plaintiff testified however that she still ploughs the suit land and that action taken together with the fact that the deceased was buried thereon is sufficient evidence to prove that the defendant has for all practical purposes been dispossessed of the suit land which, in any event, he never possessed at any one time. The defendant no doubt knew about the plaintiff's possession and occupation of the suit land and as is now clear from **GITHU VS NDEETE 1984 K.L.R 776**, the change of ownership of the suit land from one person to another does not interrupt the adverse possessor's right. What I have grappled with in the circumstances of this case however is the period when the plaintiff's possession of the suit land became adverse to that of the defendant. Since the plaintiff and the deceased were all living on the suit land from 1995, it is my view that for purposes of adverse possession, time started to run in 2009 when the deceased sold the suit land to the defendant. Time could not have run from 1995 because between that time and 2009, the plaintiff's occupation of the suit land was not adverse to the deceased as she was there with his consent. When the time is computed from 2009, it means that the twelve (12) year limitation period had not expired by the time this suit was filed in 2016. The plaintiff has only been in possession and occupation of the suit land for some eight (8) years and does not therefore qualify for orders under **Section 38 of the Limitation of Actions Act.**

In my view, however, the plaintiff has a good case for challenging the defendant's title to the suit land for having been obtained illegally. As I stated at the start of this judgment, the parties are acting in person and so their pleadings are what is commonly referred to as "***home-made***". The plaintiff's suit is predicated on a pleading of adverse possession as is clear from the Originating Summons. She did not file a plaint seeking the cancellation of the defendant's title to the suit land for having been obtained illegally, un-procedurally or through a corrupt scheme which is one of the grounds provided under **Section 26 (1) of the Land Registration Act** through which the defendant's title to the suit land could be impeached. Ordinarily, a Court will only determine a dispute on pleaded issues. However, in **ODD JOBS VS MUBIA 1970 E.A 476 DUFFUS P**, while considering the question whether an un-pleaded issue can form the basis of a decision rendered himself as follows:

"Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also arrive at the issues to be determined by the Court. In this respect a trial Court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocate and on which a decision is necessary in order to determine the dispute between the parties"

It is clear to me that the case of **ODD JOBS** (supra) applies in the circumstances of this case. This is because in the course of the proceedings, both parties laid emphasis on the validity of the agreement dated 13th October 2009 through which the defendant acquired the suit land from the deceased in exchange for a motor vehicle. In his evidence in chief, the defendant said:

“In 2009, I had a Matatu No. KAT 567C when a land broker informed me that someone was interested in exchanging his land for a matatu. Then I met the plaintiff and her husband and they agreed to exchange the land in dispute for the matatu. We went to an advocate who prepared the agreement”

When she was cross-examined by the defendant however, the plaintiff’s response to that assertion was as follows:

“I am not aware that you gave my husband a vehicle in exchange for the land. I have not gone to any Land Control Board”

Further on she said:

“I have not seen any agreement that you entered into with my husband HARUN NDUBI over the land. If you did, then I was not involved in that agreement”

Both parties confirmed when cross-examined by the Court that the suit land was agricultural land for which the consent of the Land Control Board would be required without which, as per **Section 6 (1) of the Land Control Act**, the agreement dated 13th October 2009 was void and therefore unenforceable. No interest in the suit land passed to the defendant by virtue of that agreement and therefore this Court cannot accede to his request to dismiss the plaintiff’s suit so that, to quote him, ***“..... I can take possession of the land”***. To do so would amount to enforcing an illegal contract and as the Court held in **MISTRY SINGH VS SERWANO WOFUNIRA KULUBYA 1963 E.A 408** citing **SCOTT VS BROWN, DOERING, MC NAB & CO. (3) 1892) 2 Q.B 724:**

***“No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court*”**

That is precisely what has happened in this case. The illegality of the agreement dated 12th October 2009 having been brought to the fore by the parties themselves for this Court’s interrogation, I am obliged to do so guided by the case of **ODD JOBS** (supra). When cross-examined by the Court, the defendant stated that he did not go to the Land Control Board but sent his representative. He did not say whether he sent his representative in 2009 (when the agreement was signed) or in 2013 (when the suit land was transferred to him). Either way, it was the duty of the defendant to prove that indeed consent to transfer the suit land to him was obtained as required in law because the plaintiff cannot be expected to prove the negative. All that the defendant should have done is avail copy of the said consent and since he did not do so, the only reasonable conclusion that the Court can arrive at is that no consent to transfer the suit land from the deceased to the defendant was obtained thus rendering the agreement dated 13th October 2009 null and void and therefore unenforceable. The defendant has no right to claim the suit land.

I have also considered if the plaintiff’s claim would, in the circumstances be time barred and I am satisfied that whether time is computed from 2009 (when she placed a caution on the suit land) or 2013 (when the suit land was transferred to the defendant, the plaintiff’s suit is within time because that is the earliest time that she became aware of the fraud as provided under **Section 26 of the Limitation of Actions Act**.

Ultimately therefore and having determined this dispute on the basis of issues arising from the facts herein, I find that the defendant’s title to the suit land issued on 13th June 2013 was obtained illegally and un-procedurally and cannot therefore be protected by the provisions of **Section 26 (1) of the Land Registration Act 2012**.

Judgment is therefore entered for the plaintiff against the defendant in the following terms:

1. An order that the defendant’s title to land parcel No. NGARIAMA/THIRIKWA/1411 was

obtained illegally and un-procedurally and should be cancelled.

2. An order that the Land Registrar Kirinyaga do register the plaintiff as the proprietor of land parcel No. NGARIAMA/THIRIKWA/1411 in place of the defendant.

3. The defendant shall meet the plaintiff's costs of this suit.

B.N. OLAO

JUDGE

22ND DECEMBER, 2017

Judgment delivered, dated and signed in open Court this 22nd day of December 2017 at Kerugoya

Plaintiff present

Defendant present

Mr. Gichia Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

22ND DECEMBER, 2017