



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 42 OF 2015

EMILY WAIRIMU CIIRA.....APPELLANT

VERSUS

NANCY WANJIRU NJUGUNA...RESPONDENT

RULING

The dispute between the parties herein has been pending in court for the last 19 years. The respondent had filed a suit against the appellant at Githunguri Senior Resident Magistrate's Court namely ,Githunguri SRMCC No. 90 of 1997, Nancy Wanjiru Njugunavs. Emily Wairimu Ciira (hereinafter referred to as the "lower court suit") seeking an order that the appellant does transfer to her a portion measuring 0.20 ha. of all that parcel of land known as Githunguri/Githunguri/2304 ("the suit property"). The respondent had averred in her plaint that was filed in the lower court that the appellant was at all material times the registered owner of the suit property and that on or about the month of January, 1996, they entered into an agreement with the appellant pursuant to which the appellant sold to her the suit property at a consideration of Kshs.165,000/=. The respondent averred that following the said agreement, they sought and obtained consent of the land control board for the transfer of the suit property to her. The respondent averred that the appellant thereafter refused and/or neglected to complete the agreement despite demand having been made upon her to do so thereby leaving the respondent with no alternative but to file the lower court suit.

The appellant was served with summons to enter appearance. I have not seen a copy of the memorandum of appearance on record. The appellant however filed a statement of defence dated 12th February 1997 on 19th February 1997. In her defence, the appellant admitted the respondent's claim in its entirety. Following this admission, the respondent filed an application by way of Chamber Summons on 28th February 1997 seeking judgment to be entered against the appellant on admission.

The respondent's application came up for hearing before M. Rungare S.R.M on 23rd March 1997 when Mr. Mwaura advocate appeared for the respondent while the appellant appeared in person. From the proceedings of that day, Mr. Mwaura argued the application and urged the court to enter judgment for the respondent against the appellant who had admitted in her defence that she had sold the suit property to the respondent. In her response to the application, the appellant told the court that she had no objection to the application. The appellant told the court that she was willing to transfer the suit property to the respondent provided the respondent paid her a sum of Kshs.7,000/= being the balance of the purchase price that was outstanding. The court having heard both parties entered judgment for the respondent and directed the appellant to transfer the suit property to the respondent once the respondent had paid to her the balance of the purchase price aforesaid. That order was made on 26th March 1997 when the application for judgment on admission came up for hearing.

After this judgment, the respondent took no further action in the matter for about 9 years until 3rd January 2006 when she made an application for the removal of a caution that had been registered against the title of the suit property by some third parties. The respondent's application for the removal of the said caution was allowed on 8th March 2006. Following the removal of the said caution, the respondent caused herself to be registered as co-proprietor of the suit property with the appellant with the appellant owning 0.367 ha. and the respondent owning 0.20 ha. of the said parcel of land. This transfer is said to have been effected pursuant to the judgment on admission that had been entered by M. Rungare S.R.M on 23rd March 1997 aforesaid. I have noted from the extracted order that the judgment on admission was wrongly attributed to Mrs. Winfred O. Lichuma (Ag. R.M).

After the respondent had been registered as co-proprietor of the suit property, the respondent moved the lower court once again on 2nd July 2007 seeking an order to compel the appellant to sign all relevant documents to facilitate the partitioning of the suit property into two portions so that the respondent and the appellant can have separate titles for their respective portions on the said property. The application was opposed by the appellant who by this time had engaged an advocate to represent her. The appellant contended that the respondent had caused herself to be registered as the owner of a portion of the suit property measuring 0.2 ha. fraudulently and as such she was not entitled to the order for the partitioning of the suit property that she had sought.

The respondent's application was heard by L. K. Mutai S.R.M who allowed the same in a ruling that was delivered on 21st January 2008. The learned Magistrate noted that the appellant had admitted expressly that she had sold a portion of the suit property to the respondent and had been paid full consideration less Kshs.7,000/=. He found no merit in the appellant's contention that she had not sold the disputed portion of the suit property to the respondent. On the allegation that the respondent had acquired the said portion of the suit property fraudulently, the learned Magistrate observed that the appellant had not made a report of the alleged fraud to the relevant authorities for necessary action to be taken against the respondent. The learned Magistrate formed the view that the appellant was relying on technicalities to defeat the respondent's just claim. He ordered the appellant to sign all relevant documents to facilitate the partitioning of the suit property failure to which the executive officer of the court does sign the same.

I have noted that the appellant had admitted in her defence that she had sold a portion of the suit property to the respondent and when the respondent sought judgment on admission, the appellant did not object to the application, in fact, she told the court that she was willing to transfer the suit property to the respondent. Judgment that was entered against the appellant on admission on 23rd March 1997 has not yet been set aside. The appellant was dissatisfied with the decision of L. K. Mutai S.R.M aforesaid and filed this appeal against the same. In her memorandum of appeal filed 1st February 2008 the appellant challenged the decision of the learned Magistrate on several grounds.

What I now have before me is the respondent's application by way of Notice of Motion dated 25th November 2010 in which the respondent is seeking an order that this appeal has abated. The respondent has contended that the appellant died on 9th March 2009 and that no action has been taken by the appellant's legal representatives to substitute the deceased appellant. The application was opposed by one, Catherine Njeri Nganga through a replying affidavit sworn on 26th May, 2011. Ms. Nganga is the daughter of the appellant. In her affidavit, she admitted that the appellant died on 9th March 2009. She stated that the family of the deceased appellant had taken time before applying to substitute of the deceased with her legal representative because one of the deceased's sons who had applied for a grant of letters of administration in respect of the estate of the deceased together with her (Ms. Nganga) also passed on before the grant was issued. Ms. Nganga stated that the respondent had acquired the suit property fraudulently and as such she should not be allowed to benefit from her own wrong.

The respondent's application was argued by way of written submissions. The appellant's advocates filed their submissions on 15th June, 2015 while the respondent who is acting in person filed her submissions on 26th June 2015. I have considered the respondent's application together with the replying affidavit that was filed by Catherine Njeri Nganga in opposition thereto. I have also considered the submissions by

the appellant's advocate and the respondent in person. Under order XXIII Rule 3(2) of the repealed Civil Procedure Rules as read with Rule 9 which is in similar terms to order 24 Rule 3(2) as read with Rule 9 of the civil Procedure Rules, 2010, where an appellant dies and no action is taken within one year to substitute the deceased with his legal representative, the appeal abates.

It is not in dispute that appellant herein died on 9th March 2009. It is also not in dispute that for the last five (5) years the legal representatives of the deceased have not made an application to be made parties to this appeal for the purposes of proceeding with the same. The reasons which have been put forward by the appellant's daughter, Catherine Njeri Nganga for her inaction are not valid. One does not require a full grant of letters of administration to be made a party to a suit on behalf of a deceased party. It does not take five (5) years to obtain a limited grant of letters of administration. From the history of the dispute herein which I have set above in detail, I am of the view that litigation must come to an end.

For the foregoing reasons, I find the respondent's application dated 25th November, 2010, well merited. I allow the same in terms of prayer 1 thereof. Each party shall bear its costs of the application and the suit.

Dated and Delivered at Nairobi this 20th day of May, 2016

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

The Respondent present in person for the Defendant

Kajuju Court Assistant