



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 449 OF 2014 (O.S)

(Formerly Nyeri HCCC No. 155 Of 2012 (O.S))

ESTHER WAMWERE NYORI.....1ST PLAINTIFF

GLADYS WANJIKU NYORI.....2ND PLAINTIFF

VERSUS

ESTHER MWIHAKI MACHARIA (Sued as Administratrix of the Estate of

GITARI S/O THEURI alias DAVID MUCHIRI THEURI.....1ST DEFENDANT

JOSEPH MAINA WACHIRA..... 2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein (Esther Wamwere Nyori and Gladys Wanjiku Nyori) took up the summons dated **17th July, 2012** and amended on **31st July, 2012** for determination of the following questions:-

1) Whether they have jointly acquired title to LR NO. Thegenge/Ihithe/53 (“the suit property”) by adverse possession?

2) Whether the suit property is registered in trust for them?

3) If the answer to (1) and (2) above is in the affirmative, whether the declared trust should be determined and the suit property registered in their joint names as the absolute proprietors thereof.

4) What is the order as to costs?

2. The application is supported by the affidavit of the 1st plaintiff, Esther Wamwere Wanyori, where she has, *inter alia*, deposed that the suit property forms part of the estate of Gitari S/O Theuri (deceased); that the estate is administered by the 1st defendant (Esther Mwihaiki Macharia) who has since transferred it to the 2nd defendant (Joseph Maina Wachira).

3. It is the plaintiffs’ case that they bought the suit property from the deceased person herein in 1958. Terming the defendants strangers to them, the plaintiffs claims to have acquired title to the suit property by adverse possession (have been in exclusive use and possession of the suit property since 1958).

4. In view of the foregoing, the plaintiffs' contend that the deceased person herein held the title to the suit property in trust for them.

5. In reply and opposition to the application/suit, the 1st defendant has deposed that the suit property was subject of adjudication via High Court Succession Cause No. 99 of 2004; that he was declared the valid heir of the suit property in that succession cause, the same having been bought by his grandmother, Martha Muthoni Karungai and that 1st plaintiff who was a party to the succession cause did not appeal against the orders issued in that succession cause.

6. The 1st defendant, who claims to be a stranger to the plaintiffs' claim, explains that after he was declared the sole heir of the suit property, he applied for and got registered as the proprietor of the suit property (was issued with a title deed on 13th June, 2014).

7. For the foregoing reasons, the 1st 2nd defendant contends that the plaintiffs have no reasonable cause of action.

EVIDENCE

The plaintiff's case

8. When the matter came up for hearing, the 1st plaintiff (P.W.1) reiterated what she has deposed in her supporting affidavit. In this regard, she informed the court that she purchased the suit property from the deceased person herein. She produced a document in which the alleged sale transaction between herself and the deceased person herein was captured. She also produced a translated version of the document as **Pexbt 2(a)** and **(b)** respectively. She informed the court that since that time, she has been in use and possession of the suit property (has been growing food crops and grazing cattle thereon).

9. She denied having knowledge of the 1st defendant (Esther Mwihaki Macharia). She told the court that she got to know her when she was served with a title alleging that the suit property belonged to Gitari S/O of Theuri (deceased person herein).

10. As to why the suit property was not transferred to her, she stated that after the deceased sold it to her, he left without coming back.

11. In cross-examination she maintained that she purchased the property before the emergency period.

12. She admitted that the document she produced to prove the transaction allegedly entered into between herself and the deceased was not signed by the deceased but explained that the deceased who was to come and sign it later on, did not do return.

13. P.W.1 further admitted that the seller of the suit property and her husband are cousins but maintained that she does not know Gitari's daughter, the 1st defendant herein.

14. P.W.1 further denied the contention that she was given the land to cultivate because she was a relative of the deceased person herein. She also denied having knowledge of the succession proceedings filed by the 1st defendant concerning the suit property and having filed objection to the succession proceedings.

15. In re-examination, P.W.1 stated that the document she relied on to prove the alleged transaction between herself and the deceased was signed by the secretary of their clan, George Ndung'u.

The Defence Case

16. D.W.1, Martha Muthoni Karungai, informed the court that she bought the suit property from Esther Mwihaki Macharia (1st defendant herein). To prove that fact, she produced the sale agreement executed between herself and the 1st defendant and the receipts issued in respect of the transaction as **Debt-1** and **2(a) & 2(b)** respectively.

17. She explained that during succession proceedings of the estate of the deceased person herein, the 1st defendant who had petitioned for letters of administration had expressed her wish to have the suit property succeeded by her grandson, the 2nd defendant herein. To prove that fact, she produced the affidavit in support of the application for grant of letters of administration of the estate of the deceased person herein as **Dexbt-3**.

18. Concerning the plaintiffs' claim that they had bought the suit property from the deceased person herein, she stated that she was not aware that the plaintiffs had bought it. All what she knew is that the 1st defendant's father had allowed the plaintiffs to cultivate the land.

19. D.W.1 informed the court that after she purchased the suit property, the 2nd defendant, who is her grandson, fenced it and began developing it.

20. In cross examination, D.W.1 admitted that she had no dealing with the suit property until recently (began dealing with it four years ago, after she bought it).

21. She maintained that she does not know about the transactions carried on by the deceased in respect of the suit property before she bought it and admitted that the plaintiffs have been in possession and use of the suit property.

22. D.W.2, Joseph Maina Wachira, informed the court that the case against the 1st defendant herein was withdrawn and produced the certificate of confirmation of grant issued in the succession cause hereto as **Dexbt-5**.

23. He explained that after his grandmother (D.W.2) purchased the suit property, the seller, (the 1st defendant herein) signed a transfer in his favour. Thereafter, he took possession of the property and began developing it.

24. In cross examination, he explained that he took possession of the suit property after he became the registered proprietor in respect thereof and that before he took possession, he issued the plaintiffs with a 6 months notice to vacate.

25. With regard to the contention that he took possession of the suit property in contravention of orders issued in this matter restraining his entry into the suit property pending the hearing and determination of the suit, he stated that he was not aware of such orders.

26. Like D.W.1, he acknowledged that before he took possession of the suit property, the plaintiffs were in use and occupation of the property. He, however, did not know when the plaintiffs entered the land and on what arrangements.

27. At the close of their respective cases, both parties filed written submissions which I have read and considered.

Submissions

28. In the submissions filed on behalf of the plaintiffs, the following facts are said to be common ground:-

1. The suit property was registered in the name of Gitari Theuri (deceased) as a first registration;
2. That upon the passing on of the deceased, the 1st defendant filed succession proceedings to administer the estate of the deceased person wherein the suit property was distributed to the 2nd defendant.
3. That the 2nd defendant was duly registered as the proprietor of the suit land by transmission on 31st March, 2014 when this suit was pending.

4. That at the time the current registered person was registered as the proprietor of the suit property, the plaintiffs were in use and possession of the suit property.

5. That upon being registered as the proprietor of the suit property, the 2nd defendant caused to be issued a notice to vacate the suit land to the plaintiffs vide a notice by the local assistant chief dated 23rd June, 2014.

6. That despite the plaintiffs having obtained orders to restrain the 2nd defendant from evicting them from the suit property, in defiance of the court orders, the 2nd defendant displaced them and took possession of the suit property.

29. The evidence of the plaintiffs is said to be uncontroverted in respect of the following aspects:-

a). The previous registered proprietor of the suit property sold it to the plaintiffs;

b). The plaintiffs took possession of the suit property pursuant to the sale agreement entered into in 1958;

c) The suit property was registered in the name of the previous registered owner when the plaintiffs were in possession.

d). The plaintiffs have been in exclusive, open and uninterrupted possession of the suit land from 1958 to the time the current suit was filed.

e). Neither the previous registered owner nor the current registered owner was in possession of the suit property in that period of time.

30. Concerning the 2nd defendant's contention that the plaintiffs have no claim against him because he obtained title to the suit property pursuant to succession proceedings of the estate of the deceased, it is submitted that owing to the fact that plaintiffs' possession of the suit property had become adverse to the title held by the previous owner of the suit property, the 2nd defendant did obtain good title to the suit property.

31. Based on the decision in the case of **Hosea v. Njiru & Others (1974) E.A 526**, it is submitted that the original registered owner held the land in trust for the plaintiffs.

32. Further reference is also made to the the cases of **Githu v. Ndeete (1984) KLR 776** and **K.T.D.A v. Jackson Gichuhi Karanja & Others (2006) E KLR**, and submitted that mere change of ownership of land occupied by another under adverse possession does not vitiate such person's adverse possession thereof.

33. Based on the decision in the case of **Githu v. Ndeete supra**, and a passage in **Halbury's Laws of England** 4th Edition vol. 48 paragraph 626, it is reiterated that the administrator of the estate of the deceased person herein held the suit land in trust for the plaintiffs' herein who had become entitled to the same by adverse possession. The said legal possession is said to be in tandem with the spirit of **Section 51** of the Land Registration Act, 2012.

34. With regard to the contention that the plaintiffs ought to have staked their claim in the succession proceedings, reference is made to definition of an estate under **Section 3** of the Law of Succession Act, Cap 160; **Rule 41(3)** of the Probate and Administration Rules (now **Order 37 Rule 1** of the said Rules of 2010) and submitted that a court handling administration of estate has no jurisdiction to administer a trust or decide on a claim for adverse possession. In this regard, it is submitted that whenever a question of trust or other beneficial interest arises within the succession proceedings, the court seized of the cause should set aside the property subject of such a question to abide the determination of the question in proceedings under **Order XXXVI Rule 1** of Civil Procedure Rules. In that regard, the court was referred to the case of **Re estate of Richard Karanja Javan (Deceased) (2014) eKLR; Tapnyobi Leldayet v.**

William Kimibei Koromicha (2011)e KLR and Re-estate of Julius Wachira (deceased) (2013) e KLR and urged to allow the plaintiffs' claim as prayed.

35. On behalf of the 2nd defendant, it is pointed out that the case against the 1st defendant was withdrawn and submitted that the withdrawal of the case against 1st defendant, who initially was sued as the administratrix of the estate of deceased person herein, compromised the plaintiffs' case. In this regard reference is made to the case of **Nduhiu Kanja v. Francis Kanake Wahome Nyeri ELC No. 509 of 2014** where this court stated:-

“My view of this matter is that this court cannot make a finding to that effect because to do so would amount to condemning the respondent’s predecessor in claim without affording them an opportunity to defend themselves.

Having found that the respondent had only been in adverse possession of the title held by the respondent, if at all for a period of less than a year, and having determined that this court cannot, in the circumstances of this case, determine whether the plaintiff’s occupation of the suit property was adverse to that of the defendant’s predecessors in entitlement to the suit property, I return a negative verdict to the first issue.”

36. It is further submitted that the plaintiffs did not prove that they had bought the suit property from the deceased person herein. In that regard, it is submitted that the document relied on by the plaintiffs to prove purchase of the suit property was not a sale agreement.

37. The document relied on by the plaintiffs' to prove their entitled to the suit property is said to be unreliable. The following reasons are advanced in support of that contention, the document-

(i) was neither signed by the parties thereto nor attested to by any witness;

(ii) neither identifies with certainty what was being bought nor indicates when it was written;

38. It also pointed out that the plaintiffs did not call the maker of the document to vouch for its authenticity.

39. Based on the fact that the deceased and the plaintiffs' husband were relatives and the fact that the plaintiffs' did not carry out substantial development in the suit land, it is submitted that the plaintiffs were mere licensees in the suit property.

40. Arguing that a licensee cannot claim adverse possession of a piece of land, counsel for the 2nd defendant submits that time does not begin to run in favour of a licensee until the license is revoked.

41. In the circumstances of this case, it is submitted that the license by the deceased to the plaintiffs was never revoked to warrant the plaintiffs' claim for adverse possession of the suit property.

42. P.W.1 is said to have been an unreliable witness for having denied having participated in the succession proceedings hereto when there is evidence that she participated in those proceedings.

43. It further submitted that because the plaintiffs' withdrew their case against the 1st defendant (the administratrix of the estate of the deceased person herein) the plaintiffs cannot claim adverse possession against the defendant. According to the 2nd defendant's counsel after the case against the 1st defendant was withdrawn, the case against the 2nd defendant was left without any legs to stand on.

44. In view of the foregoing, it is submitted that no claim for adverse possession has been established either against the title held by the deceased person herein or the current registered proprietor of the suit property.

Analysis and determination

45. From the pleadings, the evidence and the submissions filed in this case, the sole issue for determination is whether, given the fact that the case against the 1st defendant was withdrawn, the case against the 2nd defendant is maintainable.

46. With regard to this question reference is made to the decision of this court in the case of **Nduhiu Kanja supra** and submitted that given the fact that the legal representative of the estate of the deceased is not a party to this suit the case against the 2nd defendant is unmaintainable.

47. In the **Nduhiu Kanja** case supra, this court declined to make any adverse orders against the title held by the respondent on grounds that the estate of the deceased was not represented.

48. In the circumstances of this case, the plaintiffs' brought their case both against the current registered proprietor of the suit property and the administratrix of the estate of the deceased person herein. However, before the suit was heard and determined, the suit against the administratrix of the estate of the deceased person herein was withdrawn.

49. The effect of withdrawal of the case against the administratrix of the estate of the deceased person herein was that the estate of the deceased person was not given an opportunity to defend the case levelled against it.

50. There being no dispute that the plaintiffs' possession and occupation is not adverse to the title held by the 2nd defendant, I agree with the 2nd defendant's submission that the only way the plaintiffs' can establish their case against him is by showing that the title held by the 2nd defendant's predecessor in entitlement had become extinguished by their adverse possession thereof. The question that begs for an answer is whether the plaintiffs' can prosecute their claim for adverse possession against the previous registered owner of the suit property without giving him or his legal representative an opportunity to defend the case against him or his estate.

51. My view of that question is that, they cannot. In this regard see the case of **Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS[1197]eKLR** where the Court of Appeal held:-

"... The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

"However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents case who alone should have suffered the consequences of not suing

the party against whom they were seeking the relief.”

52. In the instant case, the plaintiffs' case, as I understand it, is that the title held by the deceased person herein had become extinguished by their adverse possession thereof. In my view, that kind of claim cannot be determined without giving the legal representative of the estate of the deceased person, in this case the 1st defendant, an opportunity to be heard on that issue, or in the absence of any evidence capable of showing that the suit property is not part of the free estate of the deceased, which determination cannot be made in the absence of representation of the estate of the deceased person.

53. There being no evidence that the Succession Court determined that the suit property was not part of the estate of the deceased person herein, I find and hold that the plaintiffs' claim for adverse possession against the estate of the deceased person is unsustainable.

54. Being of the view that the claim against the 2nd defendant can only hinge on the claim against the estate of the deceased person herein, I find the claim herein to be lacking in merit and dismiss it with costs to the 2nd defendant.

Orders accordingly.

Dated, signed and delivered at Nyeri this 26th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Njuguna for 2nd defendant

Mr. King'ori for the plaintiff

Court assistant - Lydia