



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 22 OF 2014

JOYCE WANGECHI NGALE..... PLAINTIFF

-VERSUS-

STEPHEN KAZUNGU JOHA..... 1ST DEFENDANT

MAGONGO MWAYAONA KIREKA.....2ND DEFENDANT

MWAKA JOHA CHIREKA 3RD DEFENDANT

Judgement

1. By a Plaint dated 23rd January 2014 and filed in Court on 4th February 2014, the plaintiff seeks the following order in respect of title Number MGUMO PATSA/MAZERAS/351 (hereinafter “the suit property/land”):

Determination and transfer of shares for registration of title deed and defendants to pay damages and costs for the interference and benefit of the plot’s produce for the last ten years.

2. The Plaintiff’s case is that she together with the parents of the Defendants are owners of the suit property in equal undivided shares. That the suit property is owned by five proprietors three of whom have died and are represented by their children, the 1st and 2nd Defendants herein.

3. The Plaintiff averred that after the death of the three shareholders, attempts to subdivide the suit property and register the subdivisions in separate names of the shareholders did not bear fruit because the Defendants opposed the process. The Plaintiff further pleaded that the Defendants are presently using and/or benefiting from the suit property by harvesting produce therefrom, cultivating it and cutting down trees.

4. The Plaintiff pleaded that the Defendants are now threatening the other shareholders not transfer or take possession of their part of the suit property. Further, the Plaintiff pleaded that the Defendants’ actions are illegal as the Defendants have no right of ownership and are not allowed to interfere in any way with the property because the same is owned by the shareholders in undivided shares.

5. The Plaintiff testified in court on 16th May 2016. She told court that her husband bought the suit property from Mazia in a public auction to repay dowry following a court case. She stated that from 1983, she has never occupied the suit land. She prayed that she be given her share of the suit property and be awarded costs of the suit.

6. On cross examination by the Defendants' learned counsel, the Plaintiff stated that she has never been to the suit land. She testified that her husband did not visit the land before purchasing it in the public auction. Contrary to what she pleaded in the Plaint that the Defendants are children of her co-owners, in cross examination the Plaintiff stated that the Defendants are brothers to the previous owner who owned the property before it was sold to her husband in a public auction. The Plaintiff stated that she knew the suit property was a family land and that the Defendants are living thereon.

7. The Defendants entered appearance under protest. In their joint Statement of Defence dated 25th April 2014 and filed in Court on 16th July 2014, the Defendants denied the Plaintiff's claim and stated that the 1st and 2nd Defendants do not own the suit property at all. They denied that they represent any party with regard to the suit property.

8. The Defendants averred that the Plaintiff did not explain how she became a partial owner of the suit property which is occupied by more than ten (10) families and is fully developed. The 1st Defendant, STEPHEN KAZUNGU JOHA testified on behalf of his co-defendants. He told court that he was born on the suit land in 1956. That his grandfather had five sons who inherited three parcels of land including the suit property from their father. That for some time they were unable to trace title documents for one parcel number only to discover later that Plot No. 351 was not in the land register. The witness stated that upon following up, they learnt that the Plaintiff had taken the title deed of the said plot yet no one in the family had given her the plot. The witness further testified that as a family, they were not told of any sale and were surprised to learn that the Plaintiff was claiming the land.

The Issues for Determination

9. In my view, after considering the pleadings and the evidence adduced in court, there are two main issues for the court's determination:

i. Whether the Plaintiff's case as filed is incurably defective; and

ii. Whether the suit property should be subdivided and a portion therefrom registered in the Plaintiff's name.

10. The Plaintiff pleaded in the Plaint that the 1st and 2nd Defendants are sued in their capacities as children of three co-owners of the suit property who have since died. The Plaintiff proceeded to annex copies of death certificates in respect of John Chireka Mwayaona and Mwayaona Chireka Mwayaona. However the Plaintiff did not disclose who among the three deceased owners each respective Defendant represents. Further and most fundamentally, it is trite law that a representative of a deceased person can only be sued if that representative is an administrator of the deceased's estate appointed by the court in accordance with the Law of Succession Act.

11. The Plaintiff's claim does disclose that the 1st & 2nd Defendants are sued in their capacities as administrators of the estate of the three deceased persons. The Defendants denied that they are representatives of any of the persons alleged by the Plaintiff. No evidence was led by the Plaintiff to prove the existence of such representation. On that basis alone, the Plaintiff's suit, based on her own pleadings, is incurably defective for having been brought against persons who are not legal representatives of the estates of the three deceased persons and whose names appear on the title. The 1st and 2nd Defendants are thus wrongly sued and the suit against them ought to be struck out.

12. Secondly, in her testimony, the Plaintiff did not disclose the date when her husband purchased the suit property through the stated public auction. She however stated that she has never accessed the suit land from 1983 and admitted that the Defendants and their families have been living on the land. The register for the suit title was opened on 5th March 2005 after the death of the listed co-owners. The 1st Defendant's testimony that he was born on the suit land in 1956 was not controverted.

13. Although the Plaintiff did not disclose when her husband bought the land, her testimony that she was

not able to access the land from 1983 shows that she could not bring an action to recover the land 31 years later. Her action is clearly statute barred by virtue of section 7 above. **Section 7** of the Limitation of Actions Act, Cap. 22 Laws of Kenya provides as follows:

“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”

On this basis too, the Plaintiff’s claim is incurably defective and must fail.

14. Although it is my finding above that the Plaintiff’s case as filed cannot stand the test of statute, for the avoidance of doubt, I wish to render my opinion on the merits of the case. The Plaintiff stated that her husband is the one who bought the suit land in a public auction. The title produced in court shows that the Plaintiff is the registered owner of the property alongside four (4) other persons. The Plaintiff did not lay a basis on how her name was entered into the register since she does not share family ties with any of the Defendants. There was no evidence that the property had been put up for sale in a public auction. The particulars of the case which the Plaintiff alleged to have been the genesis of the said sale such as case number, parties or the order/deed or the auctioneer who conducted were not disclosed.

15. Secondly, if the auction too place, it is not clear why the land would be registered in other people’s names other than the purchaser only. It is not clear whose share in the land was sold during the public auction as the Plaintiff did not show the nexus between Mazia who sold the land to her husband and the people whose names appear on the title deed. **Article 40(6) of the Constitution provides that the right to property does not extend to any property that is found to be unlawfully acquired.** The upshot of the foregoing is that the Plaintiff failed to prove how she acquired the suit property and how her name was entered in the register of the suit property to warrant an order for subdivision and transfer of shares in her favour. Her case must accordingly fail.

16. In conclusion, for the reasons set out above, I find that the Plaintiff’s case has no merit and is hereby dismissed with costs to the Defendants.

Dated & Signed and Delivered at Mombasa this 8th Day of September 2016

A. OMOLLO

JUDGE