



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC 252 OF 2014

**AGNES MALALA KUSIMBA WALUBENGO (SUING ON BEHALF OF HERSELF AND ON
BEHALF OF THE ESTATE OF)**

ANTONINA AORI KUSIMBA PLAINTIFF

-VERSUS-

YOLANDA SANGALE

MATRONAAKISO MBENDO

ISAAC NJOROGE JAMES DEFENDANTS

JUDGEMENT

1. The plaintiff brought this suit as the administrator of the estate of Antonina Aoori Kusimba - deceased and a beneficiary against the four defendants. The plaintiff pleaded that the 1st and 2nd defendants are staying on this land illegally and collecting rent from the 3rd and 4th defendants. The Plaintiff pleaded further that the property is due for auction over outstanding rates of Kshs. 2,000,000. The plaintiff aver that they have found a buyer for the property from which the debt will be cleared and a substantial amount of money left to the beneficiaries of the estate. She prayed for ;

- a) *An order of eviction.*
- b) *An order compelling the defendants to account for all the monies received since 2003.*
- c) *Costs of the suit and interest*
- d) *Any other relief the court deems just to grant.*

2. The defendants were served on 15th October 2014 with Summons to enter appearance, plaint, verifying affidavit, list of witnesses/statements at the suit property but failed to enter appearance within the prescribe time. The plaintiff requested for judgement on 30th October 2014 in default of appearance. this judgment was endorsed by the Deputy Registrar subject to hearing on formal proof. The plaintiff then listed this matter for formal proof on 5th February 2015. On this date, I directed the plaintiff's counsel to serve the defendants with a hearing notice and return for hearing on 18th February 2015.

3. Due to pressure of work I did not peruse the affidavit of service filed on 17th February 2015 that deposed the defendants were served with the hearing notice properly. While writing this judgment, I discovered that notice was served by Mr. Robinson advocate for the plaintiff who just copied, pasted and filed the same affidavit he used to serve the earlier pleadings to demonstrate to this court that he served the defendants with the hearing notice. The Counsel as an officer of this court has misled this court when no hearing notice was served for this matter to proceed. Be that as it is, I will proceed to consider whether the plaintiff has proved her case to warrant the prayers contained in her plaint given she had interlocutory judgment on record.

4. The plaintiff testified that she is the step-daughter of the late Antonina Aori Kusimba. The late Antonina died in 2003 and left the plaintiff and her sister Mary Oduma Kusimba as the beneficiary of her estate. The plaintiff continued that the deceased inherited the suit property XV/313/M1 from their father who died in 1975. The witness said there is unpaid rates as owned to the Municipality (County Government) of Kshs. 2 million. The suit plot is developed with rental houses. She said she served notice of demand to the 1st and 2nd defendants for rents collected receipts of which the said defendants acknowledged by the instituted suit against plaintiff in MBS CMCC. 3552 of 2013. That suit was later withdrawn. The plaintiff wishes to sell this plot because of the debt owned to the municipality.

5. She urged the court to issue an order to evict the tenants and award her costs of the suit and interest. She produced rates notice from the Counsel as PExh.1. The plaintiff stated further that the mother to the 1st and 2nd defendants is a sister to the late Antonina Kusimba. She wants the defendants evicted on the basis that she is the legal representative of the estate of the deceased. The plaintiff closed her case.

6. Mr. Robinson advocate for the plaintiff then filed written submissions which is a summary of the evidence on record. He submitted that there is no reason why the plaintiff's evidence cannot be believed as there is a real danger of the deceased estate being mismanaged and the assets misappropriated. The plaintiff had a statement that was filed where she recorded that the 2nd and 3rd defendants have been collecting rents since 2003 but have refused to account. She stated that the defendants have also failed to clear the liability owed to the county government. The plaintiff filed a list of documents which attached the certificate of grant issued to her, demand notice sent to the defendants, court order withdrawing the suit no. CMCC. 3552 of 2013 and the statement of outstanding rates from Mombasa Municipality.

7. From these documents, there is none of them which confirms that indeed the suit property is registered in the name of the late Antonina Kusimba. A statement of rates from the Municipal only does not confer ownership of property to an individual. It is my view and I so hold that failure to show documentary proof of ownership of the suit property is fatal to the plaintiff's claim. The plaintiff also said the suit is due for auction for non-payment of the rates. Besides the statement of rates, produced there was no letter from the County Government demanding settlement of the outstanding rate with a default clause of the property being sold. The proposition that the property is in danger of being sold was also not proved.

8. The plaintiff prayed for an order that the defendants be made to account for the monies they have collected from 2003 to date. In her evidence, the plaintiff did not say how many rental houses are on this plot. She did not put any evidence before this court that indeed rents are being collected and whether the 1st and 2nd defendants were also living on this property as tenants. The plaintiff could have engaged the services of a valuer to put emphasis to this claims. Further the plaintiff became an administrator of the deceased estate in 2014. She did not give explanation why she delayed taking out letters of grant to entitle her to demand for accounts of monies received from 2003 before her appointment as the legal representative.

9. Lastly the plaintiff averred that the defendants are staying on this plot illegally. From her own evidence, It appears the 1st and 2nd defendants have been on this land since 2003. There is nothing laid before court to explain how the said defendants came into occupation that made their stay therein illegal. The plaintiff having failed to establish that indeed the property is registered in the name of the Antonina Kusimba and having failed to show the illegality of the defendants occupation of the suit premises cannot and is not entitled to the orders of eviction sought. In conclusion I find the plaintiff has not proved her

case within the standards provided in law. This suit is thus dismissed with no order on costs.

Dated and delivered at Mombasa in open court this 16th day of April 2015.

A. OMOLLO

JUDGE