

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO.122 OF 2012

Estate of SYLVESTER KIMAGUT SANG

represented by JENNIFER CHEBET SANG PLAINTIFF

VERSUS

JANE JEPTOO SAWE DEFENDANT

J U D G M E N T

1. The plaintiff is the legal representative of the estate of the late Sylvester Kimagut Sang who was the registered owner of LR NO.Kaplamai/Kachibora Block 2/Mateket/95 (suit land). The defendant is the wife of the late Gideon Bore who died on 30.6.2005. The Plaintiff filed this suit against the defendant claiming the following reliefs:-

- a) A declaration that the late Sylvester Kimagut Sang is the sole registered owner of the land comprised in Title No. Kaplamai / Kachibora Block 2/Mateket/95 and further the defendant who has no proprietary interest whatsoever in the said land be ordered to move out therefrom and failing which she and anyone else claiming under her be forcefully evicted therefrom.
- b) A permanent injunction
- c) Costs
- d) Interest
- e) Any other relief that this Honourable Court may deem fit to grant.

2. The history of this suit can be traced back to some three agreements for sale entered into by the husbands of the plaintiff and defendant between 1983 and 1985. The defendant's husband at first bought three acres from the husband of the plaintiff. He then bought two acres and finally one acre making a total of 6 acres. The plaintiff's husband had eight (8) acres which means he was left with only two acres for his family. When Jennifer Chebet Sang realized the the husband had sold part of their land to Gideon Bore, she moved to the Tribunal and filed a case against Gideon Bore. She was protesting her husband's sale of 6 acres to Gideon Bore. The Tribunal ordered that Gideon Bore be given three acres. Both parties to this dispute were dissatisfied. Gideon Bore came back to court where the Tribunal verdict had been adopted and asked that the dispute be referred back to the District Officer for re-consideration but before the District Officer could reconsider it , Gideon Bore died. His widow who is the defendant herein went to Kaplamai Land Disputes Tribunal and filed a claim before it against Sylvester Kimagut Sang. The dispute was heard and the Tribunal ruled that Sylvester Kimagut Sang gives Gideon's widow 6 acres. Sylvester moved to the High court and filed a Judicial Review application seeking to quash the Tribunal verdict. Sylvester died before the application could be concluded. His widow Jenifer Sang took over and concluded the application. The Tribunal verdict was quashed by the High Court on 15.3.2012. This is what paved the way for the filing of this suit.

PLAINTIFF'S CASE

3. The plaintiff's position is that the defendant is a trespasser on the suit land, that she has no

proprietary interest in the same and should therefore be evicted from the same. She produced grant of letters of administration to show that she is the legal representative of the estate of her late husband. The grant was produced as exhibit 1. She also produced a copy of title deed in the name of her husband exhibit 2. The title was issued to her husband on 14.10.1993. She testified that the late Gideon Bore had about 20 acres which is away from the suit land. This is where the defendant resides. The defendant had been using an agent to cultivate the 6 acres but she later sent one of her sons who has since settled on the land.

DEFENDANT'S CASE

4. The defendant's position is that she is lawfully on the suit land pursuant to three sale agreements between her husband and the plaintiff's husband. She contends that she should not be evicted as she has acquired the land by adverse possession. She testified that her husband bought 3 acres on 28.4.1983. He again bought two acres on 28.7.1983 before finally buying one acre on 1.4.1985. Her husband paid Kshs.21,000/= for the three acres, 16000/= for the two acres and Kshs.8500/= for the last one acre. She testified that she took possession of the suit land in 1984.

ANALYSIS OF THE EVIDENCE, THE LAW AND ISSUES FOR DETERMINATION

5. There is no contention that the defendant's husband bought 6 acres from the husband of the plaintiff vide three agreements. Though the defendant neither filed the copies of those agreements in court nor produced them in evidence the same were marked for identification and the counsel for the plaintiff cross examined the defendant and her witnesses on the same. It is also not in contention that the transaction never received the consent of the land control board. The land being bought was Agricultural land which required the consent of the land control board. Since the transaction did not receive the consent of the land control board, it became null and void for all purposes.
6. I have gone through the pleadings and the evidence adduced in court as well as submissions by the counsel for the parties. The issues which emerge for determination are firstly whether the three agreements conferred any legal interest in the defendant or her later husband and secondly if the defendant has acquired the suit land by adverse possession.
7. The three agreements were entered into between 28.4.1983 and 1.4.1985. There was no consent of the land control board obtained. The three sale agreements became void after expiry of six months from their respective dates. This is because the land control board Act required consent to be obtained within six months from the date of the transaction. Since there was no consent of the land control board applied for and obtained, the transactions therefore became null and void. The defendant could therefore not claim the 6 acres based on the void transactions.
8. The next issue for determination is whether the defendant has acquired the six acres by adverse possession. According to the defendant's evidence, she took possession of the suit land in 1984. Her possession of the six acres became adverse to the owner after the transactions became void for want of the consent of the land control board. The Law provides that for one to claim land by way of adverse possession he/ she should be in continuous and peaceful occupation of the same for a period of 12 years. There are three possible scenarios which can be used to compute the 12 years period. The first one is after six months from 28.4.1983 when Gideon bought 3 acres. The second one is six months from 28.7.1983 when he bought two acres and the third one is six months after 1.4.1985 when he bought the last one acre. Whichever scenario one picks out, it is clear that neither the defendant nor her late husband had been in possession peacefully for a period of 12 years. This is because in 1987 when Jennifer Sang realized that her husband had sold land to Gideon Bore, she went and filed a case before the Tribunal. It is the Tribunal verdict which was adopted as Judgment of the court vide Kitale Senior Resident Magistrate Land case No. 10 of 1987. The filing of this case effectively stopped time from running. In the case of Njuguna Ndatho vs Masai Itumo & 2 others Nakuru Civil Appeal No.231 of 1999(2002) eKLR at page 3, the court of Appeal Judges had this to say regarding when time stops running:-

“ The position in Kenya as regards when time would stop running against an adverse possessor has been amply set out in the case of William Gatuhi Muratha vs Gakuru Gathimbi (Civil Appeal No.49 of

1996) unreported). This court followed the decision in the case of Joseph Gahumi Kiritu vs Lawrence Munyambu Kabura (civil Appeal No.20 of 1983) (unreported) which reviewed previous judgment of this court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to land by adverse possession.”

9. Following the decision of the court of Appeal in the cases cited herein-above, it is clear that time stopped running in favour of the defendant and or her husband when the plaintiff herein filed a case seeking to have back the land which her husband had sold to Gideon Bore. The defendant had been in possession of the suit land for slightly over 3 years before time was stopped from running in her favour by the filing of the suit. The defendant has therefore not acquired the 6 acres by adverse possession.
10. The defendant's advocate submitted that by the defendant being put in possession, the plaintiff had thereby created a constructive trust which cannot be defeated even for want of consent of the land control board. In support of this, two court of Appeal decisions were brought in aid. They are Nyeri court of Appeal No.6 of 2011 consolidated with Civil appeal No.26 and 27 of 2011 between Macharia Mwangi Maina and 87 others and Davidson Mwangi Kagiri. The other one is Kisumu Court of Appeal Civil Appeal No.3 of 2014 between Sammy Likunyi Adiema and Charles Shamwati Shisikani.
11. The issue of constructive trust or implied trust is a matter of evidence and each case has to be looked at with regard to its peculiar circumstances. The circumstances which led the court of appeal to find that there was constructive trust in the two cases are quite different from the circumstances in this case. In the present case there is evidence that Gideon Bore was initially leasing the land in issue. The husband of the plaintiff who was not of sound mind secretly sold the land without the knowledge of his family. When the family got to know of the sale, a claim for the re-possession was filed by the plaintiff at the Tribunal. DW3 Francis Kiplagat Sitienei was a witness to two agreements between Sylvester Sang and Gideon Bore. When he was cross examined by Mr. Kiarie for the plaintiff, he confirmed that Sylvester was not of sound mind. This witness was even referred to the proceedings before the Tribunal where it is recorded that he together with two others went aside and asked themselves why Sylvester wanted to sell most of his land and whether his wife (Plaintiff) was aware. The concept of constructive trust cannot therefore be applicable in the circumstances. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.
12. In the case of Macharia Mwangi Maina (supra) the respondent had put in possession the appellants who had purchased land from him and paid the entire purchase price. He did not take the appellants before the land control board because he wanted to sell all the 240 plots before he could take them for consent. When he did not take them to the land control board for consent and wanted to have the appellants evicted on grounds that there was no consent of the land control board, the court of Appeal held that he had created a constructive trust and he could not turn against the appellants who had developed their plots and had actually been put in possession by the appellant. The circumstances of this case are quite different from the instant case. The sale by the husband of the plaintiff was opposed right from the word go. Though the defendant has been utilizing the land, that possession has not been peaceful because of the litigations in court over it.
13. In the case of Sammy Likunyi Adiema (Supra), the respondent had bought land from the father of the appellant. He was put in possession in 1985. The appellant's father died in 1992. The appellant's family carried out succession which did not include the respondent. The court of Appeal held that since the respondent had been put in possession by the appellant's father, the appellant could not evict him as there was creation of constructive trust. The court ordered that two acres be excised from the appellant's 12.5 acres and be given to the respondent. The circumstances of this case cannot be equated to the present case. In any case, the appellants in the first case and the respondent in the second case had filed counter-claims asking for their rights to be recognized. This is unlike in the present case where the defendant did not counter-claim. Her attempt to file a counter-claim was made belatedly but rejected. This is because it came too late after the plaintiff had closed her case and she did not have letters of administration in respect of her husband's estate to enable her mount a counter-claim.

DETERMINATION

14. There is no basis upon which the defendant can either succeed on the basis of construction trust or adverse possession. I find that the plaintiff has proved her case against the defendant on a balance of probabilities. I grant the following reliefs:-

- a) A declaration that the late Sylvester Kimagut Sang is the sole registered owner of the land comprised in title no. Kaplamai / Kachibora Block 2/Mateket/95.
- b) The defendant is hereby ordered to move out of the land voluntarily or be forcefully evicted forthwith.
- c) A permanent injunction is hereby issued against the defendant or anyone claiming under her from any interference with the suit land.
- d. The defendant to pay the costs of this suit to the plaintiff.

Dated , Signed and delivered at Kitale on this 5th day of May, 2015.

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for plaintiff and Mr. Kraido for M/S Arunga for defendant , Court clerk - Isabella.

E. OBAGA

JUDGE

5.5.2015