



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 44 OF 2012

JOSEPH MUNYAO DISHON *suing in his capacity as the person representative of the estate of the late*

LILIAM MWIKALI ANDRE.....PLAINTIFF

=VERSUS=

EMERICUS HENDRIKUS VAN DE WARF.....DEFENDANT

J U D G M E N T

Introduction:

1. According to the Amended Complaint dated 20th May 2013, the late Mwikali Andre was the beneficial owner of 1/3 undivided share of land known as portion numbers 2166 and 2167 (original number 2092/2) Malindi (the suit property). The said suit property is registered in the name of the late Karl Andre, the husband of the late Lilian Mwikali Andre.
2. After the finalization of the succession cause in Germany in respect of the Estate of Karl Andre, Ralf Geunter Andre, Ulrich Andre and Ellen Enerst Andre were appointed as the administrators of the Estate of Karl Andre. It has been averred in the Complaint that the resealing of adoption of the Grant of Letters of Administration was done in Probate and Administration Cause Number 2832 of 2008.
3. However, it was averred, on return to Kenya, the late Lilian Mwikali Andre found the Defendant, a total stranger to her, had trespassed on the suit property.
4. In the Complaint, the Plaintiff is seeking for declaration that the Estate of the late Lilian Mwikali Andre is the rightful and legal beneficial owner of 1/3 undivided share of portion number 2166 (original number 2092/2) Malindi and portion number 2167 (original number 2092/2) Malindi.
5. The Defendant filed a Defence and averred that he is a director of and shareholder of Big Game Fishing Lodge Malindi Limited which purchased the suit property way back in 1999 in a public auction.
6. The Defendant further stated that even if the late Lilian Mwikali Andre had a valid claim over the suit property, then the same is extinguished by operation of the doctrine of adverse possession.
7. Although the Defendant's advocates were served with a hearing notice, neither the Defendant nor his advocate was present when the matter came up for hearing.

The Plaintiff's case

8. Joseph Munyao Dishon, PW1, informed the court that he was the brother of the late Lilian Mwikali Andre who was murdered within the suit premises after filing this suit. PW1 produced the Limited Letters of Administration in respect to Estate of Lilian Mwikali Andre as PEXB1.

9. According to PW1, plot numbers 2166 and 2167 Malindi are registered in the name of the late Karl Andre who was the husband to his late sister Lilian Andre. The said Karl Andre has 1/3 share in the said two properties. When Mr. Andre died, it was the evidence of PW1 that her late sister inherited the share that Mr. Andre had in the suit property. PW1 produced as PEXB2 the proceedings in Nairobi Succession Case number 2832 of 2008 in which the late Lilian Mwikali Andre was conferred ownership of the suit property by the court.
10. Although her late sister had the original title documents in respect to the suit property, it was the evidence of PW1 that the said title documents were taken away from her when she was murdered. PW1 made a report to the police about the disappearance of the said title documents. He produced the police abstract as PEXB 3.
11. PW1 produced the copies of the Indentures in respect to the two plots as PEXB 4a and b and the original official searches as PEXB 5a and b.
12. It was the evidence of PW1 that the Defendant has since been charged with the murder of Lilian Mwikali Andre. PW1 produced the charge sheet as PEXB 6.
13. PW1 informed the court that upon investigations, he realised that the title documents that the Defendant was using to lay claim on the two suit properties were forgeries. PW1 produced a letter from the Ministry of Lands as PEXB 7 which showed that the title documents the Defendant was using to claim the suit property are forgeries and non-existent.
14. PW1 prayed that he should be granted the suit property on behalf of his late sister.

Submissions

15. The Plaintiff advocate reiterated in his submissions the evidence of PW1 which I have already summarised.
16. Counsel submitted that the Plaintiff has proved that the late Lilian Mwikali Andre is entitled to 1/3 share of the suit properties having inherited the same from her late husband, the registered proprietor of the same.

Analysis and findings

17. PW 1 produced in evidence certificates of postal searches as at 1st November, 2012 for plot no. 2166 and 2167. The certificates of postal searches show that the two parcels of land are registered under the Land Titles Act, Cap 282 Laws of Kenya. According to the searches, the registered owners of the two parcels of land are Henri Johann and Hans Urich in respect of 2/3 share and Karl Andre in respect of 1/3 share. The searches further show that the properties were caveated on 12th September, 1995 by the original Plaintiff in respect to the share of Karl Andre.
18. It is not in dispute, at least in so far as the current pleadings and the evidence of PW 1 are concerned, that Karl Andre, the proprietor of 1/3 share of the two suit properties was the husband to the late Lilian Mwikali Andre, the original Plaintiff. There is no mention by the Plaintiff or the Defendant about the whereabouts of the owners of the two thirds share of the suit property.
19. The Plaintiff has also produced in evidence Form 81, which is the seal of grant issued in Germany on 14th November, 1995 in respect of the Estate of Karl Andre. The said Form 81 is issued by the High Court of Kenya pursuant to the provisions of Rule 42 of the Probate and Administration Rules. These are rules made under the law of succession Act Cap 160 of the Laws of Kenya.
20. Rules 42 (1) of the Probate and Administration Rules provides that an Application under section 77 of the Act for the sealing of a grant issued by the court or other authority of a commonwealth country or other country to which that section applies shall be made to the Principal Registry or to the Mombasa Registry by the person to whom the grant was made or his attorney empowered in writing to apply on his behalf. The sealing of the grant was published in the Gazette of 13th February, 2009.
21. The grant that was issued in German and sealed in Kenya shows that Lilian Andre, the original Plaintiff, was the sole beneficiary of plot number 2167 and 2166 in Malindi. The supporting affidavit of Ralf Geunter Andre, Ulrich Andre and Ellen Endorst nee Andre, the administrators of the Estate of Karl Ernst Andre sworn on 6th September, 2010 and filed in Nairobi Succession cause no.2832 of 2008 at paragraph 6 states as follows;

“That as our father had wished to donate his shares of Sailfish club to his ex-wife Lilian Mwikali Andre, we transferred our share of Sailfish Club, Malindi registered with the District Land Registry, Mombasa under plot number 2166 and 2167 on 19th day of May 2004 (see certified copy of conveyance and certificate translation marked RUE1.”

22.It is therefore not in dispute that the original Plaintiff, Lilian Mwikali Andre, had gone through all the legal motions of acquiring the interests of Karl Andre in parcel of land numbers 2166 and 2167, which constituted a third of the suit property. Unfortunately, she was murdered before she could enjoy the fruits of her pursuit of what she believed belonged to her late husband.

23.The Plaintiff has proved on a balance of probability that she is the lawful owner of the share that was being held by the late Karl Andre in the suit property. The Defendant, on the other hand has not shown his proprietary interest at all in the suit property.

24.In the circumstances, I allow the Plaintiff's amended Plaint dated 20th May 2013 as prayed.

Dated and delivered in Malindi this **26th** day of **September,** 2014.

O. A. Angote

Judge