



Keshenke v Rune (Suing as the Administrator of the Estate of Palle Juel Rune) (Environmental and Land Originating Summons 404 of 2017) [2024] KEELC 5751 (KLR) (29 April 2024) (Judgment)

Neutral citation: [2024] KEELC 5751 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 404 OF 2017
LC KOMINGOI, J
APRIL 29, 2024
(FORMERLY NAIROBI ELC NO. 1223 OF 2013)

BETWEEN

NKOYOK OLE KESHENKE PLAINTIFF

AND

PALLE JUEL RUNE DEFENDANT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF PALLE JUEL RUNE

JUDGMENT

1. The Plaintiff through the Originating Summons dated 14th October 2013 filed at the ELC Nairobi and later transferred to this court sought:
 - i. A declaration that the Applicant Nkoyok Ole Keshenke is entitled to be registered as proprietor of all that parcel of land known as Title No. Kajiado/Loodariak/1092.
 - ii. An order for rectification of the land register by registration of the applicant's Nkoyok Ole Keshenke as the proprietor of Title No. Kajiado/Loodariak/1092 in place of Palle Juel Rune.
 - iii. An order directing the Respondent Palle Juel Rune to execute all documents of transfer in favour of the Applicant in respect of Title No. Kajiado/Loodariak/1092 in default whereof the Deputy registrar of this Hon. Court be empowered to execute the same in place of the Respondent.
 - iv. That costs of this suit be in any event given to the Plaintiff/ Applicant.
2. In his Supporting Affidavit the Plaintiff averred that the Defendant was the registered owner of Title No. Kajiado/Loodariak/1092. He claimed that in September 1990 he entered into a verbal agreement with the Defendant for a 3-year lease of the suit property at an annual rent of Kshs. 3,600. He then gave the original title deed to the Defendant for registration but the Defendant disappeared with it. He then



conducted a search at the lands registry only to find that the Defendant had fraudulently transferred the suit property to himself. The Plaintiff has been in possession of the property since 1990

3. The Defendant in his Defence and Counterclaim denied the allegation stating that his late father Palle Juel Rune purchased the suit property LR No. Kajiado/Loodariak/1092 measuring approximately twenty (20) acres from the Plaintiff sometime in 1990 for a consideration of Kshs. 60,000 and has been in possession since then. He stated that the Plaintiff issued him completion documents including the application for consent to the Land Control Board, transfer form and original title deed. The Defendant was subsequently issued with title to the suit property on 18th December 1990. Hence, the allegation of fraud was false.
4. He stated that in 1994 the Plaintiff put a restriction on the property but the same was lifted in the year 2000 after his late father protested. The Plaintiff then put another restriction in 2012. As such, his alleged possession and occupation has clearly not been peaceful and uninterrupted and the claim for adverse possession should fail. The Defendant prayed for:
 - a. A declaration that land title No. Kajiado/Loodariak/1092 belongs to Palle Juel Rune (deceased) who is the registered owner.
 - b. An eviction order be and is hereby issued and directed to the Plaintiff to immediately move out of land Title No. Kajiado/Loodariak/1092.
 - c. The Plaintiff herein be and is hereby ordered not to trespass, subdivide, occupy, sell and or in any manner deal with land Title No. Kajiado/Loodariak/1092.
 - d. Any other order that this Hon. Court may deem fit to order so as to enforce the above prayers in the interest of justice.
 - e. Costs of this suit be paid by the Plaintiff.
5. The Plaintiff contested the Defendant's claim and sought for dismissal of the counterclaim with costs.

Evidence of the Plaintiff

6. The Plaintiff failed to appear in court to prosecute his case and the same was dismissed.
7. The Defendant's Counterclaim thus proceeded for hearing.

Evidence of the Defendant/ Plaintiff in the Counterclaim

8. PW1 Torben Peter Rune testified and relied on his witness statement as part of his evidence in chief as well as his bundle of documents as exhibits. He stated that his father purchased the property in 1990 and all necessary consents granted and was subsequently issued with a title deed. He has been in possession since then, sunk a borehole and grew avocados on the property. He stated that the Plaintiff had never occupied the property although sometime in 2015 he attempted to put up structures on the property.
9. At the close of the oral testimony the defendant put in written submissions.

The Defendant's Submissions

10. Counsel submitted that the Plaintiff's Originating Summons was fatally defective because it did not seek for declaration of the Plaintiff as owner of the property by way of adverse possession adding that the Plaintiff had not attached copy of the suit property's title as required. Counsel added that the Plaintiff did not produce evidence of a lease agreement to support his claim that he had leased the



property to the Defendant. And it was not in contention that the Plaintiff received Kshs. 60,000 as acknowledged by the parties

11. Counsel further submitted that the Defendant had adduced documents supporting his father's ownership of the property as required by Section 107 of the *Evidence Act* and the Plaintiff did not prosecute his case. The Defendant's Counterclaim should therefore be allowed with costs because it stands uncontroverted.

Analysis and Determination

12. I have considered the pleadings, the evidence on record, the written submissions and the relevant authorities. The issues for determination are:
 - i. Whether the Defendant's Counterclaim is merited.
 - ii. Is he entitled to the reliefs sought?
 - iii. Who should bear costs of this suit?
13. As already indicated, the Plaintiff's case was dismissed for want of prosecution and the Defendant's counterclaim is uncontroverted.
14. The Defendant's case is that his father the late Palle Juel Rune purchased the suit property from the Plaintiff in the year 1990 and has been in possession since then. It is trite law that he who alleges must prove as stipulated by Section 107 (1) of the *Evidence Act* which provides; "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
15. To prove this, he produced a copy of certificate of search dated 21st May 2013 which shows that L.R. No. Kajiado/Loodariak/1092 was registered to Palle Juel Rune and title issued on 18th December 1990. There is a letter with the Plaintiff's name and a thumb print acknowledging receipt of Kshs. 60,000 being the purchase price for L.R. No. Kajiado/Loodariak/1092 purchased by Palle Juel Rune. There is also copy of an application for consent to the Land Control Board dated 13th September 1990 by the Plaintiff in favour of Palle Juel Rune. The certificate of search shows that on 4th July 2012 a restriction was registered by Nkoyok Ole Keshenke against the suit property. He thus prayed for declaration that the property belongs to Palle Juel Rune.
16. The Defendant has produced documents showing how his father acquired registration of the suit property. No evidence has been adduced to controvert the said registration to show that it was procured illegally, fraudulently or unprocedurally as provided by law. Section 24(a) of the *Land Registration Act* provides that: "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto..."
17. Section 26 goes on to stipulate that: "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."



18. It is a fundamental principle in law that without substantial evidence to challenge the validity of a title, the holder of said title possesses an unassailable and absolute right to the property in question. This principle has been consistently upheld by courts, as demonstrated by the Court of Appeal in *Mbarak v Freedom Limited* [2024] KECA 160 (KLR) where it was held;

“98. The golden thread that runs through the foregoing statutory and judicial authorities is that a certificate of title is prima facie evidence of ownership defeasible on evidence of illegality, irregularity in its acquisition or corrupt dealing. In effect, the sanctity of title to immovable property finds protection in the *Constitution* on the basis of a higher value – integrity and the rule of law, and not merely on formal registration of transactions on which a claim is founded.”

19. Also the Supreme Court of Kenya in *Rutongot Farm Ltd vs. Kenya Forest Service & 3 others* [2018] eKLR stated;

“...once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the *Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property...”

20. It is imperative to recognize that an individual who has successfully established, on the balance of probabilities, their rightful ownership of a property should not be unjustly deprived of their title. I therefore, see no reason why the Defendant should be deprived of the same.

21. On the issue of costs, it is legally embedded that costs follow the cause unless the court for good reasons deems otherwise. In the present case, the Plaintiff instituted legal proceedings but subsequently failed to diligently pursue their claim. In light of this failure, there exists no compelling reason to deviate from the well-established principle that costs should follow the event.

22. In conclusion I find that the Defendant has proved his case on a balance of probabilities as against the Plaintiff. (Defendant in the Counterclaim)

23. Accordingly Judgement is entered in favour of the Defendant as follows;-

- i. That (Torben Peter) (Administrator of the estate of Palle Juel Rune) is hereby declared the registered owner of property Kajiado/Loodariak/1092.
- ii. That a permanent injunction is hereby issued restraining the Plaintiff, his servants or assignees from trespassing or in any way dealing with the suit property known as LR No. Kajiado/Loodariak/1092.
- iii. That costs of the suit be borne by the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 29TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A for the Plaintiff.

Mr. Wanjohi for the Defendant.



Court Assistant – Mutisya.

