



Simiyu & another (Acting as the Personal Representatives of the Estate of the Late John Simiyu Palanga - Deceased) v Were (Environment & Land Case 108 of 2019) [2024] KEELC 5959 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 108 OF 2019
DO OHUNGO, J
SEPTEMBER 19, 2024**

BETWEEN

BELINA NANGILA SIMIYU 1ST PLAINTIFF

BENSON WABOMBA PALANGA 2ND PLAINTIFF

**ACTING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE
LATE JOHN SIMIYU PALANGA - DECEASED**

AND

FRANCIS WAMALWA WERE DEFENDANT

JUDGMENT

1. The Plaintiff moved the Court through Originating Summons dated 10th September 2019 seeking determination of the following:
 1. Whether the litigation in the formerly Kakamega H.C.C.C. no. 283 of 1991 currently ELC. no. 230 of 2017 - John Simiyu Palanga - deceased as substituted by Francis Wamalwa Were v Chepkooe Kosgei & Levi Luvandale Nandoya was instituted by the late John Simiyu Palanga to vindicate his rights of acquisition of land by adverse possession in respect of the land parcel known as Kakamega/Sango/83?
 2. Whether upon the demise of the late John Simiyu Palanga - deceased the defendant was substituted as the plaintiff for the purposes of proceeding with the prosecution of the suit on behalf of the estate of the late John Simiyu Palanga - deceased?
 3. Whether the judgment obtained in the said suit and any benefits accruing there-from belong to the estate of the late John Simiyu Palanga - deceased?



4. IF the answer to 3 above is in the affirmative is it proper for the defendant to obtain title to the land parcel known as Kakamega/Sango/83 in his personal name instead of proceeding to cause a transmission of the land to the estate for administration in-tandem with the provisions of the *Law of Succession Act*, Cap. 160 of the Laws of Kenya?
 5. Whether the defendant is holding any benefits accruing from the decree in the formerly Kakamega H.C.C.C. No. 283 of 1991 and currently ELC. no. 230 of 2017 - John Simiyu Palanga - deceased as substituted by Francis Wamalwa Were v Chepkooe Kosgei & Levi Luvandale Nandoya as a trustee of the estate of the late John Simiyu Palanga - deceased and ought to be compelled to transmit or convey the benefits of the decree to the estate of the deceased for administration in terms of the *Law of Succession Act*, Cap. 160?
 6. Whether in the event defendant fails to execute the requisite instruments to give effect to the transmission or vesting of the benefits of decree in the formerly Kakamega H.C.C.C. No. 283 of 1991 and currently ELC. No. 230 of 2017 - John Simiyu Palanga - deceased as substituted by Francis Wamalwa Were v Chepkooe Kosgei & Levi Luvandale Nandoya the Deputy Registrar of the Court can execute the same?
 7. Whether the defendant should render vacant possession of the land parcel known as Kakamega/Sango/83 for the purposes of the administration of the estate of the late John Simiyu Palanga - deceased?
 8. Who should meet the costs of the suit?
2. Hearing of the matter proceeded by way of oral evidence. Belina Nangila Simiyu (PW1) adopted her witness statement dated 2nd November 2020 and produced copies of the documents listed as item numbers 1 to 9 in the Plaintiff's List of Documents dated 2nd November 2020.
 3. PW1 stated in her statement that the Plaintiffs were joint administrators of the estate of John Simiyu Palanga (deceased) pursuant to a Grant of Letters of Administration issued to them on 20th March 2006 in Kakamega HC Succession Cause No. 558 of 2005. That the deceased had instituted Kakamega HCC No. 283 of 1991 being a claim for adverse possession in respect of parcel number Kakamega/Sango/83 but passed away on 6th February 2004 while the suit was pending and that the Defendant's application to substitute the deceased was allowed on 19th February 2013.
 4. PW1 further stated that judgment was delivered in the suit on 5th December 2015 and that the Defendant prosecuted the suit as a representative of the deceased's estate. That the Defendant breached his obligations as an administrator by obtaining a ruling dated 11th July 2018 pursuant to which he got the suit property transferred to his sole name and not the deceased's estate. She also stated that the Defendant then started to threaten to evict the Plaintiffs together with other dependants of the deceased and commenced acts of destruction on the suit property.
 5. PW1 went on to testify that the deceased had four wives including herself and that the deceased also owned another parcel being Kakamega/Sango/82 where her house and compound are located. That during distribution of the deceased's land by elders, all other heirs of the deceased got a portion of Kakamega/Sango/82, save for the Defendant who got land in the suit property. She also stated that she and nine others were arrested and charged in an Eldoret court about an incident in 2019 where the Defendant's house on the suit property was burnt. That she filed this case out of anger after being arrested and charged in the Eldoret case and that were it not for the arson case, this case would not have been filed.



6. Nabangi Paul Makete (PW2) adopted his witness statement dated 13th May 2022. He stated that he is a retired chief having served as the chief of the area where the suit property is located and where the deceased hailed from. That he wrote a letter listing the deceased's heirs for purposes of Kakamega HC Succession Cause No. 558 of 2005 and included the Defendant as a relative of the deceased. That he wrote the letter at the request of PW1 who gave him a list.
7. The Plaintiff's case was thereafter closed.
8. The Defendant testified as DW1 and stated that PW1 is his stepmother while Benson Wabomba Palanga is his brother from another house. He adopted his witness statement dated 26th September 2022 as well as his replying affidavit sworn on 11th March 2021. He stated that he has been residing in the suit property since 1971 with the deceased until his demise on 6th February 2004. That he and the deceased filed Kakamega HCC No. 283 of 1991 being a claim for adverse possession against the then registered owner of the suit property Levi Luvandale. That Kakamega HCC No. 283 of 1991 later became Kakamega ELC No. 230 of 2017.
9. The Defendant further stated that he substituted the deceased in Kakamega HCC No. 283 of 1991 and testified for his own benefit since he was in occupation of the suit property to the exclusion of the Plaintiffs. That he was not given any part of the deceased's estate in the distribution in Kakamega HC Succession Cause No. 558 of 2005 since he had been given the suit property by the deceased and that it is for the same reason that his siblings did not claim the suit property.
10. The defence case was thereafter closed, whereupon parties filed and exchanged written submissions.
11. I have carefully considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether this court can vary the judgment delivered on 5th November 2015 in Kakamega HCC No. 283 of 1991 and ruling delivered on 11th July 2018 in Kakamega ELC No. 230 of 2017 (formerly Kakamega HCC No. 283 of 1991) and whether the reliefs sought by the Plaintiffs can issue.
12. There is no dispute that the deceased filed Kakamega HCC No. 283 of 1991 where he sought to be declared the proprietor of the suit property by adverse possession and that upon the deceased's demise on 6th February 2004, the Defendant herein substituted him pursuant to an order made by the High Court on 19th February 2013. The Defendant herein prosecuted Kakamega HCC No. 283 of 1991 and testified in the matter on 20th March 2014. Ultimately, judgment was delivered by the High Court on 5th November 2015.
13. The High Court stated thus in the judgment:

In the end, I do find that the plaintiff has proved his case and the summons are granted as prayed. The suit land, Kakamega/Sango/83 belongs to the plaintiff and a title deed shall issue to that effect.
14. HCC No. 283 of 1991 was later transferred to this court pursuant to an order made by the High Court on 10th July 2017 whereupon it became Kakamega ELC No. 230 of 2017. Subsequently, the Defendant herein filed an application seeking an order authorizing the Deputy Registrar to sign transfer forms in his favour. The court allowed the application through a ruling delivered on 11th July 2018. The Plaintiffs' case is that the suit property was transferred to the Defendant pursuant to the orders of 11th July 2018.



15. As narrated above, the Defendant acquired title following the aforesaid judgment and ruling. The judgment was rendered by the High Court and not this court. As for the ruling, even though rendered by the Environment and Land Court, the court was differently constituted from this court. I do not have jurisdiction to revisit and revise a judgment and ruling delivered in a different matter from the present one and by other courts. Prayers 1 to 4, 6 and 7 of Originating Summons dated 10th September 2019 invite this court to interrogate the judgment and ruling. I cannot do so through a separate suit, as is the case herein. Equally, I cannot vary the judgment and ruling as is essentially sought by the Plaintiffs.
16. Through prayer 5 of the Originating Summons, the Plaintiffs have sought determination of whether the Defendant is holding benefits accruing from the judgment and ruling as a trustee of the deceased's estate. Existence of trust is a question of fact which must be proven through evidence.
17. The Court of Appeal stated in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR as follows:

It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.
18. The Plaintiffs are in effect contending that the judgment and ruling made the Defendant a trustee of the deceased's estate as far as the suit property is concerned. My reading of the judgment does not reveal any declaration of trust. In any case, this court cannot infer trust through separate proceedings other than within Kakamega ELC No. 230 of 2017 (formerly Kakamega HCC No. 283 of 1991). Trust is an equitable principle. Equity follows the law. Any determination of whether the judgment and ruling rendered the Defendant a trustee must be done within Kakamega ELC No. 230 of 2017 (formerly Kakamega HCC No. 283 of 1991).
19. In view of the foregoing, the Plaintiffs have not established their case. It follows therefore that the reliefs sought cannot issue.
20. The Plaintiffs' case is without merit. Consequently, I dismiss it. Considering the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF SEPTEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mogambi for the Plaintiffs

The Defendant present

Court Assistant: M Nguyayi

