



Magut v Nyachio (Suing as Legal Representative of the Late Mary Kerubo Aminga) & 3 others (Environment & Land Case 5 of 2015) [2024] KEELC 13339 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 5 OF 2015
EO OBAGA, J
NOVEMBER 21, 2024**

BETWEEN

VERONICA J MAGUT PLAINTIFF

AND

GLADY MORAA MARIE NYACHIEO (SUING AS LEGAL REPRESENTATIVE OF THE LATE MARY KERUBO AMINGA) 1ST DEFENDANT

PAUL KAVISI 2ND DEFENDANT

EMILY MISOI 3RD DEFENDANT

KAPYEMIT BLOCK 20/46 SELF HELP GROUP 4TH DEFENDANT

JUDGMENT

Introduction

1. By an amended plaint dated 17.4.2023, the plaintiff sought the following reliefs from the Defendants: -
 1. An order of permanent injunction be and is hereby granted against the Defendants in respect of and restrain the Defendants from the plaintiff's plot namely plot No. Kapyemit Block 20/46 subplot No. 174 both on paper and on ground.
 - 1(b) eviction against the 1st Defendant from the Plaintiff property known as Kapyemit Block 20/46 subplot No. 174.
 2. Costs.
 3. Interest.
 4. Any other relief deemed fit in favour of the plaintiff.



Background;

2. The plaintiff holds a limited grant in respect of the estate of her later mother Christine Chehel Sitienei (Deceased) who died on 16.6.2001. The 1st Defendant holds a limited grant in respect of her late mother Mary Kerubo Aminga (Deceased) who died on 17.9.2019.

Plaintiff's case;

3. The plaintiff testified that she brought this suit on behalf of the estate of her mother Christine Chehel Sitienei (Christina). She testified that Christine purchased 1/8 of an acre from Stanly Songok on 7.4.1972. She stated that the land was initially plot No. 174 but it was later changed to plot 165 by a chief who had since retired.
4. The plaintiff continued to testify that Christine took her to the land in 2002 and showed it to her. As at that time there was no one on the land. She stated that she did not know when Mary Kerubo Aminga (Mary) entered the land but that she discovered Mary's occupation of the land in 2006/2007. She reported invasion by Mary to the area Chief who did not assist her. She went to the Assistant chief who summoned Mary and after arbitration proceedings, the Assistant chief ruled that the land belonged to the family of Christine.
5. After the ruling of the Assistant chief, she went and fenced the 1/8 of an acre but Mary came and destroyed the fence. Mary was charged in Eldoret court with creating disturbance likely to cause a breach of the peace. She was convicted and sentenced to serve twelve months' probation.
6. The plaintiff testified that she was a member of Kapyemit Block 20/46 Self Help Group and that she used to make payment to the group and that she did not know if Mary was a member of the group. She stated that it is the officials of the Self-help group who authorized Mary to construct on the disputed land.
7. The plaintiff called PW2 Philemon Birech the chief who arbitrated between her and Mary. This witness testified that she looked at the agreement between Christine and Stanley Songok and was convinced that Christine is the one who purchased the disputed land. He testified that Mary did not produce any sale agreement to confirm that she had purchased the land despite being given time to do so.
8. The Plaintiff also called Stanley Songok (PW3) who testified that he sold land measuring 1/8 of an acre to Christine in 1972, and that he did not know one Samwel Kimenjo Kimeto who claims to have sold land to Mary. This witness stated that there is a time he was called to the chief's office where he showed all the documents pertaining to the same between him and Christine. He stated that he did not know Mary or Samwel Kimenjo Kimeto who sold land to Mary.

Defendant's case;

9. The 1st Defendant who was substituted in place of Mary testified that her mother purchased ½ an acre out of LR. No. 11036 from Samwel Kimenjo Kimeto on 20.8.1979. Her mother took possession of the ½ acre where their family stayed peacefully until 2007/2008 when the plaintiff started laying claim to the land. She stated that she was married while staying on the suit property.
10. The 1st Defendant testified that there was a tribunal which was convened and it gave a verdict that the disputed property belonged to Mary. The 1st Defendant stated that the Plaintiff came to claim the suit property after 30 years and this was after the postelection violence of 2007/2008.



Plaintiff's submissions;

11. The Plaintiff filed her submission dated 3.5.2024. She submitted that she had proved on a probability of more than 50% that her mother purchased the disputed property. She relied on the case of Union Pacific Railroad Co –vs- State Board of Equalization which described preponderance of evidence standard as the weight of evidence meaning more than 50% proof. Under this standard, the burden of proof is met when the party with the burden convinces the court that there is a greater than 50% chance that the claim is true.

1st Defendant's submissions;

12. The 1st Defendant filed her submissions dated 22.5.2024. She submitted that the plaintiff did not prove that Christine did not prove that she was entitled to a permanent injunction against the Defendants. She further submitted that the plaintiff did not take possession of her alleged property since 1972 and only came to lay a claim to it in 2007/2008 after the post-election violence.

Analysis and determination;

13. I have carefully considered the evidence adduced by the plaintiff and that of the 1st Defendant as well as the submissions of the parties. The issue which stands out for determination is on who between Christine and Mary purchased the disputed land.
14. A close examination of the evidence adduced herein shows that LR. No. 11036 was measuring about 36 acres. This land belonged to the father of Stanley Songok. This is according to the evidence of PW3 Stanley Songok. It is also apparent that a group calling itself Kapyemit Block 20/46 Self Help Group had purchased a portion of LR. 11036 which they then distributed to their members.
15. The plaintiff claimed that her mother Mary had purchased land measuring 50x100 which is equivalent to an 1/8 of an acre. In support of her case, she produced a sale agreement dated 7.4.1972 (exhibit 2). This agreement clearly shows that it was not the initial agreement. This is because it refers to an agreement which was made in 1972 wherein the original witnesses were named as Tabutany, Murei and Rono.
16. The initial agreement is said to have been made in the presence of Mzee Arap Samoei Cheusi deceased, neighbours and a land surveyor who were not named. It is therefore clear that there was no agreement which was made on 7.4.1972 which would have formed the basis of the plaintiff's claim. The date of the original agreement if any was not disclosed and the alleged agreement was not produced in evidence.
17. If indeed there was any agreement made between Christine and Stanley Songok in 1974 it beats logic why Christine did not take possession of the same in 1972 or earlier or why the plaintiff who claims that her mother Christine took her to the land in 20202 did not take possession until 2007/2008 when she first made an attempt to fence 1/8 of an acre out of Mary's land measuring ½ an acre.
18. PW2 Philemon Birech is the assistant chief who convened an arbitration meeting over the disputed land. The verdict of the meeting was given on 17.12.2007 that the disputed land belonged to the plaintiff. Mary was not present due to post election violence. Mary appealed the verdict of the assistant chief and his elders and the panel which was constituted faulted his decision. The elders' decision which was produced in evidence by the 1st Defendant as exhibit 2 clearly shows that Christine did not purchase the disputed land.
19. The 1st defendant produced a sale agreement as defence exhibit 1. This agreement clearly shows that Mary purchased ½ an acre from Samwel Kimenjo Kimeto. Samwel Kimenjo Kimeto was a shareholder



of the 4th Defendant. He did not have to purchase the disputed land from PW3 Stanley Songok who was son to the owner of LR. No. 11036. In the proceedings produced by DW1 as defence exhibit 2 the former secretary of the 4th Defendant Shadrack Ruto confirmed that Christine was not a member of the 4th Defendant.

20. Infact the plaintiff tried to make payments to the 4th Defendant on 30.11.2019, 28.1.2010 and 28.11.2010 to prove that she was a member of the 4th defendant. These payments were a belated attempt to prepare for a case which she filed in 2011 before the Chief magistrate's court laying claim over the disputed land. This case was struck out as she did not have locus to bring it on behalf of the estate of her late mother.
21. During the hearing before the elders, the plaintiff claimed that her original documents were burned in a house fire. She was able to produce a duplicate copy which was faint. The witnesses particularly Mary Kiberen who testified stated that Christine had told her that the plot which she had purchased was 25x100 and that it had turned out to be on a road reserve. She stated that the agreement which Christine had shown her was on a green paper and not the one which her daughter the plaintiff showed before the elders. Christine had further told her that the original was with Jacob Cherwon and that it could not be traced.
22. During the hearing before this court, the plaintiff produced an original agreement which as I have stated hereinabove is not the alleged agreement because an agreement cannot be witnessed by a deceased person. There was an original agreement which was never produced. PW3 purported to claim that the agreement of 7.4.1972 is the one he entered with Christine. This witness was clearly lying and he never appeared before the tribunal which examined the documents which were purportedly made between him and Christine despite him having appeared before PW 2 who was an assistant chief and whose verdict was overturned by the elders on sound grounds.

Disposition;

23. From the above analysis, it is clear that the plaintiff has failed to prove her case on balance of probabilities. The same is dismissed with costs to the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF NOVEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Misoi for plaintiff.

Mr. Omboto for Defendants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

21ST NOVEMBER, 2024

