



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ELC NO.13 OF 2014

DOMINIC OBAGO WANDERA.....PLAINTIFF

VERSUS

GEOFFREY SHIKHENGE.....DEFENDANT

J U D G M E N T

1. By a plaint filed in Court on 17/2/2014 and dated 5/2/2014, the Plaintiff – **DOMINIC OBAGO WANDERA** – pleaded, *inter alia*, that he is the registered owner of land parcel No.L.R. Bunyala/Bulemia/2369 (disputed land) measuring 1.3 ha designated on map sheet No 33 Bulemia Section.The defendant – **GEOFFREY SIKHENGE** – is said to have trespassed onto the disputed land and occupied it.The defendant was further said to have no beneficiary or purchaser’s interest in the disputed land.

2. The plaintiff wants an order of eviction to be issued against the defendant and an injunctive relief to prevent a repeat.Also asked for are costs of the suit.

3. The defendant filed his defence on 26/5/2014.He denied the plaintiffs claim and averred that he not only has a purchaser’s interest in the land, but he is also an adverse possessor.The defendant then proceeded to lodge a counterclaim that pleads adverse possession.According to him, he and his family have lived on the disputed land since 1984 when the defendant’s late father bought the land.His occupation, he pleaded, is for more than 30 years, which exceeds the 12 years required for adverse possession.

4. The defendant prayed for the following orders:

a) A declaration that the plaintiff has acquired the whole of L.R No.**BUNYALA/BULEMIA/2369** by way of adverse possession and a transfer of the same into defendants names.

b) Costs of the counter-claim.

c) Any other relief deemed fit by the court.

5. The plaintiff filed a reply to defence in which the defendants defence and counter-claim were controverted.

6. The court started hearing the matter on 28/11/2016.The plaintiff testified as PW1.He reiterated that he is the registered owner and that the defendant is a trespasser and/or an illegal occupier.He showed his title (PEx No 1) and a certificate of search confirming ownership (PEx No 2).He also showed the map of the area (PEx No 3).He testified that the defendant entered the disputed land some 7 or 8 years back and at that time he himself was in Mombasa.

7. Land parcel No.**BUNYALA/BULEMIA/685** whose green card was availed as PEx No 4 is said to have been subdivided to create the disputed Land.The plaintiff acquired the land through purchase.One **PETRO WANDERA** sold it to him.That happened long before the land was registered.In fact it seems clear that the subdivision took place at the time of adjudication such that the plaintiff became the 1st registered owner of the disputed land.It was the plaintiff’s position that the defendant’s father never purchased the land.

8. The plaintiff called a witness – **RESLA AUMA** – who testified as PW2.According to the witness, the plaintiff is the owner of the disputed land.The Court started hearing defence on 13/11/2017.The defendant testified as DW1.According to him, he lives on land parcel No 685, not 2369.He even said he does not know parcel No 2369.During cross-examination however, the defendant was shown his statement.He acknowledged it as his own.The statement showed the defendant saying that he knew land parcel No.2369.He then changed position and said he knows it and lives on it.

9. But the defendant changed yet again during cross-examination to say he does not know parcel No.2369.He said he knew parcel No 685 whose registered owner was **PETERO WANDERA**.The defendant was then referred to paragraph 11 of his defence where he pleads that his late father bought the disputed land in 1984.He said that that pleading was not true.The truth instead was that his father was gifted the land by **PETERO WANDERA** in 1976.He averred during hearing that he was claiming the land gifted to his late father.Asked if he had a grant from Court to succeed his late father, he answered in the negative.

10. The defence called another witness.This was **MAXIMILLA NABWIRE ANDERA**. This witness adopted her statement filed in Court on 8/2/2016.In her evidence in Court, she said that the plaintiff was sold land by her father.In her statement however, she is shown – at para 8 specifically - saying the plaintiff never bought the land.She is shown saying that the alleged purchase by the plaintiff was an “act of forgery”.

11. After hearing, written submissions were to follow.The Plaintiff filed his submissions on 23/11/2017.The defendant did not file submissions.

12. In the plaintiff’s submissions, it was asserted that the plaintiff had demonstrated his ownership of the suit land while the defendant failed to demonstrate adverse possession.

13. I have considered the pleadings, evidence from both sides, and submissions filed by the plaintiff.The plaintiff demonstrated well that he is the registered owner of the land.He availed the title, copy of search results showing ownership, and a copy of green card.The defendant on the other hand kept on shifting positions. First he didn’t know the disputed land, then he knew it, and then again he didn’t know it.Further, the land was bought by his late father, then it was not bought; it was gifted.Then also the defendant lives on parcel No.685, but then NO, he lives on parcel No 2369.

14. And when it comes to DW2, the witness called by the defendant, the plaintiff was sold the disputed land by her late father – **PETERO WANDERA**.But then in her statement, which she adopted as evidence, the plaintiff was never sold the land; his alleged purchase was a forgery.

15. And then in all the defence evidence, no mention of adverse possession is made.Adverse possession only remained a pleading.The defendant instead chose to claim the land as a gift to his deceased father.And when challenged to show a grant from Court to justify his claim, it turns out that he has none.Yet his father is dead and the claim would require a GRANT.

16. Add to all this the omission to file submissions.And consider that the omission was not through inadvertence but intentional (the court was told clearly there were no submissions to be filed.This happened on 15/1/2018).The scenario then becomes clear that the defendant approached his case in a rather hamfisted way. His response to the issues raised by the plaintiff was jumbled.And both the defendant evidence and that of his witness clearly showed lack of clarity of thought.

17.I have endeavoured to set out the evidence so that one looking at it can clearly see what I am pointing out here.Quite clearly, the defence tendered is not an effective response or rebuttal to the plaintiff’s case.And the defendant counter-claim remained just as it was formulated and pleaded on paper.It was never lifted up and articulated during hearing.In a word, it remained work in progress.Even as the case progressed and reached its conclusion, the counter-claim was left behind.

18. The upshot, in light of the foregoing, is that the plaintiff well proceeded with his case and did not encounter any meaningful or effective challenge that could displace his position.I therefore hold, without equivocating, that the plaintiff’s case is proved on a balance of probabilities.I grant prayers (a) and (b) in the plaint.As regards the defendants counter-claim, my finding is that it is not proved.I therefore dismiss it with costs to the plaintiff.

A.K. KANIARU

J U D G E

Dated, Signed and Delivered at Busia this 19th Day of April, 2018

IN THE PRESENCE OF:

PLAINTIFF.....

DEFENDANT.....

COUNSELS