



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO 123 OF 2010

CHARLES ANGUCHO SUCHIA.....PLAINTIFF/APPLICANT

VERSUS

ELPHAS NYAMBAKA COSMA.....DEFENDANT/RESPONDENT

JUDGEMENT

[1] On 24th August 1991, the plaintiff in this case Mr. Charles Angucho Suchia entered into an agreement for sale with the defendant for sale of five acres of land at an agreed consideration of Kshs.160,000.00. The five acres were to be hived out of his settlement land then known as plot no. 103. The entire purchase price was duly paid. The plaintiff says that the defendant sub divided plot no. 103 into Bungoma/Naitiri 505 comprising of 27 acres and Bungoma Naitiri 506 comprising of 5 acres and Bungoma/Naitiri/507 comprising of 5 acres. The plaintiff avers that land parcel Bungoma Naitiri 506 was supposed to be for him. He avers that he stays on that portion of 5 acres and has been in such occupation for over 12 years.

[2] The defendant Mr. Elphas Nyambaka Cosma does not dispute those facts. He only says that the plaintiff has never taken possession of the land. He argues that when the defendant purchased the suit land they never obtained the land control consent because the plaintiff wanted the land transferred to one Doris Anindo. He states that the land is used by third parties. He avers that the plaintiff had filed the suit in the land's dispute tribunal and the land was awarded to him. Further he states that the land disputes tribunal award was set aside by the Bungoma High Court on 13/10/2010. The defendant stated that he subdivided settlement plot 103 in three portions 505, 506 and 507. He stated that he registered plot 505 and 506 in his name and transferred 507 to a later purchaser Peter Simiyu Wafula. The defendant states that he never transferred the suit land to the plaintiff because the plaintiff wanted the land transferred to one Doris Anindo. He said that this was about 6-8 years ago.

[3] The plaintiff called two witnesses Chrisastin Kitui Watila whose evidence was that he started seeing the plaintiff on the suit land in 1991. He said that he saw him build a house and has been cultivating the land and that he has planted Cyprus trees and that he bought five acres. The second witness was Gerald Nabwana who said that the plaintiff bought land from the defendant in 1991 and that he was a witness to that agreement and that the plaintiff went to his home to complain that the defendant has refused to transfer the land to him. The defendant had no witnesses.

[4] That being the case between the plaintiff and the defendant the question for determination is whether the occupation of the defendant's land by the plaintiff's adverse to his interests and whether Charles Angucho Suchia can be declared to have become entitled by adverse possession to land parcel Bungoma/Naitiri/506 as prayed in the Originating Summons herein.

[5] There is no dispute that the plaintiff and the defendant entered into an agreement for sale on 24th August in 1991. The purchase price was duly paid. The land under purchase was agricultural land in a land control area. Consent was supposed to be obtained within six months from the date of the agreement. That consent was not obtained. By February 1992 the sale became void. On the issue of consent not being granted before 6th months after agreement the court of appeal in Samuel Mulei Waweru Vs Jane Njeri Richu[2007]Eklr held;

“...where a purchase or lessee of land in a controlled transaction is permitted to be in possession of the land by vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

The occupation of the suit land by the plaintiff started on its road to adverse possession date in February 24th 2004. The issue to be determined here is whether there was any notice by the defendant to the plaintiff terminating the adverse possession. There is no doubt that the plaintiff himself filed a suit in Tongaren Land Disputes tribunal No. 11 of 2007. This case awarded the land to the plaintiff. The case itself was filed by the plaintiff herein. It was filed outside the period of 12 years that had elapsed in February 24th 2004. The award was reviewed by the Bungoma High Court on 13th October 2010 and the award was set aside.

[6] This case and the review thereof have no effect to this case.

Firstly, because it cannot be said that it was a notice by the registered owner of the land since it was filed by the adverse possessor. The review by the High Court therefore had no legal effect on the requirement of notice to the plaintiff adverse possessor. Secondly, the case was filed in 2007 16 years after the agreement for sale and therefore outside the 12 years rule.

[7] There is no doubt therefore that the plaintiff has been on the suit land for a period of in excess of 12 years. The occupation was adverse to the interests of the defendant the registered owner. The plaintiff's occupation was not interfered with by any notice from the defendant.

[8] During the hearing of this case the defendant did not dispute or resist the fact that the land was bought by the plaintiff in August 24th 1991. He was not averse to transferring the land to the plaintiff. His only discomfort with the defendant was that he was asking that the land be registered in the name of one Doris Anindo. This is buttressed by the fact, that when he subdivided his land into 3 portions he had parcel 507 of 27 acres, 506 of five acres and 505 of five acres which he sold to one Peter Simiyu Wafula. This therefore left 505 of 27 acres as his own and 506 of five acres to the plaintiff. The agreement for sale of 24th August 1991 was for sale of five acres. This agreement was way before the sub division. One therefore, will have no difficulty in coming to the conclusion that, the defendant has always had parcel Bungoma/Naitiri/506 for the plaintiff herein.

[9] In conclusion, I find that Charles Angucho Suchia is entitled to be registered as the owner of land parcel No. Bungoma/Naitiri/506 comprising of 2.02 hectares having acquired it by adverse possession.

I also order that he shall be entitled to costs of this Originating Summons.

It is so ordered.

Dated, signed and delivered at Bungoma this 27th day of July, 2016

S.MUKUNYA - JUDGE

In the presence of

Joy/Gladys court assistants

Madam Nanzushi for plaintiff

Mr. Were for the defendant