



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT NO. 89 OF 2001 (OS)

FRANCIS WANYONYI NGAYWA.....PLAINTIFF

VERSUS.

NICHOLAS N. NDONDI.....DEFENDANT

J U D G M E N T.

[1]. The applicant in this Originating Summons prays for the determination of the following issues;

- (1). Whether the applicant has been in occupation and/or possession of the four acres for a period of twelve years or more openly, peacefully continuously and/or without force.
- (2). Whether the respondents title to the said land became extinguished upon the expiry of the period stated above.
- (3). Whether the applicant has acquired title to the four acres by adverse possession.
- (4). Whether the registration of the respondent as proprietor of the suit land should be cancelled.
- (5). Whether the applicant should now be registered as proprietor of the title aforesaid.
- (6). Who should be condemned with costs.

[2]. The reasons advanced for the determination of those questions were that the applicant claimed that he had been in peaceful occupation of that portion of land measuring approximately four 4 acres for a period of 12 years and that he had therefore acquired title by adverse possession. Further that under Sec.38 of the limitations of actions Act Cap 22 Laws of Kenya the applicant should be registered as owner of the same. It was also contended that the respondent should execute all documents of transfer in respect of the same failing which the Deputy Registrar of the Court should execute the same on the respondents behalf and finally that applicant should be awarded the costs of the suit.

[3]. In his Affidavit in support, the applicant swore that that he is the son of Daniel Ngaywa who had been born on the land and was the first registered proprietor. He swore that his father used to work in Uganda where he left his family including the applicant and he came to Kenya in 1974 leaving behind his family in Uganda. The applicant stated in his affidavit that he returned to Kenya in 1988 and entered the suit land and took possession of four acres and started living therein with his family. He swears that he has been in open continuous, notorious and exclusive possession of the four acres as from 1988 and as of right. He claims that the said occupation was for a period in excess of 12 years and that after the 12

years, the Plaintiff held land in trust for him.

[4]. The respondent swore a replying Affidavit and stated that he is the registered owner of Wanga/Matungu/596. That he bought the entire piece from one Daniel Ngaywa who was then the registered proprietor and who gave him vacant possession thereof. The land was duly registered in the respondents name in 1975 and has remained so registered to date. The respondent says that he allowed one John Ndaliro Ochieng who comes from Matungu and who lives next to this land to use the same for his behalf and interest and that, this need was prompted by the fact that the respondent works for international organizations outside the country and is therefore mostly outside Kenya on official duties. That in 1989 he learnt that some people allegedly on the instigation of the brother of the person who sold the land to him, were laying claim on the said land. That he wrote a letter to the D.O. Mumias seeking intervention. That when he came back to Kenya in 1990 the applicant pleaded with him to give him a portion of land to stay as he had no where to go. The applicant pleaded with the respondent further that he be allowed to stay on the land and have his grass thatched house remain therein pending his identifying a suitable portion of land to buy. The respondent said that every time he came from abroad the applicant said that he had not identified a suitable place and pleaded for more time.

[5]. That on 28/8/99 on return from his international assignment in Uganda he was surprised to learn that the applicant had filed a case in the Land Dispute Tribunal at Matungu claiming the entire piece of land. That the Tribunal heard and issued orders that the respondent moves out and vacates the suit land and that his title be cancelled and ordered the same to revert to the Plaintiff's father. The respondent averred that against that order he filed a Judicial Review vide Kakamega High Court Misc. Application No. 119 of 2000 and the tribunal orders were set aside. The respondent therefore states that there was not and could not have been any adverse possession and that the applicant has not been on the suit land for a period of 12 years as alleged in respect land parcel North/Matungu/5596.

[6]. When the applicant gave evidence in Court on 8/11/2004 he stated that when he came back to Kenya in 1989 he found his father's land vacant and that is when he commenced to work on the land. He says he occupied four acres. He commenced planting trees and constructing four semi permanent houses. That later he did a search in the lands Registry and discovered that the land was not registered in his father's name but it was in the name of Nicholas N. Ndoni. That he then filed the said case in the tribunal and the High Court held that the tribunal did not have jurisdiction to confer title.

[7]. On cross examination the applicant said that when he came back and settled on the suit land his father who had come back from Uganda earlier in 1974 was not living on the land. He was living in Watoya and Kabula leasing houses to live in. When the applicant's father died, he was buried in a relative's land. Further that when the applicant filed the case in the Land Disputes Tribunal the applicant's father did not testify. The applicant called Morris Wekesa as his witness who stated that the Plaintiff left Uganda and came to occupy his father's land. His witness number two Gabriel Toto Makokha gave similar evidence on how the Plaintiff left Uganda in 1988 and came to occupy his father's land and how he built a house on the land in dispute.

[8]. The respondent Nicholas Nehemia Ndoni gave evidence on how he lives in Lusaka Zambia and that he works with the Academy for Development in the U.S.A. attached to Zambia as a regional programme coordinator. He said that he is the registered owner of the suit Land. He explained how he bought the same from Daniel Ngaywa from 1974 to 1975. He said that he was told that Ngaywa died in year 2002. He explained how he put his brother-in-law John Ndaliro in charge of the land and how the applicant started to claim the land in 1989 and the reports to the D.O and the cases that followed culminating with the Judgement of the Kakamega High Court Miscellaneous No. 119 of 2000 a Judicial Review that quashed the Judgement of the Matungu Lands Disputes Tribunal and the eventual adoption of the said award by the Chief Magistrate's Court in Kakamega.

[9]. These being the pleadings facts and evidence adduced in this case, can the questions raised in the Originating Summons be answered in the affirmative?

In this case, there is evidence by the applicant that he entered the suit land, not as a trespasser but as a son

of an owner. This is because the applicant believed that the land was his father's land. In that faith he entered, planted trees and erected for semi permanent houses. The entry was in 1988. Once inside the premises, he did a search and found out that the land was not in his father's name but in the name of the respondent. He therefore in 1989 filed a suit in the Lands Dispute Tribunal. In that suit he claimed the land N. Wanga/Matungu/596 as his father's and he alleged the respondent had acquired it by fraudulent means. This was his evidence before the tribunal on 6/10/1999.

[10]. These facts firstly, do not prove the Primary requirement of adverse possession, that if the entry on the land is not through a contract of sale that has become void because of lack of land control consent, then the entry itself must be through trespass. No trespass was established herein. This is because the applicant herein claim entry as of right. Secondly, the applicant came to the suit land in 1988 claiming the land as of right. In 1989 he himself, filed a case in the Matungu Land Disputes Tribunal against the registered owner respondent herein citing fraud. This was just a year after he occupied the land. This matter was in the Court up to 3/4/2001 when the tribunal case was quashed by the High Court. His occupation was less than one year and it was interrupted by a suit the applicant filed himself claiming ownership. The Originating Summons herein was filed on 12th June 2001 barely two months after the delivery of the Kakamega High Court's Judicial Review of the District land Tribunals Case. This obviously shows that the 12 year rule was not met under the circumstances. There was no claim against the respondent by the applicant's father who was living up 2002. He never appeared in the land Disputes Tribunal filed by the son or in the Judicial Review thereafter filed by the Defendant. He never denied having sold the land to the respondent. It is worth of note that he never settled in the suit land after he came from Uganda in 1974. A period of about 14½ years. On his death he was not buried on the suit land. He was buried in a relatives land. This clearly underlines the fact that he had sold the land to the respondent and was not ready to dishonor the sale. The Applicant whose entry to the land was based on his father's ownership of land therefore clearly operated under a misguided view that the land still belonged to his father.

[11]. The applicant has clearly not extinguished the respondent's title to the suit land. His occupation of four acres of the suit land on the basis that it was his father's land cannot be said to be adverse to the Proprietary interests of the registered owner the respondent herein. The applicant's claim in his Originating Summons is clearly misconceived and is hereby dismissed. The applicant shall move out and vacate and remove all his structures and developments in the suit land and give a vacant possession to the respondent. He shall do so over a period of ninety (90) days failing which the respondent shall be at liberty to move the court for the eviction of the applicant.

The costs and interests of the suit shall be to the respondent.

Judgment read in Open Court.

Dated, signed and delivered on 20th September, 2016.

S. MUKUNYA

JUDGE

In the presence of:

Joy/Gladys - Court Assistants

Mr. Musumba for the defendant

Mr. Ocharo for the Plaintiff