



REPUBLIC OF KENYA.

IN THE HIGH OF KENYA AT BUSIA

ELC. NO. 116 OF 2013 (FORMERLY HCC. NO. 39 OF 2010)

HERBART EHARAPLAINTIFF

=VERSUS=

LINET AJIAMBO OCHIENG..... DEFENDANT

J U D G M E N T.

HERBART EHARA hereinafter referred to as the Plaintiff, commenced these proceedings through the originating summons dated 30th June, 2010 against Linet Ajiambo Ochieng, hereinafter as the Defendant. The Plaintiff case is that he has acquired by way of adverse possession a portion of land measuring 0.6 hectares out of Samia/Butabona/1589, and posed the following six questions for determination;

- a) Whether the Applicant purchased a portion of land measuring 3 acres out of Samia/Butabona/1589, at an agreed consideration of Kshs.3,000/= in 1978.
- b) Whether the portion the Applicant purchased was clearly demarcated, whether he took possession of the same and have been using it to date.
- c) Whether the Applicant has been in open and notorious possession of the land measuring 0.6 hectares out of Samia/Butabona/1589 for a period exceeding 12 years continuously and without interruption.
- d) Whether the Respondent's title to the said portion of land became extinguished upon expiry of 12 years from the time the Applicant took possession of the said land.
- e) Whether the registration of the Respondent as owner of the portion of land measuring 0.6 hectares out of Samia/Butabona/1589 should be cancelled and Applicant registered as the owner of the portion thereof.
- f) Who should pay the costs of this case.

The Plaintiff seeks for the following prayers:

1. That the Respondent's rights over the portion of land measuring 0.6 hectares out of Samia/Butabona/1589 got extinguished by adverse possession upon expiry of the 12 statutory years when the Applicant was in possession.
2. That the Respondent be perpetually barred from taking and or using the said portion of land or any part thereof.

3. That the Applicant be registered as the proprietor of the portion of land measuring 0.6 hectares out of Samia/Butabona/1589.

4. That the Respondent do pay the costs of this case.

The originating summons is supported by the Plaintiff's affidavit sworn on 12th July, 2010 to which is attached a copy of a register for land parcel Samia/Butabona/1589 measuring 0.6 hectares in the names of Linet Ajiambo Ochieng.

In answer to the Plaintiff's claim, the Defendant filed the replying affidavit sworn on 28th October, 2010 praying for the originating summons to be dismissed with costs.

The court gave directions on 15th June, 2011 on the filing of evidence affidavits by the parties. The Plaintiff filed his evidence affidavit sworn on 27th June, 2011 with several annexures. He also filed evidence affidavits of John Makokha Ongode, Sabastian Pascal Sikuku and Hellen Barasa Ochieng all sworn on 27th June, 2011. The Defendant filed her evidence affidavit sworn on 25th July, 2011 with several annexures and that of Aloys Okwira Muchere also sworn on the same date.

M/S. Bogonko, Otanga & company advocates appeared for the Plaintiff while M/S. Ashioya & company advocates appeared for the Defendant. The Plaintiff testified as PW 1 and called Sebastian Pascal Sikuku, John Makokha Ongode and Hellen Barasa Ochieng who testified as PW 2 to PW 4 respectively.

SUMMARY OF THE PLAINTIFF'S EVIDENCE.

1. That Plaintiff purchased three (3) acres of land out of Samia/Butabona/87 from John Ongode at the agreed purchase price of Kshs.3,000/=.
2. That the said John Ongode demarcated the portion the plaintiff bought and allowed him vacant possession.
3. That the Plaintiff has been using the said portion ever since without any interruptions.
4. That on 13th May, 2005, the land parcel Samia/Butabona/87 was subdivided into parcels 1588 and 1589.
5. That on 28th February, 2008, the Defendant had land parcel Samia/Butabona/1589 which comprised the portion Plaintiff had purchased and occupied to her names.
6. That on 15th January, 2009, the Defendant commenced eviction proceedings against the Plaintiff in Busia PMCC. No. 7 of 2009.
7. That the Plaintiff has been in possession of land parcel Samia/Butabona/1589 for a period exceeding 12 years and is therefore entitled to be registered as proprietor of the said parcel of land.

SUMMARY OF DEFENDANTS EVIDENCE.

1. That the Defendant is the registered owner of Samia/Butabona/1589.
2. That she has had several cases against the Plaintiff and therefore the Plaintiff has never been in open peaceful and notorious possession of 0.6 hectares of land out of Samia/Butabona/1589.
3. That she bought her land from Hellen Barasa (PW 4) who was the administratrix of the estate of Ochieng Nabongo and obtained title to the land after suing the said vendor in Busia PMCC. No. 450 of 2006.

ANALYSIS OF THE EVIDENCE.

1. That the Plaintiff took possession of a portion land parcel Samia/Butabona/87, whose acreage was not defined as no formal survey was done, in 1978 under a sale agreement between him and the then registered owner, namely John Ongode. This was confirmed by the widow of the said John Ongode who testified as PW 4.

2. That there is no evidence availed to show whether the said vendor, John Ongode applied for and obtained Land Control Board Consent to subdivide Samia/Butabona/87 so as to excise the portion bought by the Plaintiff. There is also evidence to show whether the said John Ongode and the Plaintiff herein applied for and obtained Land Control Board consent to transfer the portion subject matter of their sale agreement. In terms of section 6 (1) of the Land Control Act Chapter 302 of Laws of Kenya the sale agreement between John Ongode and Plaintiff was void as there is no evidence that Land Control Board consent was obtained within six months of the date of the agreement.

3. That the Plaintiff did not take any steps to ensure John Ongode had transferred the portion he had bought during the life time of John Ongode or ask for a refund of the money paid which is recoverable as provided for under section 7 of the said Act.

4. That the Plaintiff occupation and possession of the portion of land parcel Samia/Butabona/87 was with the consent of the registered owner under a land sale agreement. The occupation and possession was therefore not adverse or inconsistent with the title of the owner namely John Ongode or his estate. Hellen Barasa Ochieng (PW 4) who is widow to John Ongode confirmed that her late husband had sold a portion of land to the Plaintiff.

5. That the Defendant became the registered proprietor of Samia/Butabona/1589 which was one of the two parcels subdivided from Samia/Butabona/87 on 28th February, 2008. The time in relation to adverse possession could not have started to run against the Defendant before she became the registered owner. By the time this suit was commenced through the originating summons dated 30th June, 2010 and filed on 9th August, 2010 the period that had passed from 28th February, 2008 when Defendant became the registered owner of Samia/Butabona/1589 is about two years and six months. Even if the Plaintiff had been in occupation and possession of a portion of land comprised in the said title, the prescribed period of 12 years had not elapsed from the time Defendant got registered with the land to the time the originating summons was filed.

CONCLUSION

1. That the Plaintiff should have lodged his claim against the estate of John Ongode after the vendor died before transferring the portion he had bought to him. The Plaintiff could have also raised an objection if the subdivision of Samia/Butabona/87 to create Samia/Butabona/1589 and the other portion was encroaching onto the portion he claimed while both the Plaintiff and Defendant had separately bought portions of land from Samia/Butabona/87, only the Defendant got her portion specified through formal subdivision and transfer. The Defendant became the registered proprietor of Samia/Butabona/1589 on 28th February, 2008 and her interest prevails over those of the Plaintiff.

2. That the Plaintiff claim over the suit land under adverse possession principle fails in view of various superior court decisions to the effect that where it is found that ***'Occupation is derived from the proprietor of the land in the form of permission or agreement or grant, then such occupation is not adverse.'*** See **Benjamin K. Murima & Others -vs- Gladys Njeri C.A. NO. 213 of 1996, Wambugi -vs- Njuguna**(1983) KLR 172. That it is worth to note that the Plaintiff's claim is not against John Ongode who sold the land to him or his estate. Had that been the case and he had shown his occupation has been adverse, time would have started being counted from 1978 when he took possession. The Defendant herein only became the registered owner of the suit land on 28th February, 2008 and 12 years had not passed by the time this suit was filed.

3. That for reasons set out above, the court finds that the Plaintiff has failed to establish his case to the standard required and his claim is dismissed with costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 28TH DAY OF JANUARY, 2015.

IN THE PRESENCE OF PRESENT IN PERSON PLAINTIFF

PRESENT IN PERSON DEFENDANT

MR. BOGONKO FOR PLAINTIFF.- ADVOCATE

MR. ASHIOYA FOR THE DEFENDANT – ADVOCATE.

JUDGE.