



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.242 OF 2009 (OS)

NAFTAL NYABERI MANGERERE.....PLAINTIFF

VERSUS

REBECCA KWAMBOKA MIYABA.....1<sup>ST</sup> DEFENDANT

ORANGI AMISI.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. By amended Originating Summons dated 24<sup>th</sup> August 2011 the plaintiff sought the following reliefs against the defendants:-

**i. That the honourable court be pleased to make a declaration that the plaintiff is entitled to be registered as proprietor of a portion measuring 13 ½ acres out of land parcel number Narok/Transmara/Poroko/221 having acquired the same by adverse possession and by transfer.**

**ii. That the honourable court do make an order for rectification of register by ordering the sub-division of the said land into two parts and registering the portion occupied by the plaintiff in the name of the plaintiff measuring 13 ½ acres.**

**iii. That the honourable court do make an order that the defendants/respondents do sign all transfer documents in favour of the plaintiff/applicant in respect of a portion measuring 13 ½ acres of land parcel Narok/Transmara/Poroko/221 failure to which the executive officer of the court be ordered to sign the same.**

**iv. Costs of this suit be provided for.**

The amended Originating Summons was supported by the affidavit of the plaintiff sworn on 24<sup>th</sup> August 2011 in which the plaintiff deposed that he purchased a portion measuring 13 ½ acres of all that parcel of land then known as **LR No. Narok/Transmara/Poroko/101** (hereinafter referred to as "**Plot No. 101**") from one, Namisi Ole Kiptek alias Namisi Joseph Kiptek (hereinafter referred to only as "**Namisi**"). He first purchased a portion of the said parcel of land measuring 7 acres on 21<sup>st</sup> November 1975. Soon thereafter, Namisi added him another portion of the said parcel of land measuring 6 ½ acres. The plaintiff deposed that Plot No. 101 measured 7.4 ha.in total.

2. The plaintiff deposed further that Namisi had charged Plot No. 101 to Industrial and Commercial

Development Corporation Ltd. to secure a loan of ksh. 200,000/=. This charge made it difficult for Namisi to sub-divide Plot No. 101 and transfer a portion thereof measuring 13 ½ acres that he had sold to the plaintiff to him. The plaintiff however continued to occupy the said portion of Plot No. 101 whose possession he took in the year 1975. The plaintiff deposed that he has been cultivating maize and beans on the said portion of Plot No. 101. He has also planted trees on the same. The plaintiff deposed that the defendants are the administrators of the estate of Namisi and that due to his occupation of the said portion of Plot No. 101 peacefully for uninterrupted period of over 34 years, he is entitled to be registered as the proprietor thereof on account of adverse possession. In the alternative, the plaintiff prayed for an order of specific performance of the agreement for sale that he entered into with Namisi.

3. The defendants were served with summons to enter appearance but failed to do so. The matter was listed for hearing on 12<sup>th</sup> November 2014 when the plaintiff gave evidence. In his testimony, the plaintiff told the court that he purchased land measuring a total of 13 ½ acres from Namisi who owned Plot No. 101. Namisi first sold to him a portion of the said parcel of land measuring 7 acres at a consideration of kshs. 7,000/=. Thereafter he sold to him the second portion measuring 6 ½ acres at a consideration of a bicycle, a goat and 3 cows. He also made some cash payments to him in addition to the foregoing. The agreements for sale that he made with Namisi with respect to the said portions of land were in writing. Namisi gave him possession of the said portions of Plot No. 101 in the year 1975 and he has occupied the same to date. He has planted tea, trees and fruits on the same. Following the said agreements for sale, they applied for consent of the Land Control Board that was granted. He produced as exhibits, copies of the agreements for sale that he entered into with Namisi and a copy of application dated 14<sup>th</sup> June 1996 that they made for the Land Control Board Consent.

4. The plaintiff told the court that Plot No. 101 was later sub-divided into two (2) portions namely, **Narok/ Transmara/Poroko/220**(“**Plot No. 220**”) and **Narok/Transmara/Poroko/221**(“**Plot No. 221**”). Plot No. 220 was transferred to one, Nyambane Mirera while Plot No. 221 remained in the name of the deceased, Namisi. He produced in evidence certified copies of registers for Plot No. 101, Plot No. 220 and Plot No. 221 as exhibits. He stated that he is in occupation of Plot No. 221 which measures 13 ½ acres. He beseeched the court to assist him obtain a title for Plot No. 221 which he has occupied without any interruption over the years. In examination by the court, the plaintiff stated that Namisi died in the year 2009 and that before he died, he became evasive and refused to transfer Plot No. 221 to him. He stated further that he is solely in occupation of the said parcel of land and that he has been in occupation of the same since the year 1975. The plaintiff did not call any witness.

5. After the close of the plaintiff’s case, the plaintiff’s advocate made closing submissions in writing. I have considered the plaintiff’s case as pleading and the evidence that was adduced by the plaintiff in proof of the same. I have also considered the written submissions that were filed by the plaintiff’s advocates. The plaintiff’s claim is for adverse possession and in the alternative for specific performance. The plaintiff has claimed that he purchased from Namisi, deceased, all that parcel of land measuring 13 ½ acres which is now comprised in title, **LR. No. Narok/Transmara/Poroko/221** (“**Plot No. 221**”) in the year 1975 and that Namisi died in the year 2009 before transferring the same to him although consent had been given by the Land Control Board in the year 1996 for that purpose. The plaintiff has contended that the defendants who are wife and son of Namisi and also the administrators of the estate of Namisi have also failed to transfer the said property to him. Instead, the 1<sup>st</sup> defendant has caused a restriction to be registered against the title of the said property. The plaintiff has claimed that he has been in possession of the land comprised in Plot No. 221 from 1975 to date which is a span of over 34 years. The plaintiff has contended that his occupation of the said parcel of land has been continuous and uninterrupted.

6. The plaintiff has contended that he has planted tea, fruits and trees on the property. The plaintiff has placed evidence before the court that he purchased the property in dispute in the year 1975. His claim that he has been in occupation of the said property since then is therefore believable. This fact is also not contested by the defendants who did not defend the suit. The plaintiff has also placed evidence before the court that Plot No. 221 is still registered in the name of Namisi. The defendants have not denied that they are legal representatives of the estate of Namisi. I am satisfied on the evidence before me that the plaintiff has established the elements of an adverse possession claim. It is my finding that the Plaintiff’s case against the defendants has been proved on a balance of probability. The plaintiff is therefore entitled

to the orders sought in his amended Originating Summons dated 24<sup>th</sup> August 2011. I have noted that the plaintiff has in his amended Originating Summons claimed a portion measuring 13 ½ acres of **LR. No. Narok/Transmara/Poroko/221**. According to P.Exhibit 8, **LR. No. Narok/Transmara/Poroko/221** measures 5.36ha. which is approximately 13 ½ acres. The plaintiff's claim is therefore for the entire parcel of land comprised in **LR. No. Narok/Transmara/Poroko/ 221**.

7. In conclusion, I hereby enter judgment for the plaintiff against the defendants jointly and severally on the following terms:

a. It is hereby declared that the plaintiff has acquired title to the parcel of land known as **LR No. Narok/Transmara/Poroko/221** by adverse possession.

b. The defendants shall execute all documents necessary to facilitate the transfer of the said parcel of land to the plaintiff within 60 days from the date of service of a copy of this judgment and the decree extracted therefrom upon the defendants.

c. In the event that the defendants fail to execute the documents referred to in paragraph (b) above within the prescribed time, the Deputy Registrar of this court shall with leave of the court obtained on a formal application made to this court for that purpose, execute the said documents to facilitate the transfer of **LR No. Narok/Transmara/Poroko/221** to the plaintiff.

d. A copy of this judgment and the decree extracted therefrom shall be served upon the defendants personally and through the chief under whose jurisdiction they reside and an affidavit of service shall be filed in court.

e. The filing of the said affidavit of service shall be a condition precedent to any further proceedings in this matter at the instance of the plaintiff.

f. Each party shall bear its own cost of this suit.

**Delivered, signed and dated at KISII this 20<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Bigogo h/b for Mr. Sagwe                      for the plaintiff

N/A    for the defendants

Mr. Mobisa    Court Clerk

**S. OKONG'O**

**JUDGE**