



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

ELC. NO. 70 OF 2014 (FORMERLY HCC. 18 OF 2010)

JACOB ADUNGO ODAKAI.....PLAINTIFF

VERSUS

1. FOLOBIA AUJO EMOKOLO

2. BEATRICE TATA.....DEFENDANTS

J U D G M E N T

JACOB ADUNGO ODAKAI commenced this suit against **FALOBIA AUJO EMOKOLO** and **BEATRICE TATA**, hereinafter referred to as 1st and 2nd Defendants respectively, through the originating summons dated 12th April, 2010. His claim was for three (3) hectares out of South Teso/Angoromo/419 on the basis of adverse possession.

The Defendants opposed the claim and filed a replying affidavit sworn by Folobia Aujo Emokolo on 12th May, 2010 only conceding to giving the Plaintiff one acre which they said he occupied with the consent of their deceased husband, Kalisto Ojuang.

Through the court's directions of 14th June, 2011, the originating summons and replying affidavit were deemed as the plaint and defence respectively. The parties were then directed to file evidence affidavits. The plaintiff's evidence affidavit and those of his two witnesses, namely Safario Agwala Michael and Emmanuel Ikapel Ilukol, were filed on 6th December, 2011.

The evidence affidavit of 1st Defendant sworn on 5th December, 2011 was filed on the same date. During the hearing Mr. Otsula for Areba Advocate appeared for the plaintiff, while Mr. Otanga appeared for the Defendant.

The Plaintiff testified as PW 1 and called two witnesses namely, Saferio Agwala Michael and Emmanuel Ikapel Ilukol who testified as PW 2 and PW 3 respectively. The Defendants called only one witness, Falobia Aujo Emokolo, who testified as DW 1.

SUMMARY OF PLAINTIFF'S EVIDENCE.

1. That the suit land belonged to the father of the Plaintiff and was registered in the names of the husband to the Defendants, who is since deceased.
2. That the Defendants husband, namely Kalisto Ojuang, registered the suit land in his names

fraudulently and without the consent of the plaintiff in 1973.

3. That the Plaintiff was awarded 3.0 hectares of the suit land which he had been using by the Land Disputes Tribunal, but Kalisto Ojuang died before that could be effected.
4. That the Defendants had the suit land transferred to their names secretly.
5. That the Defendants' rights over the three hectares occupied by the Plaintiff got extinguished at the expiry of 12 years of the Plaintiff's occupation and the same should be registered in his names.

SUMMARY OF DEFENDANTS' EVIDENCE.

1. That the suit land South Teso/Angoromo/419 was registered in the names of their late husband, Kalisto Ojuang.
2. That the late Kalisto Ojuang had allowed the Plaintiff to settle on one acre of land.
3. That on 15th April, 1999, the Plaintiff lodged a claim before the Amukura Land Disputes Tribunal over the portion of land and the tribunal awarded him three (3) hectares. That the late Kalisto died before the award could be adopted as judgment of the court.
4. That the Plaintiff continued using the one acre of land and when the Defendants filed Busia H.C. Succession Cause No. 20 of 2001, the Plaintiff filed objection proceedings claiming 3 hectares of the suit land but was not successful.

SUMMARY OF PLAINTIFF'S COUNSEL'S SUBMISSIONS.

1. That the suit land South Teso/Angoromo/419 was family land for both the Plaintiff and his brother, the late Kalisto.
2. That the husband to the Defendants, the late Kalisto, had been registered with the suit land as trustee for the Plaintiff but died before he could give the Plaintiff title to his share.
3. That the Defendants filed Succession Cause of their late husband's estate without the Plaintiff's knowledge and that the tribunal had awarded him 3 hectares during the lifetime of the late Kalisto.
4. That the Plaintiff who was born in 1948 has lived on the suit land since birth and has five houses on it. That the Plaintiff has five sons who are married and also live on the said land whose boundary is intact.
5. That the Defendant's title to the suit land should be cancelled to allow 3 hectares carved out and transferred to the Plaintiff.

SUMMARY OF DEFENDANTS' COUNSEL'S SUBMISSIONS.

1. That Plaintiff has failed to prove that he has acquired a portion of South Teso/Angoromo/419 through adverse possession for reasons that he settled on the land with the then registered owners consent.
2. That the portion of land the late Kalisto gave Plaintiff was one acre and that he has been using it continuously, peacefully and without interruption from anybody.
3. That after the Plaintiff's objection in the Succession Cause No. 20 of 2001 was dismissed, the Defendants were issued with the grant which was consequently confirmed.
4. That the Defendants have set aside the portion the Plaintiff has been using.

5. The Defendants' counsel referred the court to Nakuru C.A No. 231 of 1999 *Njuguna Nadatho –vs- Masai itumo & 2 others and Alex Njonjo Kamau Gitongo* [2014] eKLR and submitted that the Plaintiff's occupation of the one acre of the suit land was with permission and therefore not adverse to the title of the registered owner.

6. That this suit was unnecessary as the Plaintiff is at liberty to secure the registration of the one acre he has been using.

CONCLUSION.

1. That the suit land South Teso/Angomo/419 was on first registration on 7th November, 1973 registered in the names of Kalisto Ojuang. That the said Kalisto Ojuang was the younger brother to the Plaintiff and husband to the Defendants. The late Kalisto had on being registered as proprietor of the said land acquired absolute ownership of the land in terms with Section 27 of the Registered land Act (Now repealed), Chapter 300 of the Laws of Kenya. The rights of a registered proprietor were as set out under Section 28 of the said Act and could only be challenged in accordance of the said Act.

2. That though the Plaintiff claimed that the suit land was family land and should have been registered with his parents names, he did not offer any evidence why that did not happen. However, the evidence available leads the court to conclude that their parents had died by the time the land was registered. Though the Plaintiff indicated that the late Kalisto and himself lived in Kampala until 1971, it is not clear how then Kalisto got registered with the suit land (if indeed the suit land was family land) instead of in his names as the older brother.

3. That the evidence availed by both the Plaintiff and Defendants shows that the Plaintiff lived peacefully on the suit land with the family of his late brother until sometimes in 1999 when the Plaintiff lodged a complaint on the size of the land he was using. This clearly shows that upto the year, 1999, there was no dispute between Plaintiff and the registered owner of the suit land. The Plaintiff had up to 1999 occupied the land peacefully with the knowledge of the registered owner and time for adverse possession could not start to run in his favour during that period. In the case of *Alex Njonjo Kairu & 3 others –vs- John Kamau Gitongo [2014] eKLR* the court of Appeal citing the holding in *Wambo –vs- Njuguna (1983) KLR 173* held as follows;

“ where the claimant is in exclusive possession of the land with leave and lisenice of the appellant in pursuance to a valid sale agreement, the possession become adverse and time begins to run at the time the lisenice is determined . Prior to the determination of the lisenice, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

Also in the case of *Benjamin K. Murima & Others –V- Gladys Njeri* C.A No 213 of 1996 the court held as follows;-

“ The issue of whether or not there is adverse possession one only needs to look at the position of the occupier and if it is found that the occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived, then it is adverse....”

The Plaintiff herein has failed to show that his occupation of a portion of the suit land was adverse to the title of the original registered owner, Kalisto Ojuang. His evidence was that he was on the land by right as it belonged to their family and therefore adverse possession cannot arise as he could not have been in adverse possession of the land he believed belonged to him by right. The contention of the Defendants is that Plaintiff use of the portion of the suit land was with permission of their husband and after his death, their permission as administrators of his estate and adverse possession does not therefore arise.

4. That though the Plaintiff claim he has been in occupation of three hectares, the evidence adduced by PW 2 and the Defendants is that he has been occupying about one acre of the suit land. The Plaintiff

had lodged a complaint with Amukura Land Disputes Tribunal in 1999 against the Defendants husband over the size of the portion of land and the tribunal is said by both parties to have awarded him 3 hectares. The tribunal award does not appear to have been filed with the subordinates courts for adoption as judgment of the court as required under section 7 of the Land Disputes Tribunal Act (Now Repealed) No party seem to have preferred an appeal with the Provincial Land Disputes Appeals Committee under Section 8 (9) of the said Act. This court cannot tell from the material provided whether the late Kalisto Ojuang had known of the tribunals award by the time he died as no copy was availed to confirm whether it was read to the parties and if so, when. That notwithstanding, it is important to remember that the power of the tribunal was limited under section 3 (1) of the said Act. The award as reported would have required, if adopted as judgment of the court, the cancellation of the late Kalisto title to the suit land which was registered so as to subdivide and transfer three hectares to the Plaintiff. In my considered view, the award would appear to have been beyond the powers of the tribunal. The Court of Appeal in case of *Jotham Amunavi –vs- The Chairman Sabatia Division Land Disputes Tribunal & Another C.A.* No. 266 of 2002 held that if the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels opening a register in respect of each subdivision and thereafter the transfer of the subdivision of half acre it is clear that the proceedings before the tribunal related to both title to land and beneficial interest in the suit land and such a dispute is not within the provisions of Section 3 (1) of the Land Disputes Tribunal Act as such disputes can only be tried by the High court or Resident Magistrate's courts in cases where the latter has jurisdiction. As in that decision, the reported decision by Amukura Land disputes Tribunal awarding Plaintiff 3 hectares out of the suit land was beyond the tribunal's power. The award is not before this court for adoption nor is it subject to appeal before these proceedings and the court will not say more on it.

5. That the Plaintiff's pleadings are only based on the adverse possession. This may be for reasons that the claim was commenced through originating summons. After direction were taken that the originating summons be taken as plaint and replying affidavit as defence, no party moved the court to amend their pleadings. Therefore even though the evidence tendered by the Plaintiff and submissions by his counsel seemed to suggest that the late Kalisto Ojuang was registered with the suit land as trustee for the Plaintiff, the pleadings were not amended to provide the particulars of trust that would then be proved through the evidence that was to be adduced. The court cannot consider to grant that which was not pleaded and the attempt by the Plaintiff to base his claim on any other ground except adverse possession must fail.

6. That contrary to the Plaintiff's claim that the Defendants filed the Succession Cause of their late husband, Kalisto Ojuang, the available evidence shows otherwise. The copy of the judgment in Busia H.C. Succession Cause No. 20 of 2001 which he produced as Plaintiff's exhibit 2, shows that he had participated in those proceedings through some application filed on 2nd April, 2001 seeking to enforce the award from Amukura Land Disputes Tribunal, but was not successful. The Plaintiff also appear to have filed an application dated 16th June, 2003 to revoke or annul the grant but was also not successful. The judgment in the said Succession was read on 5th May, 2009 and there is no indication of any party preferring an appeal or a review of the orders.

7. That having found as above, the court finds that the Plaintiff has failed to establish his case against the Defendants on adverse possession and his claim is dismissed with costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE

DATED AND DELIVERED ON 16th DAY OF FEBRUARY, 2015.

IN THE PRESENCE OF; PRESENT IN PERSON PLAINTIFF

PRESENT IN PERSON 1ST DEFENDANT

PRESENT IN PERSON 2ND DEFENDANT

Mr. Otanga for Defendants and M/S. Lunani for Areba for plaintiff.

JUDGE