



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUSIA.

ELC. NO. 45 OF 2013.

SYLVESTER OKUMU OCHAMI.....PLAINTIFF

VERSUS

MAXWEL TABU ABALA.....1ST DEFENDANT

AMBROSE TAARIE MUGANDA.....2ND DEFENDANT

J U D G M E N T.

1. The Plaintiff **SILVESTER OKUMU OCHAMI** filed this suit through the plaint dated 28th May, 2013 against **MAXWELL TABU ABALA and AMBROSE TARI MUGANDA**, hereinafter referred to as 1st and 2nd Defendants respectively, for permanent injunction in respect of land parcels Busia/Magombe/4857 and 4858 and costs. The Plaintiff has filed this suit as a personal representative of **WILFRED WESONGA OCHAMI** and **JULIUS OCHAMI NGERO** who were registered as proprietors of the two parcels of land and are now deceased.

2. The Plaintiff's claim is denied by the Defendants who filed separate, but similar in contents, statements of defence both dated 8th July, 2013. The Defendants deny being in possession of the two parcels of land and further aver that the two named deceased persons had merely been given temporary accommodation and had no registrable interests over the suit lands. The Defendants allege fraud on the part of the two deceased persons and the Plaintiff in the process of registration of the suit lands which they claim were hived from their land. The Defendants further aver that this suit contravenes section 6 of the Civil Procedure Act as they had filed Busia H.C. Misc. Application No. 147 of 2012 against Plaintiff and others, in which they claim to be registered with the suit lands under section 7 of the Limitation of Actions Act.

3. When this matter came up for hearing on 7th October, 2014, the claim against the 1st Defendant was withdrawn upon the application of the Plaintiff's counsel. This judgment therefore relates to the Plaintiff's claim against Ambrose Tara Muganda who will hereinafter be referred as the Defendant.

4. The Plaintiff testified as PW 1 and called Consolata Chomini, Pascalla Adero, Aggrey Omolo Ogola who testified as PW 2 to PW 4 as witnesses. The Defendant testified as DW 1 and called Willimina Obonyo who testified as DW 2 as a witness.

ISSUES FOR DETERMINATION.

5. a) Whether the adjudication process of land parcels Busia/Magombe/4857 and 4858 have been

completed and if so, in whose names they have been recorded.

b) Whether the two parcels of land have been recorded in the names of Wilfred Wesonga Ochami and Julius Ochami Ngero who are reportedly deceased.

c) If the answer to (2) above is in the affirmative, whether the Plaintiff has capacity to file this suit.

d) Whether the Defendant has trespassed onto the suit lands.

e) Whether the Plaintiff is entitled to the orders prayed.

APPLICABLE LAW.

6. a) The Land Adjudication Act, Chapter 284 of the Laws of Kenya, is the guiding statute in land adjudication process. The Act came into operation on 28th June, 1968 and its heading sets out its aim as follows:-

“ to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes thereto.”

b) The trust land to be adjudicated is identified in accordance with section 5 of the Act.

c) The adjudication register in terms of section 24 of the Act complies of the demarcation map and adjudication record for each parcel of land prepared under sections 19 and 23 of the Act respectively.

d) The action that follows on the completion of the adjudication record is as set out in section 25 of the Act which states as follows:-

“ 25 Action on completion of adjudication record.

When the adjudication register has been completed, the adjudication officer shall so certify on the adjudication record and demarcation map, and shall then –

a. deliver the duplicate adjudication record (bearing a copy of the certificate) to the Director of Land Adjudication;

b. display the original adjudication register for inspection at a convenient place within the adjudication section; and

d. give notice that the adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice.”

e. Any person not satisfied with the adjudication register are required to raise objection in accordance with section 26 of the Act which states:-

“ 26 Objection to adjudication register.

(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be in correct or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection. “

Further appeal to the decision made in respect of the objection can be made to the Minister under Section 29 of the Act.

f) The finalized adjudication register is under section 27 of the Act required to be sent to the Director of Land Adjudication who in turn forward the same to the Chief Land Registrar after completing his duties.

g) The action expected of the Chief Land Registrar on receipt of the adjudication register is set out in section 28 of the Act which states;-

“ 28 Action by Chief Land Registrar.

Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register.

Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.”

ANALYSIS OF THE EVIDENCE.

7. (a) The evidence tendered by PW 4, who is the Land Adjudication Officer in charge of Siaya and Busia Counties, shows that the suit lands were within the Magombe adjudication section. PW 4 produced a copy of the notice of completion dated 14th November, 2000 of the adjudication register issued pursuant to sections 25 (c) and 26 (1) of the Land Adjudication Act as exhibit 4. He also produced copies of the adjudication record dated 23rd January, 1998 showing that parcels 4857 and 4858 had been recorded in the names of **WILFRED WESONGA OCHAMI** and **JULIUS OCHAMI NGERO** respectively. The records were produced as exhibits 3(a) and (b).

(b) That there was no objection raised in respect of the two parcels of land being registered in the names of the two persons during the adjudication process. However there was a boundary dispute relating to the two parcels and others in August, 2012. The dispute was heard by PW 4 and the surveyor and after taking measurements to confirm the boundaries they found that the disputed portion was partly in the two suit lands. This finding did not however have any effect on the adjudication record as no objection had been raised.

c) That the father to the Plaintiff had in his lifetime allowed several people, including PW 2 and PW 3, to use portions of his land. That the Defendant and his relatives, including his parents, grandmother and DW 2, had at one time or the other, used portions of the two suit lands which were later claimed by the Plaintiff on 11th March, 2011.

d) That after the Plaintiff lodged a claim over the suit lands, the Defendant obtained a consent from the Land Adjudication officer to file suit in respect of the suit land and he consequently filed Busia Misc. Application No. 147 of 2012. The court has on its own motion called for the file and noted the consent issued to the Defendant is dated 28th July, 2012. The record also shows that the Defendant with four others filed an application to be allowed to file suit as paupers dated 4th September, 2012 to which was annexed a copy of originating summons of the same date, in which they claimed ownership of land parcels Bunyala/Magombe/4856 and 4857 under adverse possession. The application was placed before the Judge on 19th September, 2012 and the following order was made;

“ The applicants are seeking to file suit in respect of property belonging to an estate of a deceased person without having obtained letters of Administration. The suit herein is hereby stayed pending the applicants obtaining an appropriate grant of letters of administration intestate authorizing them to file suit on behalf of the estate of the deceased.”

There is nothing in the file or from the defence offered in this present suit to confirm whether the Defendant took any further step to prosecute their application. Therefore as the application to be allowed to institute the suit as a pauper had not been granted, and filing fee not having been made, there was no suit filed and the court finds that the provisions of section 6 of the Civil Procedure Act had not been offended in the filing of the current suit.

e) That the Plaintiff is a son to **JULIUS OCHAMI NGERO** and brother to **WILFRED WESONGA OCHAMI** who were the registered proprietors of the two suit lands. The Plaintiff also filed Busia H.C. Misc. Applications numbers 54 and 55 of 2013 and obtained Limited Grant of letter of Administration Ad Litem dated 27th and 23rd May, 2013 respectively. The Plaintiff produced copies of the two grants as exhibits 1(a) and (b) and are limited for the purpose of filing suit in accordance with section 54 and 5th schedule of the Law of Succession Chapter 160 Laws of Kenya. The Plaintiff therefore has capacity as a personal representative of his father and brother, who are deceased and registered with the two suit lands to file this suit to ward off trespassers.

f) The Defendant disputed that the two suit lands were registered in the names of the two deceaseds. He also denied being in possession of the two suit lands [*see paragraphs 2 to 4 of the statement of defence*] The Defendant in the alternative appears to put forward a defence based on section 7 of the Limitation of Actions Act, claiming to have been in possession for over 12 years after adjudication and registration. Though the latter defence is offered as an alternative and on a without prejudice basis, it could only be available where a claimant concedes ownership of the land is as registered and that the claimant occupation has been continuous for over 12 years so as to extinguish the title of the registered owner for the portion. The evidence availed by PW 4 shows that the suit lands adjudication register were completed under the notice dated 22nd November, 2000. Even though the person recorded to be entitled to be registered with the two suit lands were confirmed, there is nothing to show that the Chief Land Registrar has since caused the parcels to be registered in accordance with section 28 of the Land Adjudication Act. The court notes that none of the parties presented evidence of registration of the two suits lands and will therefore take it that they are not registered yet. There is therefore no title of ownership to extinguish under adverse possession and that defence is not available to the Defendant.

g) The Defendant has also alleged fraud on the part of the Plaintiff, his deceased father and brother in his statement of defence but offered no evidence in support. The Defendant's statement of defence did not contain a counterclaim and in view of the evidence offered by PW 4, the recording of the Plaintiff's father and brother with the two suit lands on completion process of the adjudication was in accordance with the law, and there is no evidence to fault it.

h) That the evidence adduced by PW 1, PW 4 and the Defendant confirms that portions of the two suit lands had been found to have been encroached into by the Defendant and others. The boundaries of the two suit lands were confirmed during the exercise of 2012 and the Defendant has no excuse to continue trespassing onto the two parcels. The Plaintiff, as a son and brother to the owners of the two suit lands, and by virtue of the two grants ad litem, has a better claim to possess the two suit lands than the Defendant.

FINDING.

That flowing from the foregoing, the Plaintiff has established his claim on a balance of probabilities and prayers 10 (a) and (b) are granted in the following terms.

a. A permanent injunction is hereby issued restraining the Defendant, his agents and or servants from trespassing or interfering with parcel numbers Busia/Magombe/4857 and 4858.

b. The Defendant to pay half of the Plaintiff's costs in this case in view of the fact that the case of the other Defendant was withdrawn by the Plaintiff midstream.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 23RD DAY OF APRIL, 2015.

IN THE PRESENCE OF.....PRESENT.....PLAINTIFF

.....PRESENT.....DEFENDANT

... MR. JUMBA FOR PLAINTIFFCOUNSEL.

JUDGE