



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELC. 17 OF 2013

ALBERT FRED EKIRABA.....PLAINTIFF

VRS

1. NYONGESA SIRARI)

2. PATRICK OCHI)

3. JOSEPH OCHI)

4. GODFREY OPILI)

5. JOEL ONGIRO)

6. DENNIS SIRARI.....DEFENDANTS

JUDGMENT

1. BACKGROUND

(a). Albert Fred Ekirapa, the Plaintiff, filed this suit through the plaint dated 13th March, 2013 against the six defendants, namely Nyongesa Sirari, Patrick Ochi, Joseph Ikisai, Godfrey Opili, Joel Ongiro and Dennis Sirari praying for their eviction from Land parcel North Teso/Angurai/213 and costs. The Plaintiff averred that he is the registered proprietor of the suit land and that the Defendants occupied it in the year 2012 without authority. M/S Ipapu R. Jackah & Co Advocates appeared for the Plaintiff.

(b). The Defendants filed an amended statement of defence and counter claim dated 6th November, 2014 disputing the Plaintiff's claim. The defendants averred that this suit is Res Judicata in view of Busia CMCC No. 15 of 2013 and that they have lived on the suit land for over 40 years and hence entitled to be registered as proprietor of the suit land under adverse provision. The defendants further avers that the land had been awarded to them by the land dispute Tribunal whose award was adopted in Busia CMC Land case No. 85 of 2007. The defendants pray for the suit land title to be registered in the names of the 1st defendant and costs.

(c). The Plaintiff filed a reply to the defence and counterclaim dated 2nd December, 2014 stating that he was not a party to Busia CMCC NO. 143 of 2008, Busia H.C P&A No. 132 of 2008, and Busia CMCC No. 85 of 2007. He further averred that the defendants objection proceedings in Busia H.C P& A No. 132 of 2008 was dismissed and that they had been evicted from the suit land by the time he bought it.

2. ISSUES FOR DETERMINATION

(a) Whether or not the defendants moved onto the suit land in 2012 without the registered proprietor's authority and if so, whether eviction orders should issue.

(b) Whether the defendants had occupied the suit land for over 12 years and if so, whether the plaintiff's registration with the title was subject to their right to the suit land under adverse possession.

(c) Whether the Plaintiff's registration with the suit land should be cancelled and replaced with the 1st defendant's name.

3. EVIDENCE BY THE PLAINTIFF

(a) That Plaintiff bought the Suit land measuring 3.6 hectares from PW 2 at Kshs. 930,000/= on 23rd April 2011. A sale agreement was done and is annexed to the evidence affidavit of PW 2 (Rosela Akisa Odama) sworn on 24th February 2015. The Plaintiff was registered as the proprietor of the suit land on 10th November

2011 as confirmed by the copy of the register and search certificate for the suit land.

(b) That the suit land was initially registered in the names of the brother to PW 2 called Cornelius Omuse Obanyi who is now deceased. That PW 2 had subsequently inherited the suit land through Busia H.C Succession Cause No. 132 of 2008 before selling it to the Plaintiff.

(c) That in December, 2012, the Plaintiff learnt that the 1st Defendant was planning to bury his sick wife on that land, if she died.

The Plaintiff reported to the chief who summoned the Defendants and during the hearing they claimed the suit land belonged to them.

(d) The Plaintiff stated that when buying the suit land, he had seen the remnants of houses on it and learnt that the houses belonged to persons who previously lived there but had been evicted through the order issued in Busia PMCC No. 143 of 2010.

(e) That the plaintiff learnt that the Defendants had filed objection proceedings in Busia H.C Succession Cause No. 132 of 2008 which was dismissed through the ruling dated 31st October 2013.

(f) The Plaintiff further pointed out that though the Defendants claimed to have purchased the suit land through the documents dated 5th September, 1996, they never got registered as proprietors and they should therefore be evicted from the suit land with costs.

(g) That the Plaintiff did not find the Defendants on the suit land when he bought it and that they only came onto the land in December, 2012.

(h) The Plaintiff confirmed that the eviction order had been against the 1st Defendant alone and that it was later set aside to allow the 1st Defendant file his defence in a period of two weeks.

(i) The Plaintiff confirmed having filed Busia CMCC No. 15 of 2013 against Defendants which was dismissed. He confirmed that the suit involved the same subject matter as in this case.

(j) The Plaintiff concurred that the Land Disputes Tribunal in Case Number 1 of 2007 which was adopted in Busia PMC Land Case No. 85 of 2008 awarded the suit land to the 1st Defendant but added that PW 2 had not disclosed that fact to him during the land sale transactions. The Plaintiff stated that had that information been given to him he would not have bought the land.

(k) The Plaintiff's witness, PW 2 confirmed filing a dispute with the tribunal to have 1st Defendant

vacate the suit land but the tribunal ruled in favor of the 1st Defendant and asked him to file a succession cause. She added that the 1st Defendant did not

file a Succession cause but she did and inherited the land before selling it to PW 1. She added that she later filed a case against the 1st Defendant in the lower court for eviction orders.

(l) PW 2 stated that her brother Cornelius had told her that he had sold one acre of land to 1st Defendant and had also shown her a sale agreement for payment of Kshs.11,050/=. She confirmed that her brothers, who were her witnesses in the tribunal case, testified that 1st Defendant had moved into the suit land in 1973. She agreed that she had not disclosed to the lower court where she had applied for 1st Defendant's eviction and the succession court that her late brother, Cornelius, had sold one acre of the suit and to the 1st Defendant. She denied using trickery to obtain the eviction orders against the 1st Defendant.

(m) PW 2 offered to buy 1st Defendant one acre of land if he abandoned his claim over the whole suit land.

4. EVIDENCE BY DEFENDANT

(a) That in the 1970, the 1st defendant bought the suit land from the then registered owner, Cornelius Omuse, at Kshs. 11,050/=. The 1st Defendant took possession of the suit land and has been living on it since then. The 1st Defendant indicated that he paid the purchase price in three installments and produced copies of the three acknowledgement notes with the last one dated 5th September 1996.

(b) That the 1st Defendant had seven children when he took possession of the suit land and has since got fifteen other children including 2nd to 5th Defendants while on that land.

(c) That P W 2 sued 1st Defendant before the tribunal over the suit land and the tribunal ruled in his favor. The award was adopted in Busia PMC Land Case no. 85 of 2007.

(d) That later PW 2 sued 1st Defendant in Busia PMCC No. 143 of 2010 and an eviction order was issued leading to the demolition of most of his families houses. 1st Defendant said he was away on the day of the demolition and returned to the suit land after a day and reconstructed the demolished houses.

(e) That the Plaintiff herein filed Busia CMCC No. 15 of 2013 against the defendants for similar orders as in this case which was later dismissed. The 1st Defendant added that on learning that PW 2 had filed Busia H.C Succession cause No. 132 of 2008 over Cornelius Omuse's estate, he filed objection proceedings but he

was not successful.

(f) The 1st Defendant stated that the sale of the suit land by PW 2 to PW 1 was illegal as the tribunal had given him the land.

He said that as he has lived on the land since 1970, the court should enter judgment for him in terms of the counterclaim.

(g) That the 1st Defendant could not have filed the succession cause as recommended by the tribunal as PW 2 had retained the identity card of Corenlius Omuse.

(h) That after the demolition of the houses on 24th March 2011, two houses belonging to 2nd and 4th Defendants were spared.

That the eviction order had been obtained *exparte* and was later set aside and the 1st Defendant allowed to file his defence.

(i) That the defendants have been using the whole suit land for grazing, cultivating and planting trees without anybody interfering since 1970.

5. ANALYSIS OF THE EVIDENCE

(a) That the suit land, North Teso/Angurai/213, was first registered on 18th September, 1973 in the names of Coronell Omuse. The suit land title was later transmitted to Roselia Akisa Odama (PW 2), on 10th June, 2009 under Busia H.C Succession cause No.132 of 2008. Then on 10th November 2011 the Plaintiff herein became the registered proprietor of the suit land after buying it from PW 2 under the sale agreement date 23rd April, 2011.

(b) That the first registered proprietor of the suit land, Coronell Omuse, had in 1970 entered into a sale agreement with 1st Defendant under which the 1st Defendant took possession of the suit land. The defendants have availed three written notes under which the said Coronell acknowledges various payments. The last payment was in September 1996.

(c) That from the testimonies offered by both parties, the suit land is for agricultural purposes and therefore the agreement for sale of land between Coronell and 1st Defendant was subject to the Land Control Board consent being obtained within six months in terms of section 6 and 8 (1) of The Land Control Act Chapter 302 of Laws of Kenya. There is no evidence to show that the consent was obtained and the sale agreement became void on expiry of six months from 5th September 1996, which is the date of the last acknowledgement note.

(d) That as the 1st Defendant took possession of the suit land with the permission of the then registered proprietor, Coronell Omuse, in 1970, the law recognizes him as a licensee for the period from 1970 to the expiry of six months from September, 1996 which is the date of the note of the last acknowledgement of payment of purchase price. That period cannot be taken for purposes of computing the period the defendants were in adverse possession of the suit land.

(e) That on the expiry of six months from September 1996 without Land Control Board consent being obtained, the sale agreement between 1st Defendant and Coronell Omuse became void.

The six months ended in March 1997. However the 1st Defendant and his family continued in occupation and possession of the suit land. The Defendant's possession of the suit land became adverse to the interest of the registered owner from April 1997. The then registered owner did not take any steps to recover the suit land and by April, 2009, the 1st Defendant had been in occupation and therefore adverse possession of the suit land for over twelve (12) years.

(f) That after Coronell Omuse's death on a date that has not been disclosed, but which the court takes to have been in or before 2008 when PW 2 filed the succession cause, the 1st Defendant and his family continued in occupation and possession of the suit land. It is obvious PW 2's efforts through the Land Disputes Tribunal in the 2007 case, whose award was adopted in Busia PMC land Case No 85 of 2007, to recover the suit land was not successful. The award was in favour of the 1st Defendant and recommended that he should file a succession cause to get registered with the suit land. It is clear that P.W 2 beat 1st Defendant into filing the Succession cause and the 1st Defendant's effort through the objection proceedings was not successful.

(g) That by the time PW 2 got the grant issued on 4th November, 2008 confirmed on the 2nd June, 2009, the 1st Defendant had been in adverse possession of the suit land for over 12 years from the date the sale agreement became void. Therefore PW 2 inherited the suit land subject to the rights of the 1st Defendant

as a prior purchaser in adverse possession. (See **Kairu – vs- Gacheru 2 KAR III**). This shows that by the time the Plaintiff bought the suit land from PW 2, he also acquired the title to subject to the 1st

Defendant's right as an adverse possessor.

This is because the Law relating to prescription (adverse possession) affects the title of the person registered with the suit

Land during the twelve years period and all those that acquire the title thereafter.

(h) That by the time PW 2 attempted to recover the suit land by evicting the 1st Defendant on 24th March 2011 through the order issued in Busia CMCC No. 143 of 2010, which was obtained *ex parte* and later set aside and 1st defendant allowed to file his defence, the 1st defendant's rights as an adverse possessor had crystallized. In any case the evidence adduced shows that not all of the defendant's houses on the suit land were demolished. Two houses belonging to 2nd and 4th Defendants were left intact. The evidence also shows that other than the partial demolition of the houses, PW 2 did not take any other steps to recover possession of the suit land which Defendants have been living on, grazing and cultivating on. The 1st Defendant evidence was that he returned to the suit land on the following day and commenced the reconstruction of the demolished houses. The Court of Appeal said the following about the implication of section 7 of the Limitation of Action Act, Chapter 22 of the laws of Kenya in an action to recover land in the case of **William Gatuhi Murathe – vs- Gakuru Gathimbi (1998) CKLR**; **“section 7 of the Limitation of Action Act provided that such an action may not be brought after the end of twelve years from the date on which the right accrued. This means that the appellant, having bought and having been registered as the proprietor of the suit land and therefore claiming ownership in the suit land, could seek to recover it from the respondent, but only if he did so within twelve years after he acquired the suit land”**.

The court concurs with the passage quoted by Tuiyott J, in his ruling in Busia H.C. Succession Cause No. 132 of 2008 where he referred to passage of the Court of Appeal decision in **Kairu – vs Gacheru (1988) 2 KAR III** which was cited by Waki J (as he then was in **Temo & 6 others - V Swaleh on this legal implication as follows**:

“If the period the Respondent was in adverse possession against Mwangi were to be excluded and the period of limitation reckoned only when the Appellant became registered proprietor an owner of land whose title was in danger of being lost by prescription can better his lot by the simple device of alienating the land just a day before the 12 years period ran out. But it is elementary that a grantor of land cannot grant better title than he has. The Appellant took Mwangi title subject to the rights of prior purchaser in adverse possession. That the law relating to prescription affects not only present holders of title land but their predecessor – in title as shown by section 7 of the Limitation of Actions Act”.

It follows therefore that the 1st Defendant continued being in adverse

possession of the suit land even after PW 2 became the registered proprietor of the suit land in 2009. The title that PW 2 got from her late brother through succession, and which she transferred to PW 1 was subject to the 1st defendant's right of an adverse possessor from the date the sale agreement became void. The right to recover the suit land could have been exercised by Coronell Omusee during his life time, and thereafter by PW 2 before the period of twelve years expired in 2009, but they did not do so.

It is therefore clear that by the time PW 2 filed Busia PMCC No. 143 of 2010 and the Plaintiff filed Busia CMCC NO. 15 of 2013 and thereafter this suit, the window for recovery of the suit land from 1st Defendant had been closed on or about April 2009.

6. FINDINGS

- a. That the title to the suit land that PW 2 got on inheriting the suit land from her late brother, Coronell Omusee was subject to the 1st Defendant's right of an adverse possessor.
- b. That the title to the suit property that PW 2 passed to the Plaintiff in 2011 was also subject to the 1st defendant's right of an adverse possessor.
- c. That in view of the findings in 6(a) and (b) above. The Plaintiff cannot sustain an eviction suit against the defendants herein and his claim under the plaint dated 13th march 2013 is without merit and is dismissed with costs
- d. That the Defendants have proved their case against the plaintiff on a balance of probabilities on their counterclaim re- amended on 6th November, 2014. The judgment is hereby entered in their favour against the Plaintiff as follows;-
 1. That the Plaintiff's title to the suit land, North Teso/Angurai/213 is hereby cancelled.
 2. That the suit land North Teso/Angurai/213 be registered in the names of the 1st Defendant, Nyongesa Sirari, who has acquired it through prescription under section 17 of the Limitation of actions Act, Chapter 22 of Laws of Kenya.
 3. That in case the Plaintiff's fails to sign the documents necessary to effect the transfer in (ii) above, the Deputy Registrar is hereby authorized to sign all such necessary documents to give effect to (ii) above.
 4. The Plaintiff to pay the defendants the costs in the counterclaim

It is so ordered.

S.M. KIBUNJA

JUDGE

DATED AND DELIVERED ON28th DAY OF MAY, 2015

IN THE PRESENCE OF

PLAINTIFF.....ABSENT.....

1ST DEFENDANT...].

2ND DEFENDANT]

3RD DEFENDANT]...PRESENT.....

4TH DEFENDANT]

5TH DEFENDANT]

6TH DEFENDANT]

COUNSEL...MR. aSHIOYA FOR DEFENDANTS AND MR. WANYAMA FOR IPAPU FOR PLAINTIFF.

JUDGE