



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**LAND & ENVIRONMENT CASE NO. 198 OF 2013**

**JEPHTER IDEWA OTUNGU .....PLAINTIFF**

**VERSUS**

**ANDREW JUMA .....DEFENDANT**

**JUDGEMENT**

**PLEADINGS**

[1] The plaintiff Jephter Idewa Otungu filed this case and stated that the defendant Andrew Juma sometimes in the year 1978 unlawfully and without colour of right entered into the plaintiff's parcel of land North Teso/Kamuriai/16 and constructed a house and occupied the land and has since refused to vacate therefrom.

He avers that a notice was served on the defendant requiring him to move and vacate the said land but he has refused so to do. He seeks for a declaration that the said land parcel North Teso/Kamuriai/16 comprising of 4.4 hectares belongs to him. He also seeks for an order that the defendant, his servants and/or his agents be evicted therefrom. He attached the land certificate of North Teso/Kamuriai/16 registered on 9/3/87.

[2] The defendant filed his statement of defence on 19<sup>th</sup> July 2013. In his defence, the defendant admitted that land parcel North Teso/Kamuriai/16 is registered in the name of the plaintiff. But he states that such registration was extinguished by operation of law upon the plaintiff executing the transfer vesting ownership to the defendant. The defendant denies that he unlawfully and without colour of right entered into the said land and states that the plaintiff voluntarily and freely surrendered vacant possession in 1978 after the defendant completed payment of the consideration agreed upon by the parties herein. Defendant further avers that, that entry was open and with full permission of the plaintiff.

[4] The plaintiff averred that the suit is incompetent, bad in law and an abuse of the process of the court.

Finally, the defendant pleaded that title of the plaintiff was extinguished at the expiry of 12 years of the defendant continuous and uninterrupted occupation and possession from 1978 to date. He avers that he shall challenge the leave granted to file this suit in Bungoma High Court Miscellaneous Application No. 120 of 2013.

**EVIDENCE**

[1] The plaintiff told the court that the land in dispute is his. He produced the title for North Teso/Kamuriai/16 in court. He said he got his title from his parents in 1972. He stated that the plaintiff came to his land with his family, he left them there and returned to Nairobi. He said that the defendant

came back and requested him to give him a place to plant maize. The plaintiff gave him the place to farm. Further that the defendant requested that he be allowed to stay in the plaintiff's house since the plaintiff was not staying there. The plaintiff says he allowed the defendant to stay in his house and he requested the defendant to look after his land. The plaintiff contended that the defendant later filed a case at the High Court Kakamega Civil Case No. 76 of 1988. He averred that the case was dismissed in the year 2010. The plaintiff said that the defendant was selling the plaintiff's land to other persons. He denied that he ever sold the suit land to the defendant and denied ever having transferred the land to the defendant. The plaintiff said the signatures on the transfer document and the letter of consent were not his. He said that he wanted the court to order that the defendant to leave and vacate his land and the suit be allowed with costs.

[2] The defendant on the other hand denied the allegations of the plaintiff. He stated that he was working as a clerk in Nairobi as an accounts officer. That he is now retired. He said he knows the plaintiff. That sometimes in 1977 the plaintiff asked him to look for somebody to buy the plaintiff's land. This was land parcel North Teso/Kamuriai/16. This land comprised of 4.4 hectares. He says he went to the land, leased it and he agreed to buy the land at a consideration for Kshs.8,300.00 He said he paid the sum. He stated that he attended the Land Control Board on 22/2/1978. The Land Board was at Amagoro. He produced copy of the Land Control Board's Consent. He averred that the plaintiff also signed a transfer of land form in favour of the defendant. The defendant also produced the minutes of the land control Board sitting at Amagoro. He said that his transaction is recorded as No. 663. The defendant said that in 1977 the plaintiff came to the land and sub divided the land. He said that the sub division was reversed by the court in Kakamega High Court Civil Suit No. 76 of 1988. He produced a court order dated 22/11/1993. The defendant said that he had put a caution on the suit land which was removed by the Land Registrar without consulting him. The green card was produced as D EXH 5. He also produced a letter by the Land Registrar Busia to the Registrar High Court Kakamega showing that he had bought the suit land. He said that the plaintiff has never asked him to leave the land. That he is the one who uses the land and that the plaintiff sold to him the entire land. That the land was sold freely. He attended the land control board and signed the transfer of the land to the defendant. He asked that the suit to be dismissed with costs.

### **ANALYSIS**

[3] There were no documents produced by the plaintiff in this case. It was his word against the defendant that he relied on. There was no denial by the plaintiff that the plaintiff's brother Albert was married to the defendant's sister. The Defendant's brother was alive and lives at Kakape. He was not called by any one to shed light on the alleged sale of the suit land.

The defendant produces a letter of consent dated 22/2/79. This consent was for transfer of North Teso/Kamuriai/16 transfer of the whole parcel from Japhter Idewa to Andrew Juma absolutely. The consideration is indicated as Kshs. Eight thousand three hundred shillings only. The consent refers land control minute No. 663.

This document was not challenged by the plaintiff as a forgery or as a fake. The plaintiff said that he did not sign the same.

To support the consent, the defendant produced a copy of a full page of the minutes of Amagoro Land Control Consent with transactions LCR No. 658 to 666. Entry 663 shows transfer of whole parcel from Mr. Japhter Idewa to Andrew Juma for Kshs.8,300.00 for land parcel North Teso/Kamuriai/16. It shows it was approved on 22/2/78. These details support the consent aforesaid in every detail. A transfer of land for the suit land from Japhter Idewa to Andrew Juma for North Teso/Kamuriai/16 dated 2<sup>nd</sup> February 1978.

The same was before the chief S. Olubayu on 22<sup>nd</sup> February 1978. The transaction is approved by Divisional District Officer Amagoro on the same date.

[4] All these documents were not at all challenged by the plaintiff. All he said was that he did not sign

the transfer. On 14/8/87 the defendant herein filed a caution on the land office claiming purchaser's interest. This caution supports the defendant's claim that he purchased this land. Apparently this caution was removed by the Land Registrar after issuing 30 days' notice to the defendant to show cause why it should not be removed on 26/2/90. On 26/2/90 the land was sub divided by the plaintiff in parcels North Teso/Kamuriai/1347 and 1348. The sub division was revoked by the court and such revocation noted in the register on 23/1/95.

This was pursuant to High Court Kakamega Civil suit No. 76 of 1988. All these facts are born out in the Green card produced by the defendant as defence exhibit 5. This Green Card was equally not disputed by the plaintiff.

[5] **Issues for determination**

- a. Is this suit barred by Limitation of Actions Act?
- b. Have the parties acquired title that is adverse to the plaintiffs.
- c. Did the plaintiff divest himself of the title of the suit property by attending the Land Control Board and appearing before the chief for transfer?
- d. What orders should be made herein?

[6] **Is this suit barred by limitations of actions?**

The plaintiff in his plaint dated 11<sup>th</sup> July 2013 claims that the cause of action arose in the year 1978 when the defendant and without any colour of right unlawfully entered on the plaintiff's land. This is a period of over 35 years since the cause of action arose. The Plaintiff in his attempt to overcome the defence of limitation filed an application dated 24/5/2013 in this Court and A. Omollo J, granted leave of 30 days to file suit.

The order that was given by the Court stated;

*“That the application is allowed in terms that the plaintiff/applicant is granted leave of 30 days within which to file suit”*

This order merely granted the plaintiff 30 days within which to file suit. No leave was ever given to file suit out of time. This therefore meant that the defence of limitation of actions was still open to the defendant.

In paragraph 8 of his defence, the defendant stated:-

*“The defendant shall at the hearing hereof challenge the leave granted to the plaintiff vide Bungoma High Court Miscellaneous Application No.124 of 2013 for having been obtained through misrepresentation and concealment of material particulars”*

[7] The learned Judge, it would appear did not grant leave to file suit out of time for good reason as found in **Dhanesvar V Mehta Vs. Manilal M. Shah** [1963] EA where Spry JA quoting from English Authorities stated as follows:

The leading case is **Mabro V Eagle, Star and British Dominions Insurance Co. (8)** in which SCRUTTON, L.J. Said:

*“In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court had never treated it as just to deprive a defendant of a legal defence.”*

**Green, L.J.** ( in the same case said:)

*“Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an*

order which would have the effect I have mentioned. (That is, that the defendants would be Deprived of the benefit of the Statute of Limitation).

*It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not be allowed”.*

[8] In **Mary Osundwa V Nzoia Sugar Company Limited** [2002] e.KLR, Osiemo J, had, with the consent of the parties granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal the Court of Appeal said on **Section 27(1)** of Limitations Act:

*“This Section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of The Section does not give jurisdiction to the Court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.*

*Accordingly Osiemo, J had no jurisdiction to extend time as he purported to do on 28<sup>th</sup> May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent.”*

Time not having been extended this suit was filed out of time and is barred by limitation

[9] (b) Have the parties acquired title that is adverse to the plaintiffs?

The evidence adduced herein was that the defendants entered into the suit through sale. The defendant is not a trespasser. He was requested by the Plaintiff to look for a buyer of the plaintiff’s land, he ended up buying it himself. He went to the Land Control Board a consent was granted and the transfer was done and he became the registered proprietor. The occupation of the defendant in the suit land is therefore not adverse to the interests of the plaintiff. He acquired the land as of right through sale.

(c) Did the defendant divest himself of the suit property by attending the land control board and by appearing before the Chief for transfer?

The defendant paid Kshs.8300 for this land. He attended the Amagoro Land Control Board that granted its consent on 22/2/78. He produced the consent itself, the minutes of the Land Control Board showing a full page of transactions conducted by the board on that day. The plaintiff signed the transfer in favour of the defendant and the land was transferred to the defendant. A letter by the District Lands Office Busia to the Court was exhibited to the effect that land North Teso/Kimuriai/16 was sold by the plaintiff to the defendant and that the plaintiff used the money to purchase another land in Kocholia sub-location.

All these documents were not disputed by the Plaintiff as being incorrect, fake or fraudulent.

### **The determination**

[11] I find that the plaintiff willingly sold his land for Ksh.8,300 to the defendant. He attended the Amagoro Land Control Board and transferred the land to the defendant freely and of his own free will.

He completely divested himself of his land through a sale that was consensual and legal.

This suit that is therefore filed out of time, it is incompetent and an abuse of the process of the Court.

Further, the property in the suit land passed on to the defendant on the Land Control Board giving its consent and on eventual transfer to the defendant. The defendant has been on the suit land since 1978 through purchase. He was put into possession by the plaintiff. Even if there was no consent of Land Control consent and / or transfer in favour of the defendant (which is not the case here), a constructive trust was created in 1978 that would have not required Land Control consent to pass title to the defendant.

This point was made by the Court of Appeal in Nyeri Civil Appeal No.26 & 27 of 2011. In Macharia Mwangi Maina & 87 Others and Davidson Mwangi Kagiri where the Court of Appeal held;

*“That the appellants were in possession of the suit properly, that the respondent had created a constructive trust in favour of individuals who had paid purchase price for respective plots and the trial Court erred in failing to note that the consent of Land Control Board is not required where a trust is created over agricultural land”*

The plaintiff suit fails in every respect. The same is dismissed with costs to the defendants.

DATED at BUNGOMA this 28<sup>th</sup> day of October, 2015

**S. MUKUNYA**

**JUDGE**