

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 130 OF 2007

MUSA NDALIRO MUCHELULE.....APPELLANT

V E R S U S

MWANAHAWA ANYONA CHITAYI 1ST RESPONDENT

JOEL NAMBANDE CHITAYI2ND RESPONDENT

R U L I N G

The respondents filed their application dated 27.5.2013 seeking to arrest the delivery of the judgment herein. They also filed an application dated 20.9.2013 seeking orders of stay of execution as well as leave to argue their earlier application dated 27.5.2013. The two applications were argued together. Miss Omar, counsel for the applicants submitted that the judgment was delivered before the application that sought to arrest the judgment was heard. The applicants are challenging the registration of the respondent as the proprietor of the suit land. The land was initially registered in the names of **BENEDICTO WAKHUNGU** and the respondent got registered fraudulently. The applicants have lived on the land ever since they were born. The applicants wanted to adduce more evidence and that is why they wanted to arrest the judgment. The respondent got his title through a grant that was for one **FRANCIS ONDIECHE WAKHUNGU** who was not the original owner.

Mr. Osundwa, counsel for the appellant/respondent opposed the application. Counsel raised objection on the fact that the applicant's counsel swore an affidavit. Judgment was delivered and the application to arrest the judgment has been overtaken by events. The parties have litigated for long as the matter was heard before the Land Tribunal before it went to court.

The applicants filed their notice of motion dated 27.5.2013 seeking to file a supplementary record of appeal. The application was supported by the affidavit of counsel for the applicants which annexed an extract from the Kakamega Land registry for plot number **S/WANGA/LUREKO/176**. The plot is 12.6 acres and was registered in the names of **BENEDICTO NAKHUNGU** in 1967. It was later subdivided in 1996 and plot numbers 1690 and 1691 were created. I believe that is the new evidence the applicants wanted to enjoin. This appeal was filed in the year 2007 and the record of appeal was served on the respondents. The record shows that parties appeared before Justice Lenaola on the 8.7.2010 and counsel for the respondents were absent. The matter was to be dealt with by way of written submissions and it was mentioned on 3.8.2010 before the same judge when a judgment date was given. Judgment was delivered on the 16.11.2010 and in all those occasions the respondents and their counsel were absent. The applicants later made an application to set aside the judgment and the same was heard by Justice Kimaru on the 16.6.2011. The application was allowed in a ruling delivered on 17.5.2012.

The record shows that there was a Land Disputes Tribunal case at Mumias involving the suit property, vide case number 6 of 2005. This was preceded by case number 35 of 2004 before the same tribunal. The former case was plot number **S/WANGA/LUREKO/176** while the latter case was for **S/WANGA/LUREKO/172**. The two cases touch on the same issue. The matter late went to the Butere Senior Resident Magistrate Court vide case number 136 of 2005 which held in favour of the applicants. The court held that the applicants had acquired adverse possession of the suit land.

I have gone through the record of the Land Disputes Tribunal as well as the proceeds before the trial magistrate. In the proceedings before the trial magistrate there is no mention that the applicants are related to **BENEDICTO NAKHUNGU** in whose name the land was registered. According to the evidence before the Land Disputes Tribunal it was established that the land was registered in the name of Benedicto Nakhungu during demarcation. The claimants in Land Tribunal case number 205 were contending that during adjudication the land ought to have been registered in the names of **JUMA NAMBANDE** who was not at home that time. It was alleged that plot number 176 belonged to their late father **HAMISI NAMBANDE MUKOYA**. The defendant in that case was **CHRISTINE APONDI ONDIECHI** who testified that she got plot number 1690 from her late husband **FRANCIS NAKHUNGU ONDIECHI**. Before her husband died nobody had complained. Initially the land was number 176 and her husband had told her that the appellant herein had a share in the land. One of the witnesses in that case was **PATRICK NAKHUNGU** who seemed to have been the son of Benedicto Nakhungu. He testified that the land was subdivided into two and plot number 1690 was registered in the name of **FRANCIS NAKHUNGU**. John Nakhungu also testified before the tribunal and indicated that his father Benedicto Nakhungu subdivided the land into two portions namely – 1690 and 1691. The tribunal dismissed the claim by the complainants and held that plot numbers 1690 and 1691 were to remain the same.

With regard to the dispute for plot number 172 before the tribunal the tribunal was of the view that the plot belonged to the first applicant **MWANAHAWA ANYONA CHITAYI** while plot number 1690 belonged to **CHRISTINE APONDI ONDIECHI**. The tribunal advised the parties to file a case of trespass. The case before the Butere court was filed by the appellant who testified that he bought plot number **S/WANGA/LUREKO/1690** measuring **7 ½ acres (3.035 HA)**. It is his evidence that the applicants own plot number 172 measuring **3 ½ acres** but have encroached on his land. PW2 before the trial magistrate was John Asukubu who testified that he was the one who sold the suit land to the appellant. According to him Christine Apondi was entitled to 5 acres out of plot number 1690. He sold **7 ½ acres** to the appellant but the applicants have encroached on **4 ½ acres**. Plot number 1690 was subdivided and created plot number 2712 measuring **7 ½ acres** that was given to the appellant. The 1st respondent testified before the court that she has been living on the land since 1984. Her land is plot number 176 and 172 which belonged to her late husband **IDDI CHITAYI**. She was not aware of the proceedings before the tribunal. The 2nd respondent testified before the magistrate that they have stayed on the suit land since 1984 when it was number 176 and registered in the names of Benedicto Nakhungu who is their neighbor. Christine subdivided the land into 1690 and 1691 after the death of Benedicto without filing succession. He wanted to be allowed to sue Benedicto Nakhungu who got registered on the suit land.

The record therefore shows that the issue of plot number 176 was deliberated upon before the trial magistrate as well as the court. There was nothing new which the applicants could have shown the court in form of new evidence. The annexing of the extract for plot number 176 could not have been new evidence. The extract shows that Benedicto Wakhungu was the owner of the suit land since 9.1.1967. The claims by the relatives of the applicants that plot number 176 was part of their land, was not proved before the tribunal. The subdivision of plot number 176 into 1690 and 1691 was done by the relatives of Benedicto Wakhungu who were entitled to the land. It is clear to me that the applicants herein are entitled to plot number **S/WANGA/LUREKO/172** which is different from plot number **S/WANGA/LUREKO/176** or **1690** and **1691** or plot number **S/WANGA/LUREKO/2712**. The official search for plot number **S/WANGA/LUREKO/1690** shows that it was registered in the names of **CHRISTINE APONDI ONDIECHI** and **JOHN AMAKHUBI NAKHUNGU** on 15.10.2003. The plot is a subdivision of plot number 176. Plot number 172 as per the official search is 1.40 HA and was registered in the names of **CHITAYI NAMBANDE** on the 9.1.1967. It is clear to me that plot number 1690 was later subdivided and created plot number **S/WANGA/LUREKO/2712** which was sold to the appellant by John Amakhubu Nakhungu. The only issue is whether plot number 172 was taken away by the appellant when he obtained his title. In my judgment I did direct that the Kakamega Land Registrar and surveyor to visit the two properties, that is **S/WANGA/LUREKO/2712** and **172** and fix the boundaries. I did also order that an eviction order be issued in favour of the appellant to the extent of the portion that would have been found encroached by the applicants herein. It is therefore unnecessary to hear more evidence from the applicants. There was no proposed supplementary record of appeal by the

applicants. The application for the production of extra evidence was not merited even if it was to be heard and the same was filed six years after the appeal was filed. The expected new evidence was already part of the evidence on record. I hereby dismiss the application dated 29.5.2013 with costs. With regard to the application dated 20.11.2013 I also find that the same lacks merit. The supporting affidavit of Joel Chitayi indicates that they ought to have been given 45 days before the eviction notice was issued. It is clear to me that the applicants have their own land but they have only decided to encroach on the appellant's land. There was nothing like adverse possession as all along the owners of plot number 176 exerted their claim over that land. The application dated 20.9.2013 lacks merit and the same is also dismissed with costs.

Delivered, dated and signed and Kakamega this 20th day of March 2014

SAID J. CHITEMBWE

J U D G E