



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO.69 OF 2012 (O.S)

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 SEC 7, 37 & 38

RICHARD NANGUBO MASINDE APPLICANT

VERSUS

MAKOKHA OPICHO JOB RESPONDENT

JUDGMENT

1. The Plaintiff in this matter commenced his suit by way of an originating summons filed in court on the 31st May 2012. In the originating summons, the plaintiff sought the following orders;
 - a). That the Respondent's rights over the land measuring 27 acres out of land parcel no. Bokoli/Bokoli/612 got extinguished by adverse possession upon expiry of 12 statutory years when the applicant and his family had been in possession.
 - b). A declaration that the applicant be registered as the proprietor of the said portion of land measuring 27 acres and the respondent be registered for the remaining 7 acres out of the said land parcel no. Bokoli/Bokoli/612.
 - c). A declaration be made that the respondent be permanently barred from taking any portion of 27 acres or using any portion of acres named above on land parcel no. Bokoli/Bokoli/612.
 - d). A declaration that the respondent had no right to file succession of behalf of the estate of the deceased Rasto Masinde Nangubo as he was not beneficiary of the estate of the deceased.
 - e). A declaration that the creation of unregistered numbers Bokoli/Bokoli/1833, 1834, 18356 and 1836 was unlawful hence the said numbers should be deleted from the register.
 - f). A declaration that entry entered in the register land parcel no. Bokoli/Bokoli/612 showing "a half share each" be canceled and/or deleted and his name be deleted from the said land parcel.
 - g). An order that the respondent be condemned to pay costs of this case.
 - h). Such orders or other relief as this honourable court may deem fit and just to grant.

2. The suit is opposed by the defendant through his replying affidavit filed on 7th August 2012. The directions were taken and parties proceeded to adduce oral evidence. The plaintiff called three witnesses in support of his case. The defendant on his part also called three witnesses. The plaintiff testified as **PW1**. In his evidence he stated that he lives in Bokoli and is a pastor. His father called Rasto Masinde Nangubo died on 1988 and he applied for letters of grant of his estate which certificate of grant he produced as *pex. 1*. His father owned land L.R. no. Bokoli/Bokoli/612 measuring 34 acres. His father lived on this land together with the defendant. They all lived on this land as a family of Nangubo. He could not tell how many acres remained for them but he knew his father had given the defendant 9 acres and the surveyor who came to the land confirmed they lived on 25 acres.

3. The witness stated that land was registered jointly in the names of the late Masinde Nangubo and Makokha Opicho. The plaintiff further said the defendant's father did not have land and therefore his father sympathized with the defendant as his nephew and gave him some land in 1967. The boundary placed still exists to date. He produced the green card for the suit land as *pex. 2*. PW1 states that the defendant subdivided this land without their consent. The plaintiff had registered a caution on the title and he did not know how it was removed. The witness has no objection to the defendant getting 9 acres and not 17 acres he is claiming out of the suit land. The plaintiff states that his father shared out the land to each of his sons in 1986. It is his further evidence that the defendant is not living on the portion he is claiming. He also produced the death certificate in respect of the death of his father as *pex. 3*. He urged the court to nullify the titles created from the subdivisions and give each of them title deeds for their portion.

4. In cross examination, he stated that his father and the defendant's father were brothers. At the time of registration both were registered jointly on the title. They have all lived on this land. The Balisa clan in their meeting put a boundary between the plaintiff's family and the defendant's family which was done before the death of his father. The clan has not arbitrated over the land after the death of his father. He has not appeared before any District Officer on the dispute over this land. In the succession cause no 227 of 2009, he listed the suitland as part of the assets of the deceased but it was later removed. He maintained the suitland belonged to his father. In re-examination, he stated that he has not been sued anywhere concerning a boundary dispute. The boundary placed by his father is still intact to date.

5. Helen Natuba Masinde (**PW2**) is the mother to the plaintiff. She recognized the defendant as the son of her brother-in-law. She is aware her late husband gave the defendant a portion of land measuring 3 acres. She did not know the defendant had subdivided the suitland into two equal shares as the defendant is not entitled to equal share. She said the boundaries placed are still intact. Neither she nor the plaintiff has ever moved away from this land. In cross-examination she said the defendant's father is called Opicho Makokha- deceased. The late Opicho Makokha was older than her husband. She does not know the land was jointly registered. Both families stay on the same land. She does not know the size of the suit property. She admitted the land was shared by Gabriel Nali and others who were elders of the Balisa clan and who placed the boundary between the two families. She denied that the plaintiff had removed the sisal plants that were planted on the boundary. In re-examination, she said the boundary was fixed when her husband was still alive and she was also present.

6. **PW3**, Constant Wepukhulu is the brother to the plaintiff and cousin to the defendant. He states that the boundary is as intact as before their father died. The defendant's father died earlier than his father and he owned no land. His father is the one who gave the defendant Makokha Opicho land in 1965 but which was not equal share. The plaintiff has 5 brothers who also live on this land. The defendant's father lived in the scheme before he joined them. In cross-examination, he confirmed Gabriel is the chairman of Balisa clan. Rasto Nangubo and Opicho Makokha shared same father but different mothers. He did not know the title of Bokoli/Bokoli/612 was registered in the joint names of Makokha Opicho and Rasto Masinde. He was present when the clan shared out the land between the two families. He did not know how Makokha Opicho got himself registered. In re-examination, he stated the land was shared when Rasto Masinde was still alive and the boundary fixed is still intact. He does not know the size of the suitland. The plaintiff closed his case.

7. The defence opened his case by testifying as **DW1**. He lives in Bokoli and born in 1942 son of

the late Opicho Nangubo. He has a brother called Nelson Simiyu Opicho. The boundary was fixed at the time of registration and he was given 17 acres. He stated that this boundary was destroyed in 1994 by the plaintiff. They have had several sittings over the boundary dispute. He stated further that it is the plaintiff who is trying to share out the 7 acres to him. He inherited his father's share and he should get more because his father was older. The witness further said that the boundary dispute began after the death of the plaintiff's father as the plaintiff claims the land is solely his. The defendant is claiming only 17 acres and said the land is currently registered in his name. DW1 stated that the plaintiff has sold a portion comprised in Nelson's share. He urged the court to order that each party to have their respective titles. He is not asking for costs of the suit as they are brothers.

8. In cross examination he stated that he did not sign any papers during registration but he was aware of when registration was taking place. He lives on the portion of land he was given. They are to live on this portion with his brother Nelson Simiyu. The plaintiff and his family also live on the share given to them. He filed a complaint with the sub-chief. He did not know who entered in the green card of the suitland the words “*½ share each*”. He did not do succession in respect of his father's estate but did succession in respect of plaintiff's father vide Bungoma HC succession cause no. 153 of 1997. He is aware the plaintiff filed objection proceedings in that cause. The plaintiff's brothers also live on their share of the land. Upto now, each person is living on their share of the land. In re-examination, he said he lives on a portion measuring 10 acres while the plaintiff is living on Nelson's share of 7 acres. The boundary was put by the clan when the plaintiff's father was still alive.

9. Gabriel Walumbe Binale testified as **DW2**. He lives in Bokoli and is 87 years old. He knew both Opicho Nangubo and Rasto Masinde and who are all dead. The plaintiff is the son to the late Rasto Masinde while the defendant is son to the late Opicho Nangubo. He was the chairman of Balisa clan for 30 years. He is aware the suitland was jointly registered in the names of Rasto Masinde and the defendant. He participated in the sharing of the land in 1967 when they counted the feet and divided the land equally. This boundary was later destroyed by the plaintiff. He has not planted another boundary. In cross examination, he said he did not have a letter appointing him as chairman of the clan. He retired from this position in 1985 and was replaced by Wekesa Sitati. DW2 confirmed that both the families of the plaintiff and the defendant live on this land.

10. Hudson Nangubo (**DW3**) testified that he is 83 years old. He knows both parties to this suit. They all live on the same parcel of land. He shares a grandfather with the plaintiff and defendant. He participated in the sharing of the land between the plaintiff's father and the defendant. The plaintiff removed the boundary after the death of his father. He wants the land to be shared equally between defendant and plaintiff. During cross examination, he stated he knows how to read and write and signed the statement filed in court. He was neighbor to the late Rasto Masinde. He didn't know the size of land occupied by Rasto Masinde, but they had no land dispute between him and his brother. He maintained it is the plaintiff who has encroached on the defendant's portion of the land. In re-examination, he said they measured the land by walking around it and thereafter planted sisal on the boundary. The defendant called the fourth witness who was stood down because he was incomprehensible. The defence closed their case at this point.

11. The advocates for the parties filed written submissions, which I have considered while writing this judgment. In this matter, there are some facts which are not in dispute inter alia:-

- i. The suitland is jointly registered in the names of the defendant and the plaintiff's father.
- ii. Both the plaintiff's and defendant's family live on the land.
- iii. At one point the land was shared out between the two families by their clan, the Balisa clan.
- iv. The suitland measures 34 acres

12. The matters in dispute and which is for this court's determination are:-

- i. What was the the legal effect of the joint registration of the suitland.
- ii. Whether the plaintiff has established that he is in occupation of 27 acres of the suitland.
- iii. If (ii) is proved whether that occupation is adverse to the interest of the defendant.
- iv. Is the plaintiff entitled to costs?

13. **Effect of joint registration:**

The suit title in dispute was jointly registered in the names of Makokha Opicho (the defendant) and the late Rasto Masinde Nangubo in 1967 as a first registration. This is confirmed by the evidence of witnesses from both sides and the green card (certified copy of the register) produced as *pex*. 2. Section 102 (1) of the Registered Land Act cap 300 (*repealed*) provided that;

“Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land and consequently;

102 (1) (b) on the death of a joint proprietor, his interest vest in the surviving proprietor or the surviving proprietors jointly.”

Under section 60 of the Land Registration Act 2012 provides thus:-

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall upon proof of death, delete the name of the deceased name of the tenant from the register by registering the death certificate.”

14. In light of the provisions of the law above quoted as regard joint tenancy, and in applying it to the instance case, it follows that on the death of Rasto Masinde the plaintiff's father in 1988 the land remained solely to the defendant. In joint registration, a share of the deceased does not pass to his survivors. The defendant was at liberty under the law to do with the the title what he deemed fit. He processed the title into his name and proceeded to do subdivision. The plaintiff said it was illegal for the defendant to subdivide the land without their consent. It is my finding that the law did not require the defendant to seek the consent of the plaintiff to undertake the exercise. The land wholly belonged to the defendant upon the death of Rasto Masinde and the subdivision carried out was lawful and the court cannot nullify it or the titles created as a result as was sought by the plaintiff. This was the same reasoning used by Muchemi J in Bungoma HC succession cause no. 153 of 1997 (annexed as '**MOJ 1**' in the replying affidavit) when she dismissed the plaintiff's objection. Further the effect of joint registration cancels the plaintiff's averment that the defendant did not own any land and the portion of 9 acres was given to him (the defendant) by the plaintiff's father out of sympathy. There was no evidence led to suggest that the defendant caused himself to be jointly registered with Rasto Masinde in a fraudulent manner. In any event, this being a first registration, the issue of fraud would not stand. This was ancestral land as admitted that both families are living on this land.

15. **Is the plaintiff in occupation of 27 acres:-**

PW1 stated that they have lived on the land measuring 25 acres as was confirmed by the surveyor. **PW2** did not know the size of the land either themselves or the defendants each occupy neither could **PW3** confirm. They said the boundary is still intact therefore probably in their view this side is measuring 27 acres. The surveyor who the plaintiff said took measurement was not called as a witness. The plaintiff did not even give this court the description of their home or state any activities they are doing on the land that made him believe his share was 27 as pleaded or 25 acres he stated in evidence. The rule of evidence is that he who alleges must prove. In this case i hold that the plaintiff has failed to

discharge this burden in failing to prove that they are in actual occupation of 25 acres of the suitland.

16. **Was the occupation adverse?**

In a claim for adverse possession under section 38 of Limitations of Actions Act the person claiming must establish, **“the acts done which are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. Fencing off is the best evidence of possession of surface of land; but cultivation has also been held sufficient to prove possession.”**

The evidence adduced by both sides show clearly that both parties and their families are staying on this land their homes separated by boundary. The existing boundary is said to be intact by the plaintiff and his witnesses while the defendant allege it was destroyed. The plaintiff did not in evidence tell the court what acts he is engaging on the portion to which in his view the defendant is laying claim on. He also did not say if these acts have dispossessed the defendant of such use. What comes out is a dispute on boundary as the parties are each in possession of their respective portions.

17. The defendant appreciated the fact of the suitland being family property when after changing the title into his name took care of the interest of the plaintiff's family during the sub-division. In his evidence, he is only claiming equal share with the plaintiff's family not what the law has bestowed on him when the joint owner died. The plaintiff's claim for adverse possession if at all would be on the portion of 17 acres admitted by the defendant to belong to them. The defendant has no objection to them getting title to that portion and therefore he needed not to file this suit to get it as he knew this position during his objection proceedings in the succession cause. I do hold that the plaintiff's claim for adverse possession is unfounded and is not proved.

18. **Costs:**

The defendant said he does not claim any costs because they are brothers with the plaintiff. The plaintiff's suit having failed, it follows that it is the defendant who would have been entitled to costs. Consequently this suit be and is hereby dismissed with no order as to costs.

DATED and DELIVERED at BUNGOMA this 30th of October, 2014.

A. OMOLLO

JUDGE.