



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 92 OF 2014 (O.S)

COSMAS OMONDIPLAINTIFF

VERSUS

ALFRED ODUOR OLENDO.....DEFENDANT

J U D G M E N T

1. The plaintiff took out this Originating Summons pursuant to the provisions of Order 37 Rule 7 and 14 of the Civil Procedure Rules and Sections 37(A) and 38(1) of the Limitations of Actions Act Cap 22 Laws of Kenya and Land Registration Act No. 3 of 2012 against the Defendant in which he is seeking to be declared the owner of 2 acres out of parcel of land known as **MARACHI/KINGANDOLE/822** measuring 3.5 acres registered in the name of the Defendant by reason of the doctrine of adverse possession.

2. The Originating Summons was supported by an affidavit sworn by the plaintiff on 2nd July 2012 and in which the plaintiff deposed that he has lived peacefully, continuously and uninterrupted on the suit land for a period of over 18 years preceding the taking out of this summons and thereby gaining prescriptive rights over it. He stated that he has cultivated sugarcane on the 2 acres comprised in the suit land.

3. The Defendant entered appearance by filing a replying affidavit dated 30th July 2012, deposing that he stayed on his father's land neighbouring the suit land and at no time between the year 1993 to 2006 was the plaintiff in possession of the land parcel no. MARACHI/KINGANDOLE/822. He stated that on 23rd December 2009 he made an agreement with the lawful owner one Gabriel Oduori Maloba to purchase the whole suit land after the said Gabriel informed him that the plaintiff's wife had planted sugarcane on the land on lease which was for a period of 6 ½ years ending on 27/2/2013. The defendant denied that there was a valid contract made between the plaintiff and Gabriel Oduor Maloba in 1993 or thereafter to replace the alleged contract of 1993 and that the alleged contracts made in the year 2010 is only intended to mislead the court.

4. Directions were taken on 20/1/2015 to consolidate this suit with Busia HCC No. 69 of 2013. Further on 8/11/2016, directions were issued that this matter be converted to an ordinary suit with the Originating Summons being a plaint and the Replying Affidavit being a defence.

5. The matter was set down for hearing on 12/2/2020 when COSMAS OMONDI the plaintiff testified as PW1. He told the court that he lives in Ikonzo within Busia Township and works as a pastor. He adopted his two statements as his evidence in chief. Pw1 avers that he is the lawful owner of 2 acres of the suit land which he purchased from Gabriel Oduori Maloba and immediately took possession thereof. That he planted sugarcane and later entrusted his now estranged spouse Inviolata Atsieno Busao to manage and execute a cane farming contract with Mumias Sugar Company Limited. He added that in about January 1994, it came to his knowledge that the defendant had purchased the remaining 1.5 acres from the said Gabriel Oduori Maloba.

6. PW1 continued that in April 2010, he sought to have his 2 acres registered in his name and having misplaced the initial sale agreement of 1993, he re-executed a sale agreement in April 2010 with Gabriel Oduori. Thereafter, the vendor obtained consents of the Land Control Board to subdivide the said parcel to enable him do a transfer to him and it is during this process that he discovered that the defendant had registered himself as the proprietor of the whole parcel of land comprised in L.R. MARACHI/KINGADOLE/822. He stated that he was cultivating sugarcane on 2 acres of the suit land since 1993 and he had had peaceful continuous possession and enjoyment for over 18 years. For the years he has been in possession of the 2 acres, the defendant has never claimed ownership or possession thereof whether by notice or otherwise and it was only in September 2010 when he wrote to the vendor Gabriel Oduori through Maloba & Company Advocates claiming 2 acres of the suit land. he thereafter carried out a search and found that the defendant had been registered as owner of the whole parcel of land. He also relied on the documents attached to his affidavit dated 2/7/2012 which were produced as copy of contract for cane –PEX 1, copy of sale agreement dated 19/1/1994 –PEX 2, copy of undated sale agreement –PEX 3, copy of L.C.B. consent application –PEX 4, copy of search – PEX 5, copy of letter from Maloba & Co. Advocates –PEX 6.

7. During cross examination by counsel for the defendant, he testified that the person who sold him the land was Gabriel Maloba in 1993. The application for consent is for the year 2010, 17 years after he bought the land and the defendant bought his portion in 1994. He said that he used to farm sugarcane on the suit land as per the sugarcane contract which was in his wife's name, Inviolata. He clarified that in his amended originating summons he had asked to be given 2 acres out of L.R.Marachi/Kingandole/522A while in his originating summons he pleaded L.R. NO. 822A. He had a search for L.R. 822 and the defendant's title read Marachi/Kingandole/822 measuring 3.5 acres. He told the

court that the defendant was registered on 11/10/2011 and his claim is that he has lived on the land for 18 years. He sued the defendant because instead of getting a title for his 1 ½ acres, he got a title for the whole land. He said that he had produced a letter where the defendant demanded refund of the monies he paid. The seller executed an application for land consent board in favour of the defendant for 3.5 acres for L.R. 822.

8. On re-examination the witness reiterated that the contract and sale agreement were in respect of L.R. NO. 822A while the application for subdivision and consent for subdivision are in respect of L.R. NO. 822. He denied that the defendant has used the land neither had he sued him for eviction orders.

9. The plaintiff's second witness, GABRIEL ODUORI MALOBA adopted his witness statement dated 14/5/2013 as his evidence in chief. It was his testimony that sometime in 1993 through the plaintiff's father he entered into an agreement for sale of land with the plaintiff who agreed to purchase 2 acres of his piece of land L.R. MARACHI/KINGANDOLE/822 for a consideration of Kshs.60,000/=. Upon completion of payment of the purchase price they proceeded to plant sisal marking the boundaries of the two acres purchased by the plaintiff. That he gave vacant possession after the demarcation process free from any encumbrances. Later, in 1994 he sold the remainder 1.5 acres of L.R. MARACHI/KINGANDOLE/822 to the Defendant. Sometime in 2010 the plaintiff demanded that he transfer the title of the 2 acres to his name since he had not done so. Since the plaintiff had misplaced the agreement executed in 1993 and he did not have a copy they re-executed another one on 11th April 2010.

10. Upon cross examination, he admitted that he sold to the defendant land but he had forgotten the plot number. He admitted that he received a letter from Maloba & Co. Advocates demanding a refund of Kshs.100,000/= on behalf of the defendant for the 1½ acres. He continued that his land was Marachi/Kingandole/800 which is part of what he sold to the plaintiff and that he went to the Butula Land Control Board with Cosmas. He had a title for his land L.R. No. 800 but it got burnt and he had not obtained a replacement title.

11. ALFRED ODUORI OLENGO the defendant relied on his sole witness testifying by adoption of his witness statement dated 13/3/2019 and 22/3/2021 as his evidence in chief. He said that he bought his land from PW2, with the first portion bought in 1994 through Manwari & Co. Advocates and the 2nd portion measuring 2 acres bought in 2009. He stated that a boundary was placed on the first portion and the 2 acres had sugarcane in it owned by Inviolata Atieno. After buying the 2 acres, the seller told him he had leased the land for 6½ acres from 2006 and he shared with him a copy of an agreement from Mumias Sugar to confirm. He went on to say that Inviolata used the land until the year 2013. Subsequently, he was surprised when the plaintiff came claiming the suit land making him to file a complaint with the DO Butula accompanied by the vendor. He stated that he knew the plaintiff is not using the land except when he entered the land by force from the year 2014 before filing this suit. He produced the documents filed as exhibits; copy of title –DEX 1, copy of sale agreement – DEX 2, further copy of sale agreement – DEX 3, copy of sugarcane contract – DEX 4, copy of demand notice dated 22/9/2010 – DEX 5, copy of application for Land Consent Board –DEX 6 and copy of transfer form – DEX 7.

12. Upon cross examination by the counsel for the plaintiff, he stated that he started using the 1½ portion and the remainder portion was being used by Inviolata whom he did not know was the plaintiff's wife. He admitted that there was a boundary placed between his portion and the remainder 2-acre portion which he bought in 2009. From 1994-2006, the 2-acre portion was being used for grazing and the seller did not tell him he had sold the land to the plaintiff. He admitted that since he bought it in 2009, he never used it.

13. Parties agreed to exchange written submissions. The defendant put in their submissions on 18th November 2021 and submitted that the plaintiff has not proved his case to the required standard as he has failed to state how and when he came into possession of the suit property. He submitted that the plaintiff failed to produce a certified copy of register for the suit parcel as required under Order 21 Rule 6 of the Civil Procedure Rules and this went to the very foundation of a claim for adverse possession. In support of this argument, he relied on the following authorities; **ESSOLLY ENTERPRISES LIMITED V BENJOH AMALGAMATED LIMITED (2019) eKLR, MUSA KIPKOSKEI LABATT V LABAN KIPKEBU BARKOTON (2019) eKLR and SUSAN WANCHARA ACHERI V MAURICE ADEK ODUOGI (2018) eKLR**, on the requirement of attaching certified copy of the register to the pleadings and proof of possession.

14. The plaintiff filed his submissions on 11th November 2021 and submitted he had proved his claim of adverse possession by dint of the contract he entered into with Mumias Sugar Company and prayed that the court grants him the prayers sought and dismisses the defendant's claim.

15. The following questions have been framed for determination of the dispute;

- a) **Whether the plaintiff has proved his claim of adverse possession;**
- b) **Whether the failure by the plaintiff to produce a green card to the suit land is fatal to his claim;**
- c) **Whether or not the plaintiff be evicted from the suitland.**
- d) **Who bears the costs of this suit?**

16. The applicable law on adverse possession is now well settled both by statute and case law, for instance, in the case of **Mbira –v- Gachuhi (2002) IEALR 137** in which the court held that:

“ . . . a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

17. The ingredients were again discussed by the court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi**

(2005)eKLR where it was held that:

“adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

18. It is the plaintiff’s evidence that he bought 2 acres of L.R. 822 from the seller Gabriel Maloba who corroborated his evidence and that he immediately took possession. He asserted that during his possession and occupation of the suit land, he cultivated sugarcane. He added that his estranged wife also entered into a contract with Mumias Sugar Company Limited and a copy of the contract was produced as PEX 1. The Defendant confirmed that there was sugarcane on the land as at the time Pw2 approached him to sell the suit portion to him. According to the Defendant, Gabriel told him the said Inviolata was cultivating the land on lease. The Plaintiff continued that when he approached the seller in 2010 to have the 2 acres transferred to him and that is when he discovered that the defendant had been registered himself as the owner of entire L.R. 822.

19. The Defendant admitted during cross-exam that he was not using the land. Before 2009 (which is the date the defendant said he purchased the land) the land was in the hands of Pw2 who on his part has admitted that he had given possession of the land to the Plaintiff in 1993. This piece of evidence rebuts the Defendant’s denial that the Plaintiff was not in possession of the suit portion. Further, the Defendant admitted being shown a copy of the contract agreement between Inviolata and Mumias Sugar (produced in evidence). On page one of the said agreement, Inviolata is described as the registered owner of L.R No of plot 822A. The description of the plot as 822A does not prejudice the case of the Plaintiff as the parties knew the location of the land in question.

20. The Defendant thus paid for the land when the possession was in the hand of the Plaintiff through his estranged wife. The fact that this Inviolata was not called to testify does not water down the undisputed fact that there was sugarcane on the land planted by the plaintiff whether on lease or as a purchaser. I am therefore persuaded to find the plaintiff had been in occupation and possession of the 2 acres of L.R. 822 for a period of more than 12 years by the time the defendant purchased the same land on 23/12/2009. Thus, the seller Gabriel Maloba did not have good title to pass onto the defendant as his title had been extinguished by the plaintiff after the 12th year of his occupation and possession of the 2 acres of L.R. 822.

21. On the second issue, the defendant has submitted that the plaintiff failed to produce a certified copy of the register of the suit land and Order 21 Rule 6 and Order 37 Rule 7 of the Civil Procedure Rules are capped in mandatory terms. Order 21 Rule 6 provides as follows;

“Where there is a prayer for a judgment the grant of which would result in the alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of title shall be produced to the court before any such judgment is delivered.”

Order 37 Rule 7(2) provides as follows;

“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question annexed.”

22. The initial Originating Summons in BUSIA HCC NO. 48 OF 2012 dated 2nd July 2012 annexed a certified copy of the register of L.R. 822 which was marked as **CO-6**. The plaintiff also produced a copy of the certificate of search as PEX 5 which shows that the defendant is the registered proprietor of the suit land and this was further confirmed by the copy of title which the defendant produced as DEX 1. The argument of defect of suit raised by the Defendant is thus unmerited.

23. In **MBARI KIONI V SALOME WANJIRU MWAURA & ANOR (2012) eKLR**, Nyamweya J had this to say about the consequence of failing to produce a certified copy of the register;

“The Court of Appeal in Johnson Kinyua v Simon Gitura Rumuri Civil Appeal 265 Of 2005 (Nyeri) [2011] KLR which held that a search certificate duly signed by the Registrar can be produced as evidence in place of the extract of title. The Court of Appeal stated as follows:

“Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act, and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36(2) of the Registered Land Act provides:

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“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

24. While the plaintiff failed to produce a copy of title, the defendant did produce a copy of the title to L.R. 822 as DEX 1 and the court is able to get the particulars of when PW2 and subsequently the defendant got registered as the proprietor and as such this is not a case where Order 21 Rule 6 of the Civil Procedure Rules would apply. As already stated, the plaintiff did comply with Order 37 Rule 7(2) by annexing a certified copy of the register to his originating summons.

25. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the plaintiff has succeeded in discharging his burden of proof on a balance of probabilities. Consequently, the Defendant’s claim seeking eviction order fails on the basis that he did not acquire a good title for the two-acre portion comprised in the suit title.

26. Therefore, I enter judgement for the plaintiff' as contained in the second amended originating summons dated 27th August, 2020 and order that;

a) A declaration be and is hereby issued declaring that the plaintiff has acquired interests to 2 acres of land parcel MARACHI/KINGANDOLE/822 by virtue of adverse possession after having been in possession and occupation of the same for a period in excess of 12 years.

b) An order be and is hereby given directing the defendant to forthwith execute all the necessary documents to facilitate the subdivision, transfer and registration of the 2 acre portion comprised in land parcel MARACHI/KINGANDOLE/822 into the plaintiff's name. In default, the Deputy Registrar of the court shall execute the said documents in place of the defendant.

c) Each party shall meet their costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF APRIL 2022.

A. OMOLLO

JUDGE