



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 88 of 2011

ABISHAI NYAMWEYA MWEBI.....PLAINTIFF

VERSUS

JONES ABUTO.....DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit by way of Originating Summons dated 12th May, 2011. The Plaintiff is seeking, an order that the Plaintiff be declared the absolute proprietor of all that parcel of land known as L.R. No. West Kitutu/Bogusero/872(hereinafter referred to as **“the suit property”**) which he has occupied, used and possessed peacefully, openly and uninterrupted for a period of over 29 years, an order that the defendant do execute all necessary documents for the transfer of the suit property to the Plaintiff failing which the Deputy Registrar or the Executive officer of the court be authorized to do so and an injunction restraining the defendant by himself or through his agents, family members or legal representatives from in any way interfering with the Plaintiff’s quiet enjoyment, occupation and possession of the suit property. The Plaintiff’s suit is brought on the ground that the Plaintiff has occupied and used the suit property which is registered in the name of the defendant for uninterrupted period exceeding 29 years and as such the Plaintiff has acquired ownership thereof by adverse possession. In the grounds put forward by the Plaintiff in his affidavit sworn on 12th May, 2011 in support of the Originating Summons and in the body of the said Originating Summons, the Plaintiff claims that he purchased the suit property from the defendant in 1976 after which he took possession immediately and commenced development thereon. The Plaintiff claims that the defendant failed to apply for and obtain the requisite consent of the Land Control Board for the purposes of transferring the suit property to the Plaintiff. The Plaintiff has however remained in open, quiet, peaceful and uninterrupted possession of the suit property since 1976 when he was granted vacant possession thereof by the defendant. It is the Plaintiff’s contention that he has acquired title to the suit property by adverse possession and he is entitled to be declared the absolute proprietor of the suit property and to have the same transferred to him.

2. The defendant was served with the Originating Summons but failed to enter appearance. The matter was listed for formal proof on 5th February, 2013 when once again, the defendant failed to appear although he was served with a hearing notice. The Plaintiff gave evidence but did not call any witness. In his evidence, the Plaintiff testified that on 12th March, 1976, he entered into an agreement for sale with the defendant by which the defendant sold to him the suit property. He produced as Plaintiff’s Exhibit No.1, a copy of the said agreement. Pursuant to the said agreement, the Plaintiff took possession of the suit property and has developed the same by putting up one (1) permanent house and a semi-permanent house. The Plaintiff has also put up on the suit property, a permanent toilet, a cow shed and a bore hole. He has also planted trees and fenced the compound. The Plaintiff testified further that although he paid the purchase price in full to the defendant, the defendant refused and/or became reluctant to apply to the land control board for the necessary consent so that the suit property can be transferred to the Plaintiff. A

demand letter was sent to the defendant through the Plaintiff's former advocates Nyairo Orora & Company, Advocates on 29th October, 1988 demanding that the defendant do proceed to obtain the necessary consent and proceed to transfer the suit property to the Plaintiff but the said demand was ignored by the defendant. The said demand letter was produced in evidence as Plaintiff's exhibit No.2. The matter was thereafter referred to the chief for arbitration on 30th January, 1989 which yielded not positive result although the defendant admitted before the chief that he had received the full purchase price for the suit property from the Plaintiff. The Plaintiff testified that the suit property is still registered in the name of the defendant and that he has been in occupation of the same for 37 years as at the date of his testimony. He produced a certified copy of the register for the suit property to prove the existence of the suit property and the fact that it is registered in the name of the defendant. The register was marked as Plaintiff's Exhibit No.4. The Plaintiff mentioned that he had filed another case in the High Court namely, KISII HCCC No.44 OF 2005 against the defendant by way of a Plaint which he withdrew so that he may institute the present suit by way of Originating Summons. The Plaintiff asked the court to grant the reliefs prayed for in the Originating Summons.

3. The Plaintiff's advocate Mr.Nyariki did not make any submission. He relied entirely on the Plaintiff's evidence and urged the Court to grant the prayers sought in the Originating Summons. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. In the case of **Salim –vs- Boyd & another [1971] E.A. 550**, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the subject land for a period of 12 years or more. This is what the Plaintiff herein was duty bound to prove to the court. I am satisfied from the Plaintiff's testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has discharged this burden of proof. The Plaintiff has proved that he has been in open, continuous and uninterrupted occupation of the suit property since 1976. The defendant did not defend the suit and as such placed not material before the court to contradict the Plaintiff's evidence. It is therefore my finding that the Plaintiff has proved its case on a balance of probability. I enter judgment for the Plaintiff against the defendant as follows;

i. I declare that the Plaintiff has acquired title to all that parcel of land known as L.R.No.West Kitutu/Bogusero/872 by adverse possession and that the defendant's title to the said property has been extinguished by operation of law;

ii. I order that the defendant do execute within twenty one (21) days from the date hereof all documents necessary to transfer L.R. No. West Kitutu/Bogusero/872 to the Plaintiff failure to which the Deputy Registrar of the High Court is authorized to do so;

iii. I issue a permanent injunction restraining the defendant by himself or through his servants and/or agents from interfering with the Plaintiff's enjoyment, possession and use of L.R.No. West Kitutu/Bogusero/872;

iv. The Plaintiff shall have the costs of this suit.

Signed, dated and delivered at KISII this 19th day of April, 2013

**S. OKONG'O,
JUDGE.**

In the presence of:-

Mr. Nyariki for the Plaintiff
No appearance for the Defendant
Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**