



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 44 'B' OF 2001

1. DENIS LUYO NYAPINDA
2. ALICE OKOMBE PLAINTIFFS

VERSUS

EPHRAIM KENNETH IMBUCHI DEFENDANT

J U D G M E N T

By an Originating Summons dated 11/6/2001, the 1st plaintiff, **Denis Luyo Nyapinda** and the 2nd plaintiff, **Alice Okombe** seek the following orders:-

- a. A declaration that the Respondent's right over the whole of land title No. W. Bunyore/Ebusakami/817 measuring 0.5 Ha in area got extinguished by adverse possession upon expiry of twelve (12) years when the applicants were in possession.
- b. A declaration that the Registration of the Respondent as owner of land title No. W. Bunyore/Ebusakami/817 was unlawful.
- c. A declaration that upon the expiry of twelve (12) years from the date of the said registration the whole of land title No. Bunyore/Ebusakami/817 was held and is currently held in trust for the applicants.
- d. An order that the whole of land parcel No. W. Bunyore/Ebusakami/817 vests in the applicants jointly and severally and that the applicants should be registered as owners thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- e. An order that the Respondent do sign all relevant documents to facilitate transfer of whole of land title No. W. Bunyore/Ebusakami/817 to the Applicants and that in default the Deputy Registrar of this Honourable Court to sign the same.
- f. An order that the Respondent be condemned to pay costs of this suit.
- g. Such further orders or relief as thus Honourable court may seem just and reasonable to grant.

The 1st and 2nd plaintiff who are husband and wife swore affidavit in support of the Originating Summons. According to the said affidavits, land title No. **W/Bunyore/Ebusakami/817 (hereinafter the suit land)** is currently registered in the name of the Defendant, **Ephraim Kenneth Imbuchi Oyosi**. According to the plaintiffs the suit land which is about 0.5 Ha. is ancestral/family land inherited from the father of the 1st plaintiff. The plaintiffs have averred that they have lived on the suit land from the time they got married (in the mid 1950s) to date. It is the plaintiffs' case that they sold the suit land to the defendant in the year 1962 at Kshs.1,800/=but the transaction failed and the purchase price was refunded in 1967. That the defendant moved out of the land and gave vacant

possession to the plaintiffs who have since been in occupation of the same and have constructed permanent and semi permanent buildings and planted trees and and food crops.

The plaintiffs' complaint is that in the year 1969 the defendant unlawfully caused himself to be registered as the proprietor of the suit land.

According to the plaintiffs, they have lived on the suit premises continuously, openly and peacefully and that the defendant's right over the suit land got extinguished by operation of the law.

The defendant in his replying affidavit sworn on 25/7/2001 stated that he is the proprietor of the suit land and has lived therein from the time he was born. The defendant's case is that he bought the suit land in the year 1962 and paid the full purchase price. That pursuant to a 1967 agreement, the plaintiffs were to refund the purchase price and get the land back but the Plaintiffs failed to refund the money. The defendant asserted that he never held the land in trust for the plaintiffs as the land was properly registered in his name as a first registration. The defendant further averred that he entered into an agreement in the year 2001 with the plaintiffs to share the suit land. The defendant disputed the plaintiffs' contention that the plaintiffs stay on the suit land has been peaceful.

The defendant swore another replying affidavit on 30/1/2006 after he instructed the firm of **Mango & Company Advocates** to come on record for him. There is no reflection on the record why a second replying affidavit was filed long after the plaintiffs had testified. All the same, the contents of the replying affidavit sworn on 30/1/2006 reflect basically what is in the initial affidavit and the evidence of the defendant in court.

The plaintiffs testified on 27/7/2004 before Hon. **Justice G.B.M. Kariuki**. PW1 **Denis Yulo Nyapinda** the 1st plaintiff's evidence was that there was a sale transaction in the year 1962 when the suit land was sold to the defendant but that following intervention by the elders and relatives, the sale was rescinded and the purchase price of Kshs.700/= refunded to the defendant and Kshs.600/= to the defendant's parents as per the instructions of the defendant. According to the 1st plaintiff, the defendant went ahead to have the land registered in his name despite the refund of the purchase price. The 1st plaintiff's case is that they continued occupying the land and built houses, planted trees and continued cultivating the land.

During cross-examination, the 1st plaintiff denied having agreed to share the suit land with the defendant. According to the 1st plaintiff, he was born on the suit land together with his brothers and each inherited a portion of their father's land. The 1st plaintiff denied that the defendant was born on the suit land but conceded that his father **Daudi Nyapinda** had given the defendant's father a place to live.

PW2 **Alice Okombe** the 2nd plaintiff agreed with the 1st plaintiff's evidence and reiterated the same. PW2's evidence is that the defendant lives on his own land about 2 km away and has never planted anything on the suit land not even demanded that they do move out of the suit land.

The evidence of the plaintiff was corroborated by that of their neighbours, PW3 **Johnstone Olice Otiato** and PW4 **Josek Ananda Muchire**. According to PW2 who gave his year of birth as 1940, as a neighbor he had seen the plaintiffs occupying the suit land since the mid 1950s. PW3 described the plaintiffs as having built houses and cultivated the land while he described the defendant as having never lived on the suit land.

PW4 **Josek Ananda Muchire** described himself as a village elder who was born in the year 1922. PW4's evidence is that the plaintiffs have lived on the suit land since mid 1950s and have built houses and planted trees and food crops on the suit land. It is PW4's evidence that the defendant has never lived on the suit land. PW4 however conceded to having attended meetings to listen to the land dispute between the plaintiffs and the defendant but could not recall which year the meetings took place.

On the other hand, the defendant, **Ephraim Kenneth Imbuchi** gave evidence that in the 1920s the late **David Nyapinda** who was the plaintiff's father had given the suit land to the late **Noah Oyose** the defendant's father to settle in since the suit land was near the road. That the defendant was born on the suit land and lived there but in the year 1967 he bought another piece of land and moved there. That the plaintiff demanded Kshs.1,300/= as the purchase price of the suit land since the defendant's father had not paid for it. The defendant paid the Kshs. 1,300/=. The plaintiff was to use the Kshs. 1,300/= to buy land in **Busia** but did not purchase any land. The elders intervened as the plaintiffs' family had nowhere to settle. The elders' decision was that the plaintiffs were to refund him Kshs.1,300/= for the defendant to move out. According to the defendant the plaintiffs paid him Kshs.700/= but failed to pay the balance of Kshs.600/=. It is the defendant's further evidence that after the payment of the Kshs.700/=: he gave the plaintiffs possession of a portion of the suit land where the defendants constructed a residential house. The defendant's position is that he was to continue cultivating the rest of the suit land but the plaintiff kept chasing his workers away. The defendant complained that the plaintiff has sold a portion of the land to one **Gilbert Amuli** who has put up a commercial building on the suit land. According to the defendant he reported the land dispute to the elders and the defendant also instituted a suit with the Land Disputes Tribunal.

The defendant stated that he is the registered owner of the land but had no objection to the plaintiffs' occupation of the portion they occupy but not the entire parcel.

There is no dispute that the suit land is registered in the defendant's name. There is also no dispute that the defendant occupies the whole of the suit land except the portion occupied by one **Gilbert Amuli** who has built a shop there.

The bone of contention from the defendant's side is whether the plaintiffs only occupied the portion of land where their house stands and whether they continued occupying the rest of the parcel of land without the defendant's approval and without any peace.

Going to back to the pleadings, the affidavit sworn by the defendant on 25/7/01 refers to an agreement dated 4/4/2001 in which the defendant says they reached an agreement with the plaintiffs to share the suit land. The subsequent affidavit sworn by the defendant on 30/1/2006 seems to have been filed without the leave of the court. It is not clear from the record if the plaintiffs were served with the same. Be as it may, the affidavit sworn on 30/1/2006 agrees with the evidence adduced by the defendant in court. The gist of the said evidence is that the plaintiffs were to occupy the entire parcel of land after completion of payment of the purchase price.

The sale transaction dates back to the year 1967. The plaintiffs' occupation of the land also dates to the year 1967. This being a case for adverse possession, it would serve no useful purpose to revisit the issues relating to the sale transaction.

It is however clear from the evidence of the defendant and his witnesses DW1 **Javan Asibiko Malanda**, DW2 **Dan Otinga Kuya** and DW3 **Leoninda Okeno** that the plaintiffs have been openly and continuously living on the suit land. The Defendant testified that his workers were chased away by the plaintiffs in the mid 1970s and 1980s. DW1, DW2 and DW3 talked of disputes between the plaintiffs and the defendant regarding the year 1978, 1990s, 2001, 2002 and up to the year 2010. The plaintiffs had by then been in occupation of the suit premises peacefully for a period of over 12 years. The issue of any worker having been chased away was not mentioned in the defendant's affidavits. The said workers were not called to testify. According to DW1 the area assistant chief, some of the said workers have since passed away.

It is also clear from the defendant's evidence that he has never sued the plaintiffs. Although the defendant alluded to some proceedings instituted by the 1st respondent at the Land Disputes Tribunal, no such proceedings were produced before this court.

Having analysed the evidence from both the plaintiff's side and the defendant's case, I am satisfied that the plaintiffs have proved their case on a balance of probability. The plaintiffs have lived on the

land openly, continuously and peacefully or over 12 years. The defendant's rights were extinguished by operation of the law.

Consequently, I enter judgment for the plaintiffs against the defendant with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 18th day of April 2013.

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SAID J. CHITEMBWE

JUDGE