



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT C C. NO. 94 OF 2011.

RODGERS JOAB WAFULA.....PLAINTIFF.

-VERSUS-

JOHN DINDI NDUBI)

PATRICK OKEMO).....DEFENDANTS.

CHARLES MAKOKHA)

MOURICE ODUNGA)

J U D G M E N T.

The Plaintiff, **RODGERS JOAB WAFULA** filed this case against **JOHN DINDI NDUBI, PATRICK OKEMO, CHARLES MAKOKHA** and **MOURICE ODUNGA**, hereinafter referred to as 1st to 4th Defendants respectively, through the plaint dated 20th December, 2011 and filed in court on 21st December, 2011.

The plaintiff prays for;

- a. Permanent injunction against Defendants from entering and or utilizing his land BUKHAYO/BUYOFU/1151 unless with his authority.
- b. Order stopping Mumias sugar company not to pay the proceeds of the sugarcane on that land to Defendants .
- c. Mesne profits.
- d. Costs of the suit.
- e. Interests on (a), (b) and (c) at courts rates.
- f. Any other relief the court finds fit.

The plaintiff avers that he got registered as the absolute owner of Bukahayo/Buyofu/1151 in 1987. That about year 2005, the Defendants forcefully encroached into the land thereby barring him from the use and enjoyment of the land and hence this suit.

The plaintiff claim was disputed by the defendants who filed their statements of defence. The 1st and 3rd defendants filed their separate statements of defence dated 5th January, 2012 on 6th January, 2012. Each averred that they have distinct parcels of land and denied encroaching onto the plaintiff's land. The 2nd and 4th defendant filed a joint statement of defence dated 11th June, 2012 on the same date. They aver that they reside on parcel Bukhayo/Buyofu/1150, which belongs to their late father and in respect of which 2nd defendant has filed Busia H.C. P&A No. 98 of 1999. They denied encroaching on parcel

Bukhayo/Buyofu/1151.

In support of his case the plaintiff testified as PW 1. He explained how the Defendant's father sold to him a piece of land in 1982 and was registered as Bukhayo/Buyofu/1151. He took possession of the land and entered into a contract with Mumias sugar company who provided the farms materials totaling Kshs.24,274.81 as shown in the statement marked JRW 2 in the names of Janet Nafula Othiambo. The Defendants then cut tress from the land and he called the Forest Officer who assessed the damage at Kshs.17,166/= under the report dated 28th September, 2009 and marked RJW3. Plaintiff then took the matter to the village elder for arbitration but defendants declined. The village elder did a letter to OCS dated 22nd August, 2006 which is marked RJW4. Plaintiff said, earlier in 2005 the Defendants had attacked him on the land and robbed him of Kshs.30,000/, mobile phone, watch and tore his clothes. They also injured him. He had reported to the police and 2nd and 3rd Defendants and two others arrested and charged. As a consequence several charges in different cases were fabricated against him.

Plaintiff said he then filed a boundary dispute before the Land Registrar against Defendants who owned Bukhayo/Buyofu/1150 and a ruling dated 13th July, 2006 recommending a resurvey to enable the plaintiff occupy his portion was made as per the copy marked RJW13. The plaintiff relied on the written submissions and annexures he had filed and prays for permanent injunction and an order that payment due for produce from the said land with Mumias sugar company be paid to him. He also prays for mense profits, costs and interests.

Answering questions from 1st defendant, the plaintiff indicated that the 1st defendant has planted sugarcane on the land in question under A/C.No.31064 with Mumias sugar company. He said the 1st Defendant and his father and the other three Defendants participated in stopping him access the land. He added that 1st Defendant is a grandson to the man who sold him the land.

Answering questions from 2nd Defendant, the plaintiff said the 2nd defendant is the administrator of parcel Bukhayo/Buyofu/1150 and is also the one who led his brothers to stop plaintiff from planting on the land even though he had prepared it. He added that he could not tell whether 2nd defendant was using the land in question as he had no access to it.

Answering questions from 3rd Defendant, the plaintiff said he also owns Bukhayo/Buyofu/1009 which neighbours 1151.

Answering questions from the court, the plaintiff disclosed that the Defendants father died about 2003 and in year 2005, Defendants stopped in him from using the land.

In their defence the Defendants testified as DW1 to DW 4 respectively.

DW 1 said his father is the elder brother to 2nd, 3rd and 4th Defendants. He said his grandfather had given his father land parcel Bukhayo/Buyofu/603. Later his father bought 3 acres out of Bukhayo/Buyofu/1150 from his father in 1977. In 1981 his grandfather sold a portion of his land to PW 1(Plaintiff), who took possession and started planting sugarcane under account No.31063. He said in 1987 his father authorized him to use the land he had bought from his grandfather and he planted sugarcane. Later, when plaintiff brought surveyors to confirm the boundaries of his land, they found it covered the portion his father (Samuel) had bought. He said he has planted sugarcane under A/C.No.31064 on the land his father showed him, and that plaintiff's land is within Bukhayo/Buyofu/1150. He said the person farming on the portion of land which should belong to plaintiff is the 2nd Defendant. He added that when the Land Registrar and surveyor visited the land, they had advised them that they excise a portion from parcel Bukhayo/Buyof/1150 to exchange with that of plaintiff, Bukhayo/Buyofu/1151, but could not do so as they found some people claiming purchasers interest had filed cautions against parcel Bukhayo/Buyofu/1150. Answering questions 1st defendant said he was born in 1963 and therefore was about 13 years old when his father bought land from his grandfather in 1977. He added that he had planted sugarcane on four acres of parcel

Bukhayo/Buyofu/603 as advised by his father. He conceded he did not know the boundaries of parcel Bukhayo/Buyofu/1151 when he took the portion given by his father and planted sugarcane. He conceded that he has sugarcane on parcel Bukhayo/Buyofu/1151. He said he got to know plaintiff has title documents to parcel Bukhayo/Buyofu/1151 when he was served with the court papers which included a search certificate for the parcel.

The 2nd defendant said he is the administrator of his father's estate. That his father Philip Wekesa died in 1992 and he filed the Succession Cause in 1998. He said when his father was alive, he was seeing plaintiff cultivating on a portion of his father's land, planting sugarcane and had been extending the portion under his use. After the death of his father, 2nd Defendant said he moved his homestead near the portion plaintiff was using. He added that when in year 2005 plaintiff brought surveyor and Land Registrar to point out the boundaries of his land Bukhayo/Buyofu/1151, they placed it on the portion his brother Samuel had planted sugarcane. He said the place plaintiff land should have been was then a virgin land and he (2nd defendant) has been cultivating it. Answering questions 2nd defendant confirmed that other than the parcel plaintiff had bought, there was also another portion he had leased from his (2nd defendant's) father. He said after the death of his father he moved his house to a portion of Bukhayo/Buyofu/1150 next to parcel Bukhayo/Buyofu/1151 and not inside it. He denied that they took over plaintiff land which was ready for planting. He denied stopping plaintiff from accessing his land.

Answering questions from the court, 2nd Defendant disclosed that his father's land was initially parcel Bukhayo/Buyofu/1008 which was later subdivided into parcel 1150, 1151, 1152 and 1153. He said his father retained parcel 1150 in his names and transferred parcel 1151 to plaintiff and the other two parcels to other persons. He said he does not know the extent of parcel 1151 except on the point it borders parcel 1150. He said they got to know that the portion comprising of parcel 1151 was where his elder brother Samuel had planted sugarcane in 2010 when they were advised to give plaintiff another portion from parcel 1150. They however could not do so as they found two persons claiming to have bought portions of the land parcel 1150 from 4th defendant and Leonard Wafula had lodged cautions. He said he does not use any portion of Land Bukhayo/Buyofu/1151.

The 3rd Defendant testified how his father gave a portion of land to his brother called Samuel. He then sold another portion of land to the same brother Samuel and he was a witness to the agreement. Later he saw plaintiff working on the portion that had been sold to Samuel and when he asked his father, he told him he had sold that portion to plaintiff. He said in 1986 his father wanted to refund the money plaintiff had paid for the portion and asked him (3rd defendant) for it but he declined to give him the money. In 1992, his father died and plaintiff was still using the portion of land and continued using it. In 2005 there was a disagreement over the boundaries of their land Bukhayo/Buyofu/1150 and that of plaintiff parcel 1009 resulting to a fight between him, DW 2 and plaintiff. Plaintiff then had DW 1, 3rd defendant plus his wife and daughter arrested and charged. Then a dispute arose over the boundaries of parcel Bukhayo/Buyofu/1150 and 1151 and when surveyor and Land Registrar came they discovered it was at a different portion from the one plaintiff had been using. They opened a road to serve parcel 1151 and started discussions on how to give plaintiff a portion from parcel 1150 in exchange for parcel 1151. They later discovered some persons claiming purchasers interest had placed cautions on parcel 1150 and plaintiff had charged parcel 1151 with Standard Bank. He said parcel 1151 is used by his brother Samuel. He requested the court to give him a month to seek an out of court settlement before judgment. Answering questions 3rd defendant said after he failed to give his father the money he wanted to refund to plaintiff, the plaintiff ended up getting the land. He added that he does not know why Samuel never got the title document for the land he bought from his father.

The 4th defendant said he knows Samuel was given a portion of land by his father and also bought another portion but never followed to have them surveyed and title document issued. He added that he knew plaintiff also bought land from his (4th defendant's) father and had it surveyed and title document issued. Later plaintiff discovered the portion he had been using was in parcel 1150 and he stopped using it. He said plaintiff wanted to move to his parcel 1151 which was being used by Samuel father to 1st Defendant. Plaintiff brought the surveyor and Land Registrar and they were shown the boundaries of

parcel 1151. 4th Defendant said they discussed as a family and decided that they give the plaintiff a portion in parcel 1150 in exchange with parcel 1151 and tasked Samuel and 2nd defendant to make a follow-up. The two later reported that they had found cautions had been filed on parcel 1150. He said he does not use parcel 1151 and proposed parcel 1151 be exchanged with a portion in parcel 1150.

Answering questions 4th Defendant said the portion plaintiff had been using is currently used by 2nd defendant. He agreed that the lease agreement plaintiff had with his father was for parcel 1151. He added that plaintiff had also demanded costs he had incurred so as to agree to exchange parcel 1151 which was in his names with a portion from parcel 1150. He admitted receiving Kshs.80,000/= from one Johnson who is one of the people who have filed a caution over parcel 1150. He added he has so far refunded to Johnson Kshs.60,000/= leaving a balance of Kshs.20,000/=.

After the parties closed their cases on 28th May, 2012 the court gave them until 27th June, 2013 to seek the possibility of an out of court settlement as requested by 1st and 3rd defendant. However on 27th June, 2013, the report received from the parties showed there were no possibilities of a fast out of court settlement and the court placed the case for judgment.

The issues for determination in this suit are as follows;

0. Does the plaintiff own parcel Bukhayo/Buyofu/1151.
0. Have the Defendants stopped the plaintiff access and use to the said land?
0. If answer to (i) and (ii) above is in the affirmative, is the plaintiff entitled to an order of permanent injunction
0. Is plaintiff entitled to mense profits and if so how much.
0. Who gets the costs.

I have carefully considered the evidence adduced by the parties herein and they all agree on the following;

- a. That Defendant's father called, Philip Nekesa, sold Land Parcel Bukhayo/Buyofu/1151 to the plaintiff.
- b. That the plaintiff became registered with the said land on 7th December, 1987 when Philip Nekesa was still alive.
- c. That Philip Nekesa died in 1992 and 2nd Defendant filed a Succession Cause and was appointed the administrator of Philip Nekesa's estate comprising of Bukhayo/Buyofu/1150 in 1998.
- d. That the plaintiff had taken possession of the land he had bought from defendants father, upon purchase, and continued using it until 2005, when some disagreement on its boundaries and position in relation to parcel 1150 arose.
- e. That since 2005 the parcel of land comprising Bukhayo/Buyofu/1151 is being used by the family of Samuel Ndubi who is the first born son of Philip Nekesa, but specifically by 1st Defendant who has planted sugarcane under A.C.No.31064 with Mumias sugar company.
- f. That the disagreements between plaintiff and Defendants resulted to 2nd and 3rd Defendants being charged with a Criminal Case under Busia PM.Cr. C. No.1721 of 2005 and that plaintiff ceased using the portion of land he had been using in Bukhayo/Buyofu/1150.
- g. That the surveyor and Land Registrar confirmed that the land plaintiff owned parcel Bukhayo/Buyofu/1151 was not on the portion he had been farming but on the portion 1st Defendant has planted sugarcane under A/C.No.31064 with Mumias sugar company.

The above therefore answers the first issue that indeed land parcel Bukhayo/Buyofu/1151 belongs to the plaintiff and the ownership is confirmed by the certificate of official search marked RJW1.

The disagreements of 2005, culminating with some of the Defendants and their family members being arrested and charged in Busia PM. Cr. Case No. 1721 of 2005 and the action of 1st Defendant taking over land parcel Bukhayo/Buyofu/1151 and planting sugarcane coupled with the action of 2nd Defendant taking over the portion plaintiff had been using in parcel Bukhayo/Buyofu/150, clearly locked the

plaintiff out of accessing his land. It is however not possible to confirm that the materials in the statement marked RJW 2 in the names of Janet Nafula Othiambo, were meant to be used by plaintiff in land parcel Bukhayo/Buyofu/1151 as he alleged. This is because the statement is not in his names and does not contain the land reference Bukhayo/Buyofu/1151. The plaintiff did not also disclose how he is related to the said Janet Nafula Othiambo and the materials may have been meant for use on some other land. The above however shows the plaintiff was stopped from accessing his land by actions of the Defendants who stood to benefit by locking him out of his land and using it instead.

This brings the court to the third issue on whether the plaintiff is entitled to permanent injunction order against Defendants. The Court of Appeal in the case of *Dr. Joseph N.K. Arap Ngok –vs- Justice Moiyo Ole Keiwa and 4 others, Civil Application No. 60 of 1997* the court stated;

“ Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

Even though the defendants claim their father had sold the portion now comprising of the subject matter of this suit to Samuel Ndubi, the father of 1st Defendant, the person with the title document over that land is the plaintiff. He got the title documents in 1987 when the defendants father was still alive. Nobody has ever challenged that title in accordance with the law. When 2nd defendant filed Succession Cause for their father’s estate he did not include that land as part of the estate. The 3rd Defendant confirmed that his father pointed out that portion to be the one he was selling to plaintiff even though he had previously allegedly sold it to Samuel Ndubi. From this testimony of 3rd defendant, it would appear their father had sold the same portion of land to his son, Samuel Ndubi, and plaintiff. The Court of Appeal in the case cited above, had held that in cases of double allotment, a party who has been issued a title take precedence over all other alleged equitable rights to the title. None of the Defendants claimed that any other person including Samuel Ndubi, had obtained title documents for the suit land. The plaintiff is the only one with title to the suit land and under Section 27 (a) and 28 of the Registered land Act Cap 300 of Laws of Kenya, now repealed under section 109 of Land Registration Act No. 3 of 2012, were in the same terms with sections 24 (a) and 25 (1) of the Land Registration Act No. 3 of 2012. It stated as follows;

“ 27. Subject to this Act.

- a. **the registration of a person as the proprietor of land shall rest in that person absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto;**
- b.”

“ 28. The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a).....

(b).....

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

There is no evidence adduced herein to suggest that the plaintiff registration with the said land was as a trustee for the defendants. The Defendants appear to have known that, as they disclosed that they had resolved to ask plaintiff to relinquish the suit land in exchange for another parcel to be excised from land

parcel Bukhayo/Buyofu/1150. The plaintiff appear to have agreed but had asked to be paid some undisclosed costs. This arrangement flopped after the Defendants discovered that their land had been cautioned by some two persons, claiming purchasers rights. Had this arrangement been carried out, this case would most likely never have been brought to court. After the parties closed their cases the court gave them one month to see whether they could conclude the arrangement but ones again they were faced with the same predicament.

The upshot of the foregoing is that the Defendants have no business stopping the plaintiff from taking possession of his land Bukhayo/Buyofu/1151. The plaintiff has therefore established on a balance of probabilities that an order of permanent injunction should be issued in his favour against Defendants, their servants, and agents.

Prayer (b) in the plaint appear misplaced. This is because the plaintiff does not indicate in the pleading who would be the beneficiary of the proceeds of the sugarcane if the court was to order Mumias sugar company not to release it to the Defendants. Plaintiff tried to remedy this when he testified, by asking the court to make an order that the payment be released to him. Parties are restricted to prayers contained in their pleadings and as the plaintiff had not amended his pleadings to contain or accommodate what he said in his testimony, prayer (b) cannot be granted.

Prayer (c) is indicated to be "Manse profits." The court take this to have been meant to refer to mesne profits. The evidence adduced shows as of the year 2010 parties were discussing how to resolve the issue. It appears that it was after plaintiff realized Defendants were unable to actualize their offer to give him an alternative parcel from Bukhayo/Buyofu/1150 in exchange for his land Bukhayo/Buyofu/1151 that he filed this suit in year 2011. There is nothing to show that he had taken legal steps to retake possession of his land before filing his suit. The quantum of mesne profits claimed was not disclosed nor was evidence adduced to establish the amount. As such mesne profits is not granted.

Obviously as costs follows the events, and plaintiff has succeeded in the main prayer of his suit, he will get costs.

The plaintiff has as shown above, established his case on a balance of probabilities and judgment is entered in his favour against Defendants jointly and severally as follows;

- a. That the Defendants specifically the 1st Defendant, are hereby ordered to vacate from Land parcel Bukhayo/Buyofu/1151 and give possession of the said land to the plaintiff within 30 days from the date hereof.
- b. That an order of permanent injunction is hereby issued against the Defendants, their servants and agents from entering, occupying or in any way using plaintiff's land parcel Bukhayo/Buyofu/1151 without his authority and or consent.
- c. That the Defendants will pay costs of this suit to the plaintiff

It is so ordered.

S. M. KIBUNJA,

JUDGE.

Delivered on 24th day of July, 2013.