



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT CIVIL CASE NO. 47 OF 2012.

LINUS OGAYI HASSAN.....PLAINTIFF

VERSUS

JOHN OGOTI LUONDI..... DEFENDANT.

J U D G M E N T.

The Plaintiff, Linus Ogayi Hassan, filed this case through the plaint dated 27th June, 2012, against the Defendant, John Ogoti Lubondi. He prays for:-

- a. Permanent injunction against Defendant and all those claiming under him from Land parcel Bunyala/Bulemia/86.
- b. Damages.
- c. Further and or other relief, and,
- d. Costs of and incidental of this suit.

The Plaintiff avers that he is the beneficial owner of land parcel Bunyala/Bulemia/86 by virtue of the court order in Mombasa High court Succession Cause No. 98 of 2001. He adds that Defendant entered into the suit land in 1973 and that he has persistently declined to vacate and hence this case.

The Plaintiff's claim is disputed by the Defendant, through his statement of defence, filed through his then advocate dated 13th August, 2012. The Defendant avers that he had lived on the suit land since 1962 and in 1973 he bought the land from the owner, Julias Musunu Wakula, who later died in 1998. He further says that the plaintiff's claim is time barred by virtue of the Limitation of Actions Act. He added that the matter was res judicata as it had been dealt with by Budalangi Land Disputes Tribunal in its award of 9th May, 2011 which was filed in Busia CMC Land Case No. 15 of 2012.

During the hearing, Mr. Odipo and Mr. Juma, advocates appeared for the Plaintiff and Defendant respectively. The Plaintiff testified as PW 2. He called his mother who testified as PW 1. The Defendant testified as DW 1. At the close of the oral evidence counsel consented to file written submissions. The Plaintiff's submission dated 3rd September, 2013 were filed on 4th September, 2013 and that of the Defendant dated 17.9.2013 was filed on 18th September, 2013.

SUMMARY OF PLAINTIFF'S EVIDENCE.

1. That Land parcel Bunyala/Bulemia/86 was after Land adjudication registered in the names of

Hassan Ogai who died on 25th August, 1973.

2. That the said Hassan Ogai left a wife, who testified as PW 1. PW 1 subsequently gave birth to the plaintiff in September, 1973.
3. That after the death of Hassan Ogai, the Defendant settled on a portion of Bunyala/Bulemia/86 and when asked to vacate vide letter dated 28th June, 2012, he declined to comply and hence this suit.
4. That Defendant had lodged a complaint over the land with the Budalangi Land Dispute Tribunal which made a finding that the land parcel Bunyala/Bulemia/86 belonged to the late Hassan Ogai. The tribunal went ahead to award Lubondi Ogoli Lubondi half share of the land on the basis of adverse possession.
5. That the award was filed in Busia CMC. Land case No. 15 of 2012 but the court declined to adopt the award in its order of 11th May, 2012.
6. That the Plaintiff filed a Succession Cause in respect of the estate of Hassan Ogai and was appointed the administrator in Mombasa H.C. P & A No. 98 of 2001.
7. That the court confirmed the grant on 30th November, 2009 distributing the estate. The Plaintiff was registered as the proprietor of Bunyala/Bulemia/86 on 12th March, 2012 as confirmed in the certificate of official search dated 31st August, 2012.

DEFENDANT'S EVIDENCE SUMMARY.

1. That Defendant has lived on the suit land since 1962.
2. That in 1973, he bought the suit land from Julias Musunu Wakula, who later died in 1998.
3. That the Plaintiff's case is time barred and Defendant is entitled to the land by adverse possession.
4. That the case is res judicata as the issues had been decided by the Budalangi Land Disputes Tribunal whose award was filed in Busia CMC Land Case No. 15 of 2012.
5. That the land he bought was registered as Bunyala/Bulemia/2038 and extended to the road.
6. That it was only in 2011, that he learnt a portion of his land had a different title being Bunyala/Bulemia/86 and on obtaining a search certificate for the parcel, found it was registered in the names of the Plaintiff's father.
7. That on discovering that parcel Bunyala/Bulemia/86 was in the names of Plaintiff's father, he filed a claim with Budalangi Land Disputes Tribunal.
8. That Defendant's father, who lived on Bunyala/Bulemia/2038, died in 1967 before the land adjudication and registration exercise was completed.
9. That Defendant was registered with Bunyala/Bulemia/2038 as the eldest son of his father.
10. That he had had a case with one Ojiambo over parcel Bunyala/Bulemia/2038 in 1976 and that it was decided in his favour
in 1978.

11. That Defendant stayed in Mombasa between 1965 to 2000 but had returned home to, register his land Bunyala/Bulemia/2038 after the Chief summoned him.

12. That the construction he has been undertaking are on parcel Bunyala/Bulemia/2038 and not on parcel Bunyala/Bulemia/86.

ISSUES FOR DETERMINATION.

Having considered the pleadings, evidence tendered and the submissions by both counsel, the following four issues arises for determination;-

- a. Whether the Plaintiff is the owner of the suit land.
- b. Whether Plaintiff is entitled to injunction orders against Defendant.
- c. Whether Plaintiff is entitled to damages and if so, how much.
- d. Who pays costs.

COURT'S FINDINGS.

1. That the suit Land Bunyala/Bulemia/86 borders the road to the right and parcel Bunyala/Bulemia/2038 to the left. That after Bunyala/Bulemia/2038 are parcels 87 and 88 all to the left of Bunyala/Bulemia/86.
2. That below parcels Bunyala/Bulemia/86, 2038 , 87 and 88 is parcel Bunyala/Bulemia/89.
3. That land parcel Bunyala/Bulemia/86 must have been registered before parcel Bunyala/Bulemia/2038 as its number is ahead of the latter parcel.
4. That the document attached to the Defendant's list of document from the Land Adjudication office shows one Ojiambo Saidi had lodged a dispute over land parcel Bulemia 2038 and not Bulemia 86.
5. That the copy of the land sale agreement attached to the Defendant's list of document does not specify the land he was buying or its size. The agreement on the relevant portion states:

“.....Mimi Mzee Julias Musunu Wakula nimemuuzia John Ogoti Hi arthi yangu kwa mazikilizano kwa Mbei ya Shs.750/....”

The agreement is dated 20th September, 1973.

6. That even though Defendant claim the land he bought under the agreement of 20th September, 1973 was Bunyala/Bulemia/86, there is no evidence to confirm the claim as it could easily have been parcel Bunyala/Bulemia/2038 which is registered in his names and three others. The certificate of official search dated 15.11.2010 confirms the registered owners of parcel Bunyala/Bulemia/2038 on 2.10.1985.
7. That even though none of the parties availed a copy of the green card to the court for Bunyala/Bulemia/86, both parties confirmed that Hassan Ogai was the first registered owner of the parcel after adjudication.
8. That the Land Adjudication Act Cap 284 of Laws of Kenya provided the procedure or process to be followed by any person or persons who were dissatisfied with the adjudication register. There is no evidence that Defendant filed any objection against Hassan Ogai being registered with Bunyala/Bulemia/86.

9. There is also no evidence adduced to suggest that there was fraud in the process of registering parcel Bunyala/Bulemia/86 with Hassan Ogai and hence this court cannot interfere with the registration being a first registration.

10. That the only time Defendant took steps towards claiming parcel Bunyala/Bulemia/86 was in the year 2011 when he filed a claim before Budalangi Land Disputes Tribunal. He has conceded in the submission that the correct forum should have been the High Court.

11. That the Defendant has not lodged any claim to own Bunyala/Bulemia/86 under adverse possession in a competent court to date as his defence does not contain a Counterclaim. The doctrine of adverse possession should be used as a sword and not a shield to extinguish the right of a registered owner to a specific land or portion of land.

12. That the Plaintiff herein got registered with Bunyala/Bulemia/86 on 12.3.2012 and acquired the interests conferred by Section 24 of the Land Registration Act No. 3 of 2012 which states:

“ 24. Subject to this Act-

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

This section is in the same words with section 27 (a) of the Registered Land Act Cap 300 of Laws of Kenya (Now repealed). 13. That the Defendant had not known parcel Bunyala/Bulemia/86 existed until year 2011. Even though he had been using portions of that land, he had always taken it to be part of his land Bunyala/Bulemia/2038. As such the Defendant could not have been in adverse possession of land he believed was his own and cannot claim that land on that basis.

14. That having found as in 13 above, the plaintiff cannot be said to have been time barred in filing this case as he is not seeking ownership of the land Parcel Bunyala/Bulemia/86, but rather injunction against Defendant, damages and costs.

15. That in view of doubts as to the position of the boundaries between Bunyala/Bulemia/86 and 2038, it is desirable that the parties involve the County Land Registrar and the Surveyor to confirm, and if need be, reposition the boundaries between the two parcels of land.

16. That the Plaintiff did not avail any material before this court that could assist in determining the amount of damages suffered and payable. This is especially more difficult considering that the size of the portion said to have been taken over by the Defendant has not been specified for purposes of determining damages, if any.

Form the foregoing, the court finds there is merit in the Plaintiff's case and the following orders are granted;-

- a. That the Defendant is by himself, agents, servants or anybody else claiming under him permanently restrained from any dealings of whatever nature with plaintiff's land parcel Bunyala/Bulemia/86 unless with the registered owner's permission.
- b. That so as to avoid conflict on the extent of Land parcel Bunyala/Bulemia/86, the Plaintiff to seek the assistance of the County Land Registrar and Surveyor to confirm and, if need be reposition the boundaries of the said land in relation to Bunyala/Bulemia/2038.
- c. That in case the Defendant is found to have trespassed on Bunyala/Bulemia/86 after the exercise in (b) above, he is to vacate from such portion in ninety (90) days and in default be forcefully evicted.

d. That the Plaintiff's costs be paid by the Defendant.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 4TH DAY OF DECEMBER, 2013 AT BUSIA.

IN THE PRESENCE OF;

JUDGE.