



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL CASE 34 OF 2007

FRANCIS MAKIO OBALEAPPLICANT

VERSUS

DISMAS OMUKUBI ONG'ANGIRESPONDENT

J U D G E M E N T

The Plaintiff Francis Makio Obale in his Amended Originating Summons dated 17th December 2007 and filed in court the same day sues the defendant Dismas Omukubi Ong'ang' claiming title by way of prescription for a portion measuring 2.30 hectares out of Land Reference number Bukhayo/Kisoko/918. The claim is based on the ground that the plaintiff have occupied the portion of land and developed it for a period exceeding twelve (12) years.

The defendant denies the claim in his replying affidavit that the plaintiff is entitled to title to the portion of land. It is deposed that the demarcation of the said portion was done without the consent of the defendant. The peaceful and uninterrupted occupation of the land by the plaintiff is denied for the alleged period. The applicant contends there were tribunal proceedings filed by the applicant.

During the hearing of the suit, the defendant did not attend court. The plaintiff testified that one Venchwa Makokha (now deceased) sold to him 2.30 acres of land out of his parcel Bukhayo/Kisoko/918 in 1996. The purchase price was paid in instalments. The plaintiff told the court that he took possession of the land in 1976 and build a mud house which he replaced with another one later. He now has a semi-permanent home on the land where his wife and children used to stay as he worked away from home. The plaintiff is now a retired police officer. It is after the death of deceased that the defendant came to occupy the portion left by the deceased. The deceased sub-divided the land into two portions 3688 and 3689. The plaintiff occupies parcel no.3689 while the defendant lives on 3688. The father of the deceased and that of the plaintiff were step - brothers. The plaintiff later discovered that the defendant had registered himself the sole proprietor of whole parcel Bukhayo/Kisoko/918. This was when the plaintiff filed a succession cause no.137 of 2004 with a view of succeeding his portion.

The defendant's replying affidavit is a denial of the claim regarding the alleged quiet and continuous possession of over twenty (20) years or at all. The defendant lost his opportunity to testify and expound on his defence. The court is now left with the evidence of the plaintiff. The plaintiff produced a land sale agreement between him and the deceased Esie Omwami Venchwa Makokha dated 23/09/98 for four (4) acres at a consideration of sh.3700/-. The first instalment of sh.2000 and the second one of sh.1700 were

paid on or before 2/02/1980. In furtherance of the sale agreement, the parties obtained consent of the relevant land board to sub-divide the land. It was split into two portions LR.

Bukhayo/Kisoko/3688and3689. A consent to transfer L.R. No.Bukhayo/Kisoko/3689 was obtained. The deceased and the plaintiff duly executed the transfer on 07/08/1995. The deceased died the following year before transfer was effected. The Plaintiff attempted to get his land through succession proceedings but found that the defendant had transferred the land to himself. The plaintiff took the matter to the District Commissioner who acknowledged his interest on the land. The District Commissioner sent a letter to the Land Registrar Busia to give the plaintiff his portion. The plaintiff made demand for transfer of his portion to the defendant who did not cooperate.

A certified copy of register shows that the deceased Venchwa Makokha was registered owner of the suit premises Bukhayo/Kisoko/918 in 1984 having inherited it from his father Makokha Odanga. Before he became the registered owner he entered into a written agreement with the plaintiff in 1978 for sale of 4 acres. There was a verbal agreement in 1976 as a result of which sh.3700/- had been paid. The plaintiff possession of his portion in 1976. The defendant was a distant relative of the deceased. It came out in evidence that the land was ancestral and originally belonged to the defendant's grand-father Makokha Odanga. The deceased Venchwa Makokha was the uncle of the defendant and a step brother of the defendant's father. As he sold a portion of land to the plaintiff, it appear he recognized that the other portion was the entitlement of his step brother. The deceased sub divided the land and sold his portion leaving the 2nd one for his step-father's family. There is no evidence to show how the defendant became the registered owner of the whole parcel in 1987. The registration in defendant's name appears to have escaped the attention of the deceased and the plaintiff until much later when the deceased was no more.

The plaintiff has shown that he got onto the land in way of a land sale contract in 1976 when the deceased was still the owner. When the defendant acquired the title of the parcel in his name in 1987, he did not move to the land until after the death of Venchwa Makokha. The plaintiff continued using and living on his portion of four (4) acres. Although a mutation form for sub-division was produced, no copy of register showing subdivision into two portions was produced. The defendant remains the registered owner of the whole parcel. Nevertheless, he only uses his portion on the ground leaving that of the plaintiff undisturbed. The plaintiff testified that he has extensively developed the land by cultivating it and building houses.

It is my finding that the plaintiff has proved that he took possession of four (4) acres (as per the agreement) in 1976 and has been in quite, continuous and interrupted possession for over thirty (30) years which is far beyond the statutory minimum period of twelve (12) years. The defendant has never filed any legal proceedings for eviction of the plaintiff from the portion he occupies. If anything, it is the plaintiff who has been on the forefront demanding title of his portion from the defendant. The possession of the plaintiff has been adverse to the interests of the defendant. The plaintiff did not enter the land with consent of the defendant land with consent of the defendant. The defendant found him on the land. Precisely, the plaintiff was in occupation long before the defendant became registered owner of the land. The plaintiff has been in adverse possession for twelve continuous years without any interruption from the title holder.

I have looked at the plaintiffs authorities on this subject. In the case of William Gatuthi Murathe vs Gakuru Gathimi Civil Appeal no.10 of 1996 the court of appeal held that *"time stops to run when the owner asserts his rights or when his right is admitted by the adverse possessor."* The assertion of the right occurs when the owner takes legal proceedings against the adverse possessor or makes an effective entry into the land. The defendant herein has done none of these two things. The courts in the cases of Peter Thuo Kairu vs Kuria Gacheru Civil Appeal no.42 of 1987 and in that of James Mwangi and Others vs Mukinye Enterprises Nairobi HCCC no.3912 of 1996 made similar rulings as in the case of William Gatuthi Murathe on the claims of adverse possession.

I note that the agreement is for sale of four (4) acres while the mutation form and other documents give the acreage as 2.30 hectares. The latter measurement is over five (5) acres. The correct measurement and which this court will follow is four (4) acres based on the agreement between the parties. The claim of the plaintiff ought to have been restricted to four (4) acres.

I am satisfied that the plaintiff has proved his case against the defendant on the balance of probabilities. I enter judgement in his favour as prayed in the originating summons for a portion of four (4) acres. The defendant is hereby ordered to demarcate and transfer to the plaintiff at the expense of the plaintiff the portion within 60 days. In default, the Deputy Registrar to execute the documents on behalf of the defendant.

The defendant to meet the costs of the suit.

F.N. MUCHEMI

J U D G E

Judgment dated and delivered on the 29th day of May 2012 in the presence of the both advocates.

L. KIMARU

J U D G E