



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

HCCC NO.41 OF 1996 (O.S)

WINSTONE MAKOKHA PLAINTIFF

~VRS~

AGGREY WANJALA MUSIMADEFENDANT

JUDGMENT

The Plaintiff Winstone Makokha sues for orders of prescription through adverse possession in respect of L.R. Nos.E. BUKUSU/N.SANG'ALO/2866, 2867 and 2868 against the Defendant Aggrey W. Musima who is the registered owner. In his amended originating summons dated 5/05/1997, the Plaintiff claims to have occupied the land parcels in question since 1969.

In his replying affidavit, the Defendant denies the claim and depones that the Plaintiff has lost in previous suits which decided the same issues between the same parties. It is the Defendant's contention that this suit is *res judicata* and should not be entertained. The Defendant raised a preliminary objection to that effect in a notice dated 23/11/2004 which was never argued.

The Plaintiff testified that on 09/09/1969 he bought a portion of land measuring 61 X 83 yards from one Musima Mukanda the father of the Plaintiff out of land East Bukusu/N.Sang'alo/979 on 07/02/1977. Mr. Mukanda sold the Plaintiff 1½ acres being the second portion from the same land. On 26/08/1977, the Plaintiff bought another portion measuring two (2) acres from the Plaintiff's father which was to be excised from the same land. He produced the land sale agreements in evidence. The total consideration paid was Ksh.4,698.50. At the time of the transactions, the Defendant was a young boy. The Plaintiff obtained consent of the relevant land board for sub-division and transfer of 1.65 hectares on 10/04/1978. Upon death of the Defendant's father, a succession cause was filed and the Defendant became the registered owner of L.R. EAST BUKUSU/N.SANG'ALO/979. The land was subdivided by the Defendant into three parcels namely EAST BUKUSU/NORTH SANG'ALO/2866, 2867 and 2868. A caution was lodged against the title by the Plaintiff. The Plaintiff testified that he occupied the land in 1969 and utilizes part of the 1.65 hectares.

The Plaintiff called one witness PW2 who testified that a son to the deceased one Ernest Malaba Musima sold the Plaintiff two acres of the deceased's land in 1977. PW2 witnessed the sale agreement.

The Defendant denied the claim that the deceased sold land to the Plaintiff. The deceased died in 1980 and was survived by three wives and several children. Upon obtaining the grant in the deceased's succession cause, the land at Chemuche namely EAST BUKUSU/N.SANG'ALO/979 was registered in the Defendant's name. It was later sub-divided and the Defendant got only one parcel no.2868 registered in his name. The other two parcel nos.2866 and 2867 were registered in the names of other beneficiaries who are not parties to this suit. It is the Defendant's evidence that he and his family have successfully sued the Plaintiff for eviction from the suit premises in other earlier cases. The Plaintiff's appeal in respect of one of the suits was dismissed.

The Plaintiff initially claimed 1.65 hectares out of EAST BUKUSU/NORTH SANG'ALO/979 which was registered in the name of Musima Mikenda Nasong'o until 1988 when ownership changed through a Succession Cause to the Defendant. The Defendant later sub-divided the land into three portions. Parcel nos.2866 and 2867 were registered in the name of other beneficiaries while the Defendant became registered owner of parcel no.2868. The sale agreements and acknowledgements of purchase price received by the deceased were not legible and some have no signature of the deceased. The documents do not show the measurements of the parcels being sold. The Plaintiff's witness testified that he only witnessed one agreement where the son of one Ernest Malaba of deceased sold a portion whose signature was not stated to the Plaintiff. The said Malaba is not a party to this case. It also came out in evidence that the defendant's family had borrowed some money from the Defendant which was to be exchanged with some land. That land was not identified in the Plaintiff's exhibit – the agreements. In the caution lodged against the title by the Plaintiff, it is deponed that the Plaintiff bought land from the deceased between 1969 and 1978. The deceased died in 1980. A copy of register shows that the Defendant inherited the land from his father and became the registered owner of EAST BUKUSU/N. SANG'ALO/979 on 13/03/1996. Surprisingly, the Plaintiff did not object to the grant or its confirmation thereon in order to protect his interest.

The Defendant successfully sued the Plaintiff in court in Civil Suit No.154 of 1991. Orders for eviction were issued and Defendant said he evicted the Plaintiff from the land. The Plaintiff appealed against the decision but his appeal was dismissed. The mother of the Defendant had instituted proceedings against the Plaintiff before the Elders Court chaired by the area District Commissioner. The Plaintiff claims title by adverse possession from the three parcels of land 2866, 2867 and 2868 which were as a result of the sub-division of parcel number EAST BUKUSU/N.SANG'ALO/979. It is alleged that the Plaintiff bought three portions from the land between 1969 to 1978. According to him, the Plaintiff occupied the land. This allegation is denied by the Defendant who testified that the Plaintiff's land on which he lives borders the suit premises. The Defendant further said that in 1991, the Plaintiff was building a house for his mother on the land which prompted the Defendant to file the eviction suit. Eviction was carried out and the Plaintiff no longer lives there.

The portions bought by the Plaintiff were not clear in size and identity and were bought at different times. It presents some difficulty as to when time starts to run in this claim of prescription through adverse possession. It is clear from the evidence that the Plaintiff claims the whole of the original parcel which was later sub-divided into three new parcels. The last portion he bought was in 1978. In order to claim the whole, time must run from 1978. The first suit no.52 of 1989 filed by the Defendant against the Plaintiff came eleven (11) years after the sale was concluded in 1978. Another suit followed being civil case no.154 of 1991 between the same parties. It is the Defendant who won the suit. Assuming the Plaintiff took possession of the land in 1978, he had stayed in quiet and undisturbed possession for only eleven years which period is less than the twelve years prescribed by the law of adverse possession. The period does not work in favour of the Plaintiff.

The Plaintiff claims that the first two portions of land were sold to him by the deceased, while the third one was sold to him by one of the deceased's son who is not a party to this case. The deceased was still alive in 1978 and was the registered owner of the land. It therefore follows that the son of the deceased had no capacity to sell a portion of his father's land. The Plaintiff cannot establish a case of adverse possession in respect of a sale agreement which was void for lack of capacity.

The Defendant is only registered as the owner of parcel no.2868. The other parcels are registered in the names of other people who are not parties to this suit. A court of law will not make any orders against any interested party who has not been given an opportunity to be heard. This completely knocks off the Plaintiff's case in respect of parcel nos.2866 and 2867.

The Plaintiff did not produce sufficient evidence to prove that he paid the total purchase price of Ksh.4,698.50. It was not established which portion out of the original land the Plaintiff bought from the deceased. The Plaintiff has also failed to establish that he took possession of the land and stayed in a quiet, continuous and undisturbed possession for the period prescribed the law.

It is my finding that the Plaintiff's claim has not been proved to the standards required by the law. It is hereby dismissed with costs to the Defendant.

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F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 8th day of March, 2011 in the presence of Mr. Ocharo for the Defendant and Mr. kakoi for Nanzushi for the Plaintiff.

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F. N. MUCHEMI

JUDGE