REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

CIVIL SUIT 149 OF 2002

PETER MAKHINO PEPELA.....APPLICANT

~VRS~

SHADRACK BWOME.....RESPONDENT

JUDGMENT

The Plaintiff Peter Makhino Pepela in his originating summons dated 25/11/2002 sues the Defendant Shadrack Bwone claiming three acres out of L.R. Malakisi North Central Namwela/427 through adverse possession. He prays that the court determined whether after buying the land from the Defendant, he has peacefully and continually lived on the said land since 1984 and developed it. Further, whether the Defendant's title has over the years been extinguished by the operation of the law and thus giving way for the Plaintiff to acquire title by adverse possession.

The Defendant in his replying affidavit admits selling the land to the Plaintiff but avers that the transaction was void *ab initio* for want of the relevant land board consent. He denies that the Respondent has lived on the land and developed it since 1984.

This case was fully heard by my brother Justice Sergon. I took it over after both parties had closed other cases and received their submissions.

The Plaintiff's evidence is that in 1984, he entered into an agreement with the defendant for sale of land. The defendant agreed to sell land and the Plaintiff to buy three (3) acres to be excised from L.R. Malakisi North Central Namwela/427. The Plaintiff paid the purchase price of Ksh.18,500/= in installments. The Defendant thereafter refused/failed to effect the transfer of the said portion to the Defendant. He subsequently sold two acres which was part of the three acres to a 3rd party. The Plaintiff testified that he took possession of the land since 1984 and has planted coffee, trees and other crops. He called one witness, PW2 who corroborated his evidence on purchase of the land and on continuous occupation.

The Defendant agreed he sold three acres to the Plaintiff but denies that the Plaintiff ever took possession of the land. It is the Defendant's case that he is the one who had planted the coffee stems before he sold the land. The sons of the Plaintiff later opposed the sale of the land and drove out the Plaintiff from the land in 1985. they demolished a mud house the Plaintiff had build on the land. The Defendant sold part of the land to someone else in 1991. His son, PW2, supported the evidence of the Defendant on the sale of land, non-occupation and non-development by the Plaintiff. He said the Plaintiff has a home on his own land across the river where he resides with his family.

Both parties filed submissions which I have perused. The Plaintiff said that he had sued the Defendant before Mt. Elgon Land Disputes Tribunal for transfer of the land in the year 2002. The tribunal granted him the orders sought. It appears that these orders were later quashed which fact the Plaintiff said in cross-examination that he did not know. The land is registered under the Registered Land Act, Cap 300 and I suppose the issue of lack of jurisdiction on part of the tribunal led to the quashing of the award. The evidence on the tribunal's award is therefore not helpful to the Plaintiff. The sale of the land was denied. The transaction was of course null and void for want of land board consent six (6) months later. Both parties agree that no such consent was obtained.

That notwithstanding, the Plaintiff's claim is based on adverse possession. In a case of this nature the Plaintiff must prove that he occupied the land and lived there peacefully and continuously for a period not less than 12 years. The Defendant said he sold part of the land to a 3rd party in 1991 and produced an agreement. This was seven (7) years after the Plaintiff bought the land. The 3rd party is said to have occupied the two (2) acres he purchased after he constructed a home there. The Plaintiff in his evidence said that he learnt in the year 2001 that the Defendant had sold the land. This was seventeen (17) years after the sale agreement between the parties. The Plaintiff seem to have slept on his rights for all that period. His explanation is that the Defendant told him that there was a case pending in the Court of Appeal which he had to wait for its determination before transfer could be effected. The particulars of the case including its nature, date of filing and determination were not given. It would have been important to provide the details in order to justify the long wait. The evidence of PW2 was not very convincing on continuous occupation of the land by the Plaintiff. He did not give the date or the period the Plaintiff took occupation of the land. Neither did he say when the Plaintiff planted the coffee. The Plaintiff also failed to provide those details.

On the other hand, the Defendant said he had planted 10,000 coffee stems in 1980 and that the place he sold to the Plaintiff had coffee plants on it.

In the case of *GITHU -VS- NDETE CIVIL APPEAL NO.24 OF 1979 COURT OF APPEAL NAIROBI* cited by the Plaintiff, it was held:

> "*Time ceases to run under the Limitations of Actions Act when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land.*"

In this case, the Defendant sold the land to a 3rd party seven years after the sale to Plaintiff. The agreement between him and the Plaintiff was at that time void for want of Land Board consent. Although the Plaintiff denies knowledge of the sale, the Defendant said he offered refund of the purchase price to the Plaintiff who refused to receive it. Time therefore stopped to run at the time the land was sold to

someone else and refund of purchase price offered. Only seven (7) years had passed by then. The required twelve years was yet to be achieved.

The Plaintiff has failed to prove that he has lived on the three acres sold to him for the period upon which the operation of the law would confer title to him by adverse possession. The Defendant was not justified to keep the Plaintiff's purchase price for that long. If the Plaintiff refused to accept it back, the Defendant would have used other legal means to give the money back.

I find that this claim fails for lack of proof and is dismissed. The Plaintiff is entitled to refund of the purchase price of Ksh.18,500/= with interest at court rates from the date of filing the suit. Each party to meet their costs of the suit.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma this 9th day of February, 2010.

In the presence of the Applicant Peter Pepela.