



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Civil Case 15 of 2000

JACTON ABELU OMERI.....PLAINTIFF

~VRS~

ALBERT OUMA MATIADEFENDANT

JUDGMENT

The Plaintiff Jackton Abelu Omeri sues the Defendant Albert Ouma Matia for orders of eviction and injunction in respect of land parcel No.South Teso/Angoromo/46. In his amended plaint dated 21st July 2000 he avers that the Defendant encroached on his land in 1984 claiming title by adverse possession which suit was dismissed for want of prosecution. The land was subdivided into several parcels thereafter. The Defendant has now encroached on L.R. South Teso/Angoromo/5979 registered in the name of the Plaintiff. The alternative claim in the plaint is that the Plaintiff holds the land in trust for the Defendant.

The Defendant in his written statement of defence denies the claim and pleads title by way of adverse possession having occupied the parcel for over 12 years before this suit was filed. The plaintiff's case was heard by Justice Wanjiru Karanja. I took over the case on 3/11/2009 and heard the defence case.

The Plaintiff testified that the land was registered in the joint names of himself and one Samuel Oparas when the Defendant entered into it. The Defendant is not related to the Plaintiff. The Plaintiff later caused the land to be subdivided. The land in issue now and on which the Defendant continues to trespass is South Teso/Angoromo/5929. He produced a certified copy of register. The Defendant had filed a claim of adverse possession in HCCC No.67 of 1984 (O.S) which was dismissed for want of prosecution. The Plaintiff produced a copy of the ruling of the court. The Plaintiff has continually given the Defendant notice to quit but he had failed to do so.

The Defendant testified that the original land South Teso/Angoromo/46 belonged to his father Matio Okadikol and himself. It was in the names of Matia Okadikol and Albert Ouma Matia. The Defendant said he was not aware of how the Plaintiff Jackson Abelu Omeri obtained the title to the land. The land of the Plaintiff's father Omeri shared a

common boundary with that of the Defendant and was parcel number 47. The land is still what belongs to the Plaintiff. The Defendant was born on the land in question and grew up there and is still on the land. He has built his home on the land specifically parcel no.5979 which was created after sub division by the Plaintiff. His father died in 1978 and was buried on the land. The Plaintiff has never lived on the land. The Defendant told the court that neither his father nor himself ever sold the land to anybody.

The Plaintiff called three witnesses. DW2 testified that in 1957 he was the Assistant Chief of Andungosi Sub-location. DW2 said he knows the history of the land. He recalls that the land in belonged to the father of the Defendant. It was parcel no.46. the Plaintiff's father Zakiel Omeri's land was no.47. The two parcels shared common boundaries. Mr. Omeri now deceased encroached on parcel no.46 and fixed false boundaries. Mr. Omeri wanted to acquire more land through fraudulent means. The matter was reported to him by the Defendant's father. DW2 referred the case to the Area Chief. The dispute was determined in favour of the Defendant's father. The Plaintiff's father was charged in court with a criminal case relating to interfering with boundaries. In 1969, a boundary dispute between the parties arose. It was heard and determined by the land Adjudication Committee in favour of the Defendant's father and boundaries rectified.

DW2 further testified that the Defendant has lived on the land since birth. After his father's death, DW1 has lived on the land and is still there to date. The late Mr. Omeri is not a relative to the late Matia Okadikol and that the two only shared a common boundary. According to DW2 the land rightfully belongs to the Defendant.

DW3 was the Assistant Chief of the Angolomo Sub-location in 1963. He said that during his time in office a boundary dispute on land no.46 South Teso arose between the fathers of the parties herein. It was heard in Nambale native court and decided in favour of the Defendant's father. The family of the late Mr. Matia Okadikol has always lived on the land and that their dead fathers are buried there. The Defendant lives on the land and it is not known how the Plaintiff acquired the title.

DW4 is the former Member of Parliament of Amagoro Constituency and former mayor of Amagoro Town. He testified that he knew the Defendant Albert Ouma Matia for more than 21 years. The land in question belonged to the Defendant's father Matia Okadikol and was grabbed by the father of the Plaintiff. He is aware of all arbitration engagements done to resolve the land dispute between the fathers of the parties in many forums including the District Commissioner Teso. He is aware that the Plaintiff got the title to the land and has now sub-divided it into several portions. He corroborated the defence evidence that the Defendant has resided on the land since he was born.

The Plaintiff filed submissions which I have perused and considered the issues raised therein. The Defendant called witnesses who were indeed credible as far as the history of the land is concerned. He put up a defence that he is entitled to the land through adverse possession and alternatively that the Plaintiff holds the land in trust for him. The Defendant appeared in person which was a disadvantage to him especially as regards drafting of the pleadings.

The defence does not contain the land reference number of the land he is claiming. After the plaint was amended to address the new numbers on sub-division, the Defendant did not amend his defence.

His defence was meant to be a counterclaim that he has acquired title through adverse possession having been born on the land, brought up there, married there and his parents having been buried there. He told the court that he did not know how to read. Before his father whom he claims was the rightful owner of the original parcel no.46 died, the father of the plaintiff had already acquired title to the land. He is Mr. Ezekiel Omeri and was the first registered owner in 1973. This first registration was not challenged in the lifetime of the late Omeri. Section 143 of the Registered Land Act provides that first registration may be challenged on grounds that it was obtained through fraud or mistake. The Defendant's father who died much later in 1978 never challenged the said first registration. According to the Defendant, he did not know that the Plaintiff had title to the land until many years later. It appears that even the late Defendant's father was not aware in his lifetime that the late Mr. Omeri had caused the title of the land to be issued in his name. From the evidence on record, the registered proprietor did not disturb the family of Mr. Matia Okadikol who continued living on the land peacefully. Mr. Matia died and left his family including the Defendant still residing on the land.

In 1980 the Plaintiff through a succession cause seems to have inherited the land from his late father with two other people through a succession cause.

On 28/5/1984, one Samuel Ikwara's Emungas was registered with the Plaintiff jointly having been given part of the land as a gift. In July the year 2000 the land was sub-divided into two parcels with the Plaintiff taking parcel number South Teso/Angoromo/5737. Samuel Emungas was the registered proprietor of parcel number 5738. In the year 2001, the Plaintiff sub-divided his parcel into two. He is now the registered owner of parcel number 5979 on which the Defendant and his family lives.

That being the long history of the land, I proceed to look at the claims of the Defendant. On the claim of adverse possession, the first registered owner was issued with a title in 1973. As I have said earlier, this registration was not challenged under section 143 of the Registered Land Act. The Defendant lived on the land peacefully and continuously for seven (7) years before the Plaintiff and two others inherited the land in 1980. The Defendant lived there for four (4) years before the Plaintiff and Samuel Emungas became joint owners in 1984. The parties sub-divided the land in the year 2000. By this time the Plaintiff had held the title to the land for six (6) years since the first sub-division.

The parcel in issue now is no.5979 on which the Defendant claims to have lived before this suit was filed. The period translates to only a few months. This case was filed on 26/6/2000. The Defendants claim in respect of this parcel for adverse possession has not been established because the requisite period of twelve (12) years has not been achieved for the operation of the law to confer title on the Defendant. The Defendant's case is that he claims title through adverse possession in respect of the original parcel South Teso/Angoromo/46. The title has changed hands and its nature several times since 1980. There is no doubt that several parties are involved in this scenario and have not been joined in this

suit. This court cannot make orders which would affect third parties in this case. If this was done, it would be the rules of natural justice.

On trust, the Defendant has not adduced any evidence to show when and how trust was created in his favour in regard to L.R. South Teso/Angoromo/5979. I therefore find that the Defendant's defence does not controvert the Plaintiff's evidence which was based on documentary evidence.

The Plaintiff's copies of the registers show the history of the land South Teso/Angoromo/46 and has demonstrated how he acquired the land L.R. number 5979 which parcel resulted from the second sub-division.

I find that the Plaintiff has proved his case on the balance of probabilities as required by the law. I enter judgment in his favour as prayed.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Busia this 2ND day of February 2010.
In the presence of Mr. Kweyu for Omondi for Plaintiff.