



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII Civil Suit 24 of 2006

ANISON NYAHIRI MUHINDI.....PLAINTIFF

VERSUS

SAMSON GETANGITA NKWENGE1ST DEFENDANT
JULIUS RANGE NKWENGE
(SUED AS LEGAL REPRESENTATIVE OF
NKWENGE MWITA MONGORI – DECEASED).....2ND DEFENDANT
JOSEPH MWITA NKWENGE
(SUED AS LEGAL REPRESENTATIVE OF
NKWENGE MWITA MONGORI)3RD DEFENDANTT

JUDGMENT

By an originating summons dated 27th February, 2006, the plaintiff sought the following orders:

1. That he had been in continuous, uninterrupted and peaceful occupation of a seven acre parcel of land comprised in title number Bukira/Bwisaboka/165 measuring 17.2 hectares (hereinafter referred to as “**the suit land**”) currently registered in the name of Nkwenge Mwita Mongori (deceased) for a period exceeding 12 years.
2. That the defendants are the administrators of the estate of the said Nkwenge Mwita Mongori (deceased).
3. That he is entitled to be registered as the sole proprietor of the 7 acre parcel of land by virtue of adverse possession.
4. That the defendants do pay the costs of this suit.

The originating summons was supported by an affidavit sworn

by the plaintiff. He deposed that in the year 1966 Nkwenge Mwita Mongori, hereinafter referred to as “**the deceased**” sold to him a parcel of land measuring 7 acres or thereabout comprised in title number **Buikira/Bwisaboka/165** measuring 17.2 hectares or thereabout. The sale was pursuant to an oral agreement where he paid to the deceased a sum of Kshs. 7,000/= as purchase price for the suit land. Immediately thereafter he took possession of the same and began to develop it. He also settled there with his family and that is where he lives today. The plaintiff further averred that his occupation of the suit land has been open, peaceful, continuous and uninterrupted since the year 1966. He urged the court to order that he be registered as the sole proprietor thereof by way of adverse possession as against the defendants who are the administrators of the estate of the deceased. The plaintiff annexed to his affidavit a copy of letters of administration issued in **Succession Cause No. 10 of 2005** in the Resident Magistrate’s court at Kehancha. He also annexed a copy of a certificate of official search which shows that land parcel No. Bukira/Bwisaboka/165 is registered in the name of the deceased since 28th May 1973.

On 30th March, 2006, the defendant filed a replying affidavit. The same was sworn by the 1st defendant for and on behalf of all the defendants. He stated that before commencement of land adjudication in Bwisaboka Adjudication section, the deceased, who is their father,

owned a large parcel of land measuring approximately 29.7 hectares (74.25 acres). He sold a portion thereof measuring 12.2 hectares to one Kiambutha Mona who thereafter became registered as proprietor on first registration thereof and which parcel of land was registered as Bukira/Bwisaboka/177. Following the death of Kiambutha Mona, the said parcel of land was transferred by way of succession to his widow, **Anne Wanyuru Kiambutha**. On 10th April, 1984, the said Anne sold the land to Annon Nyahiri Muhindi who later erected some houses on a portion thereof towards the side of the deceased's land.

On 28th May, 1973, the deceased was registered as the proprietor of the remaining 17.5 hectares which became Bukira/Bwisaboka/165 but the actual physical boundary was only fixed by the plaintiff and a proper survey has never been carried out as to where the boundary between the deceased's land and that of Kiambutha Mona ought to be. He further stated that on 6th October, 1973, the deceased passed away and as everyone was living in peace they did not bother to take out grant of letters of administration intestate. Sometimes in August 2005 they were served with a Citation, Affidavit and Notice of Motion filed by the plaintiff wherein he had alleged that he had purchased 5 acres of the deceased's land in 1966 at a price of Kshs.7,000/= . In the said citation the plaintiff alleged that the deceased died in the year 1968 which was not the case. As a consequence of the said citation the defendants applied and obtained Grant of Letters of Administration of the deceased's estate.

On 18th November, 2005, the plaintiff filed an originating summons in Kisii HCCC No. 151 of 2005 in which he alleged that he purchased 7 acres of the deceased's land in 1966. The suit was however withdrawn on 2nd February, 2006 and the present one filed thereafter. All along the plaintiff had not produced any documentary evidence of purchase of the land. The defendants averred that if indeed the plaintiff had purchased the suit land in 1966 as alleged he ought to have been registered as proprietor of the same on first registration as was the case of Kiambutha Mona. The deponent further stated that he was an adult when their father died and he had not told him of the alleged sale of the suit land to the plaintiff. The defendants had all along believed that the plaintiff built his houses on his land parcel No. Bukira/Bwisaboka/177 until the time he brought this suit.

Sometimes in January, 2006, the plaintiff moved the District Land Registrar and Surveyor to survey and fix a boundary between the two parcels of land and the defendants were duly summoned to attend the said exercise. However, when the defendants hired the services of a private surveyor to carry out the task together with the District Surveyor, the exercise was not carried out.

On 18th October, 2006, when this matter came up for directions it was by consent agreed that *viva voce* evidence be taken to determine the issues raised in the originating summons. It was further agreed that the originating summons and the supporting affidavit thereto be deemed to be the plaint and the replying affidavit be deemed as the statement of defence.

During the hearing the plaintiff reiterated his contention in the affidavit in support of the originating summons that in 1966 he purchased from the deceased parcel of land measuring 7 acres or thereabout from the deceased's parcel of land, Bukira/Bwisaboka/165. Since then he has been on occupation of the suit land. In 2005 the defendants invaded his land, destroyed the boundary and started cultivating thereon. He made a complaint to the area District Officer on 3rd October, 2006. The plaintiff urged the court to order that he be registered as the proprietor of the suit land.

In cross examination, the plaintiff stated that there was no sale agreement between him and the deceased. He further stated that land adjudication in the area started around 1971 or 1972. That notwithstanding, he did not have the suit land adjudicated in his favour.

When the plaintiff was shown a copy of the citation which he had filed wherein he had stated that he purchased from the deceased 5 acres and not 7 as stated in this suit, he responded that his advocate had made a mistake in stating the acreage. He further stated that the defendants had uprooted the sisal plants that marked the boundary between the suit land and their late father's land and as a result he

requested the area District Land Registrar to fix the boundary afresh. He further stated that his home is situated on the suit land, that is on land parcel No. Bukira/Bwisaboka/165 and not on his land, parcel No. 177 which he purchased in 1984.

Joseph Marwa Muniko, PW2, is a retired Senior Chief from the area where the suit land is situated. He said that he was aware that the plaintiff bought a parcel of land from the defendants' late father. PW2's parcel of land is known as Bukira/Bwisaboka/187. He is a neighbour of both the plaintiff and defendants. PW2 further testified that the plaintiff had been living on parcel No. 165 from 1966. He was also aware that the defendants invaded the plaintiff's land and uprooted the sisal plants that formed a boundary between parcels Nos.187 and 165.

In cross examination PW2 said that he did not witness the alleged sale transaction between the plaintiff and the deceased and neither had he seen any written agreement between them in respect of the suit land.

The 1st defendant, DW1, told the court that their father died in 1973 and he produced the death certificate in support thereof. It shows that the deceased died on 6th October 1973. He stated that the deceased did not sell any part of his land before land adjudication was done in the area. He sold a portion of his land to one Kiambutha Mona who proceeded to register the same in his own name. After the death of the said Kiambutha Mona, his land parcel No. 177 was registered in the name of his widow, Anne Wanyuru Kiambutha, who in turn sold it to the plaintiff on 10th April 1984. The said parcel of land borders parcel No. 165. The plaintiff built on that land and became a neighbour of the defendants. There was a physical boundary marked by sisal plants but the plaintiff destroyed it using a tractor, DW1 stated. He filed a citation alleging that he had bought from the deceased 5 acres of land. DW1 referred to succession cause No. 10 of 2005 at Kehancha Resident Magistrate's court.

The 1st defendant denied the plaintiff's claim and said that if indeed he had purchased the 7 acres from the deceased in 1966 as alleged he ought to have been registered as the first proprietor thereof during the land adjudication exercise. He further stated that when the plaintiff took a surveyor to the land to fix a boundary, the defendants instructed a private surveyor to work together with the District Surveyor but their surveyor was not allowed to participate in the exercise. DW1 said that they had lived peacefully on the land until the time when the plaintiff destroyed the boundary as aforesaid.

In cross examination, the 1st defendant stated that the plaintiff moved to land parcel No. 177 in 1985. He denied that PW2 is their neighbour since his land is about 4 kms away. DW1 further stated that after the Land Registrar fixed a boundary between their land and the plaintiff's land, the plaintiff caused them to be arrested and when they had been incarcerated the plaintiff put up a house on the disputed portion of the land.

In re-examination, the 1st defendant stated that the plaintiff had obtained a death certificate in respect of their father showing that he died in 1968 whereas the deceased died in 1973.

The other defendants adopted the evidence of DW1.

At the close of the hearing, the advocates for the parties filed their respective written submissions which I have carefully perused.

The issues for determination in this case may be stated as follows:

- (i) Whether the plaintiff purchased a parcel of land from the deceased in 1966.**
- (ii) If so whether the plaintiff took possession of the same.**
- (iii) Whether the plaintiff's occupation of the suit land, if at all, is adverse to the interest of the defendants.**
- (iv) Whether the plaintiff is entitled to the orders sought.**

The law on adverse possession of land is now well settled. In

order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. See **WANJE –VS- SAIKWA** (NO.2) [1984] KLR 284. In the same decision it was further held that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

In this case, the plaintiff alleged that he purchased a parcel of land measuring 7 acres from the deceased in 1966. He said that there was no written agreement. He further stated that he took possession of the land that he had allegedly purchased immediately thereafter. If indeed the plaintiff did purchase the suit land from the deceased as alleged, his entry into the land was with the deceased's consent and cannot be said to have been adverse to the deceased's interest.

Evidence on record shows that land adjudication in Bukira/Bwisaboka area was done in early 70^s. This is because the register for Bukira/Bwisaboka registration section was opened on 28th May 1973. Ordinarily, all the people who had interests in land in the area ought to have been so registered during the adjudication exercise. They would thus be given title deeds for their respective parcels of land as the first registered proprietors thereof. **Section 13(1)** of the **Land Adjudication Act, Cap 284 Laws of Kenya**, states as hereunder:

“13 (1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.”

Upon finalization of the adjudication exercise and determination of all disputes, the Adjudication Register is completed and title deeds issued. The plaintiff, having alleged that he was in occupation of the suit land from 1966 upto the time when the adjudication exercise commenced and finalized, ought to have raised his claim over the suit land so that it could be adjudicated upon. The person who allegedly sold the suit land to the plaintiff, Nkwege Mwita Mongori (the deceased) died on 6th October 1973 as per the death certificate, **D. Exh.1**. Although the plaintiff alleged that the deceased died in 1968 there is no proof to that effect. If indeed the plaintiff had a valid claim over the deceased's parcel of land, why did he not raise it up during the lifetime of the deceased? These are issues which the plaintiff was unable to sufficiently explain. It is inconceivable that the plaintiff decided not to make a claim to the recording officer during the adjudication period.

The plaintiff is the registered proprietor of parcel of land known as **Bukira/Bwisaboka/177** which shares a common boundary with **Bukira/Bwisaboka/165**. According to the defendants' evidence, the deceased owned a very big parcel of land and before the adjudication exercise he sold a portion thereof to Kiambutha Muna.

That land was eventually registered as parcel **No. Bukira/Bwisaboka/177**. The plaintiff then acquired that land from Anne Wanyuru Kiambutha. It would appear that the boundary between these two parcels of land has always been in dispute.

Turning back to the issues for determination as earlier framed, the plaintiff did not sufficiently prove that he purchased the suit land from the deceased in 1966. Although he stated that there was no written agreement and that the defendants were present when he purchased the land, the defendants' contention was otherwise. Even in the old days when our forefathers used to transact without any written agreements, there would always be witnesses representing each side of the contract. One would have expected that the plaintiff had some

elders as his witnesses. If so, he ought to have called them as witnesses in this case. He called none. PW2 said that he did not witness the transaction between the plaintiff and the defendants' father.

Section 107 (1) of the **Evidence Act**, state that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

It was therefore incumbent upon the plaintiff to prove, on a balance of probabilities, that he purchased the suit land from the deceased in 1966.

But even if the plaintiff purchased the suit land from the defendant and took possession of the same his occupation cannot be said to have been adverse to the interests of the deceased which were eventually passed on to the defendants. See **WANJA –VS- SAIKWA (NO.2)** (supra). In **BENJAMIN KAMAU MURIMA & 3 OTHERS –VS- GLADYS NJERI** Civil Appeal No. 213 of 1996, the Court of Appeal held as hereunder:

“Indeed in determining whether or not the nature of actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse.”

In view of the foregoing, I am unable to hold that the plaintiff is entitled to be registered as the sole proprietor of the suit land by virtue of adverse possession. I dismiss the plaintiff's suit with costs to the defendants. But having come to that conclusion, I think it is important that the area Land Registrar determines the boundary between the two parcels of land, that is, **Bukira/Bwisaboka/165** and **Bukira/Bwisaboka/177**.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF JULY, 2010.

D. MUSINGA
JUDGE.

8/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Ochwangi for the Plaintiff

Mr. Okoth for the Defendants

Court: Judgment delivered in open court.

D. MUSINGA
JUDGE.