



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Civil Case 163 of 1996

NYANG'WONO MOTONU PLAINTIFF

VERSUS

SABINA NYANGIGE NYANGA'U

CYPRIAN ONDIEKI NYAMBEKI..... DEFENDANT

JUDGMENT

The plaintiff filed a suit against the defendants jointly and severally and sought the following reliefs.

- (a) A declaration that he has obtained a good title to land parcel NO.Wanjare/Bogitaa/810, hereinafter referred to as “the suit land” by way of adverse possession.**

- (b) A declaration that the transfer of the suit land to the 2nd defendant by the first defendant is null and void.**

- (c) An order to have the register rectified to have the name of the 2nd defendant cancelled and replaced by that of his.**

- (d) An order of permanent injunction restraining the defendants from interfering with his quiet enjoyment of the suit land.**

The defendants filed a statement of defence and denied

the plaintiff's claim. They stated that the 1st defendant was the registered proprietor of the suit land and he lawfully transferred the same to the 2nd defendant. They added that the plaintiff had never been in occupation of the suit land in a manner that would entitle him to prescriptive rights over the same.

The plaintiff testified that the 1st defendant is his mother in-law. He said that he did not know the 2nd defendant. He married the 1st defendant's daughter in 1966. The 1st defendant requested him to give her a piece of land to cultivate, which he did. She cultivated the land for about two years after which he took over the same. But unknown to the plaintiff the 1st defendant unlawfully acquired a title deed for the land. After some time the 2nd defendant said that the land belonged to him. The plaintiff asserted that from 1975 to 1996 he was in occupation of the land, the suit land. He claimed that he had acquired the land by adverse possession. He prayed that the title deed be cancelled and same be issued in his name.

The plaintiff called **Salome Nyaboke Matoke, PW2**, as a witness. She said that the plaintiff is her brother in-law and the 1st defendant is her mother. She testified that the 1st defendant was given a piece of land to cultivate by her father in-law during his life time. Later on when she wanted to sell the land the plaintiff gave her cows to compensate for dowry which had not been paid. She claimed that the land is occupied by the plaintiff. She further stated that it was unusual for an in-law to own land in the place where her daughter is married.

Charles Mirogi Akuma, PW3, said that he was one of the people who took one cow and five thousand shillings to the 1st defendant as dowry for PW2. He said that the 1st defendant had a parcel of land which had been given to her as dowry for her daughter, PW2, who was married in the home of the plaintiff. The father of the plaintiff did not have cows to give as dowry and so he gave her the land. The 1st defendant acquired a title deed for the same. When she wanted to sell the land the plaintiff discussed and agreed with her that she be given dowry and in return she surrenders back the suit land to the plaintiff. Although the dowry was given, PW3 learnt that the 1st defendant had sold the land to the 2nd defendant.

In cross examination, PW3 said that the dowry of one cow and five thousand shillings was given to the 1st defendant before she had sold the land.

The 1st defendant testified that the suit land was given to her by the father in-law of her daughter, PW2, since he was unable to pay dowry in form of cows. She took possession of the land but when her husband passed away the plaintiff started causing chaos over the land and as a result she decided to sell the land to the 2nd defendant. By then she had already acquired a title deed over the same. She denied having been given any cow or cash as alleged.

In cross examination she denied that she was given the land to hold as security before dowry could be paid. She agreed that it was not normal in Gusii land for an in-law to be given land in the place where her daughter is married and it was for that reason that she decided to sell the land after realizing that the plaintiff was not happy about her continued occupation of the land.

The 2nd defendant, **DW2**, claimed that plaintiff was corroborating with one **Charles Birundu** to unlawfully acquire the suit land. He said that the plaintiff had unlawfully sold the suit land to Charles Birundu. A second title deed was issued after the lands registry was made to believe that the 1st defendant was deceased. He informed the Land Registrar that the 1st defendant was alive and he was asked to take her to the land registry which he did. The Land Registrar wrote to the area Chief to verify that the 1st defendant was actually alive and was the owner of the suit land. That was verified. After that the plaintiff went to the area Land Control Board and objected to the transfer of the land from the 1st defendant to the 2nd defendant, saying that he had bought the land. He was asked to avail evidence but he was unable to do so. Consequently, the Land Control Board gave consent for transfer of the land to himself. He was issued with a title deed on 22nd August, 1995. However, the area Index Map revealed that the size of the suit land was smaller than it was supposed to be. A different land parcel had been carved out on the upper part of the suit land. The 2nd defendant produced the area Index Map as defence **Exhibit 2**.

In cross examination, DW2 said that he had lawfully acquired the title deed for the suit property, having

purchased the land from the 1st defendant. The area Land Control Board consented to the said transaction. From 1995 he has been in occupation of the suit land and he uses the same for grazing his animals.

The plaintiff filed written submissions and the 2nd defendant made brief oral submissions.

It is trite law that a claim for land by way of adverse possession must be brought through an originating summons. The summons should be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. See **Order XXXVI rule 3D (1) (2)**. This is a mandatory provision of the law. If such a claim is brought by way of a plaint or a counterclaim the same is bad in law and is misconceived. The Court of Appeal so held in **NDATHO -VS-**

ITUMO & 2 OTHERS, [2002] 2 KLR 637.

The plaintiff instituted his case by way of a plaint and that in itself renders the suit incompetent.

That notwithstanding, strict proof is required in a claim of land based on the doctrine of adverse possession. For a claimant to succeed in such a case he must show that he has been in quiet continuous and exclusive possession of the land in dispute for a period of at least 12 years. The plaintiff said that he gave the suit land to the 1st defendant to cultivate sometimes in 1966 after he married her daughter. He said that she used the same for only two years. He called PW2 and PW3 who gave evidence that contradicted what he told the court.

PW2 who is a daughter of the 1st defendant said that after she was married by the plaintiff's brother, her mother (1st defendant) was given the suit land by her father-in-law. That was in lieu of dowry which was not paid. Later on when she wanted to sell the land, the plaintiff said that he could give her cows to compensate for the dowry which had not been paid.

PW3 said that a cow and Kshs. 5,000/= were given to the

1st defendant and that was to purchase back the land. He alleged that the cow and the money was given in 1975. That was denied by the 1st defendant. She said that no cow or money were ever given to her by the plaintiff.

The plaintiff had no documentary evidence to prove his claim. He had the burden of prove and he did not sufficiently discharge the same. **Section 107 (1)** of the **Evidence Act** states as follows:

**“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.”**

The 1st defendant testified that she had all along peacefully cultivated the suit land and the plaintiff started claiming the same after the death of her husband.

If it is true that the plaintiff acquired the land from the 1st defendant in 1975, why did he not take any step to acquire a title deed for the same? The title deed that was produced by the 2nd defendant shows that the register in respect of the land was opened on 4th August, 1976. It is therefore likely that the 1st defendant became the first registered proprietor of the suit land sometimes in 1976.

I do not believe the plaintiff's contention that since 1975 to 1996 he was in quiet occupation of the suit

land.

Prior to the sale of the suit land by the first defendant to the 2nd defendant the plaintiff attempted to oppose the said transaction before the area Land Control Board but he was unsuccessful. The 2nd defendant testified that he has been in possession of the suit land from the time he acquired the same. He is grazing his animals thereon. There is nothing to show that he acquired the suit property unlawfully.

Having considered all the evidence on record, I find and hold that the plaintiff's suit is not only bad in law, having been instituted in the wrong manner but also lacks merits. I dismiss the same with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF NOVEMBER, 2009.

D. MUSINGA

JUDGE.

18/11/2009

Before D. Musinga, J.

Mobisa – cc

2nd defendant – present

N/A for the plaintiff

Court: Judgment delivered in court.

D. MUSINGA

JUDGE.