



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Suit 72 of 2005

WILLIAM BARASA MUKUBUYI ::::::::::::::: PLAINTIFF.

VERSUS

JEPHTER MWASAME MASAI ::::::::::::::: DEFENDANT.

J U D G M E N T.

The claim before me is for a declaration that the defendant was a trespasser on the suit property, title No. WEST POKOT/KERINGET A/841, as the Agreement for sale between the defendant and the plaintiff's father was nugatory and void in law. Consequently, the plaintiff asks the court to issue an order for the eviction of the defendant from the suit property.

The plaintiff also prays for costs of the suit, as well as interest. However, the plaintiff did not specify the aspect of his claims which would attract interest, or the rate of such interest.

The plaintiff, William Barasa Mukubuyi, is the son to John Wanyama Mukubuyi who is the registered proprietor of the suit property. He has brought this action pursuant to a registered power of attorney, which was donated to him by his father.

When the case came up for hearing on 8th May, 2007, the plaintiff was acting in person. In his evidence-in-chief, the plaintiff said that the suit property was registered to his grandfather, Andrea Nabimba, on 9th April, 1984.

The plaintiff also testified that the defendant did execute an Agreement for Sale dated 28th April, 1983. That agreement was also executed by the plaintiff's father.

Therefore, it was the contention of the plaintiff that as at the time when the Agreement for sale was signed between his father and the defendant, the property that was the subject matter of that agreement was not yet in existence.

It was for that reason that the plaintiff asked the court to hold that the defendant should not be permitted to come and lay claim to the suit property, as the said property was not the same as the unregistered land which the defendant had purchased earlier.

The plaintiff submitted that had the defendant been a genuine buyer, he would have protested to the succession cause which gave to the plaintiff's father the suit land, as his share of his late father's estate.

The plaintiff also contended that the Agreement for sale dated 28th April, 1983 was void, for lack of consent from the Land Control Board for the area where the suit property was located.

In any event, adverse possession could not have arisen, said the plaintiff, because the Title Deed for the suit property was first issued to his father in 1986, and thereafter the plaintiff filed a complaint before the Kapenguria Panel of Elders in 1995. In effect, the plaintiff was saying that between 1986 and 1995, the duration was less than the twelve years which are a prerequisite for a claim for adverse possession.

It was the evidence of the plaintiff that the Kapenguria Panel of elders did allocate some 7 acres to the defendant, whilst allocating 3 acres to the family of John Kundu Mukubuyi, the plaintiff's father. That decision of the elders was adopted as a judgment of the court.

However, the said decision was subsequently quashed by the High Court in the Judicial Review Proceedings **WILLIAM MUKUBUYI VS. KAPENGURIA LAND DISPUTES TRIBUNAL AND JEPHTER MWASAME MASAI, ELDORET HIGH COURT MISC. APPLICATION NO. 225 OF 1997.**

The plaintiff informed the court that there had been no appeal against the Ruling quashing the decision of the Kapenguria Land Disputes Tribunal.

Instead, the plaintiff asserted that the defendant herein filed another suit, being SPMCC No. 285/98, against the plaintiff's father.

The plaintiff also testified that he needed to, and did obtain a power of attorney from his father, so as to have the requisite authority to bring this suit against the defendant.

In cross examination, the plaintiff conceded that the defendant bought the suit property in 1983 and thereafter the defendant took possession thereof in 1984. The plaintiff also conceded that by the time the defendant took possession, he had paid the full purchase price.

Notwithstanding the said transaction, the plaintiff's father was registered as the owner of the suit property on 6th February, 1986.

Nine years after the plaintiff's father was registered as the proprietor of the suit property, the plaintiff lodged a complaint was against both the defendant herein as well as the plaintiff's father. And the basis for the complaint was that the defendant ought not to enter onto the land which he had purchased.

As the plaintiff concedes that the defendant had been in occupation of the suit property from 1984, it is not clear to me how the plaintiff wanted to stop him from doing that which had already been accomplished.

Furthermore, the plaintiff also confirmed to the court that when his father testified before the Tribunal, he said that he had indeed sold the land to the defendant. As a consequence of the analysis of the complaint and the evidence adduced before it, the tribunal awarded to the defendant some seven (7) acres of the suit property.

Because the plaintiff was not satisfied with the decision of the Tribunal, he instituted Judicial Review proceedings, which culminated in the quashing of the award made by the Kapenguria Land Disputes Tribunal.

However, even after the High Court had quashed the Tribunal's award, the plaintiff failed to evict the defendant. His application for eviction was dismissed because he lacked the requisite locus to sustain the claim.

It is significant that the plaintiff only got a power of attorney from his father on 28th September, 2004. That implies that all actions which were undertaken by the plaintiff prior to that date, were done without

the authority of the registered proprietor of the suit property. One such action would obviously be the Judicial Review proceedings which quashed the award of the Kapenguria Land Disputes Tribunal.

At the close of the plaintiff's case, the defendant sought and was granted an adjournment, so as to enable him have the opportunity to give further instructions to his advocate.

On 23rd July, 2007, when the trial was supposed to resume, the defendant and his advocate failed to attend court. As that hearing date had been set in the presence of both the defendant and his advocate, the court held that their failure to attend court implied that the defendant did not have any evidence to offer in his defence. In the result, the testimony of the plaintiff was uncontroverted.

The question that I must now answer is whether the plaintiff had adduced sufficient evidence to satisfy the court on a balance of probabilities, that he is entitled to the relief's sought.

In that regard, the court notes that the plaintiff did not produce any documentary evidence to support his case.

During his testimony the plaintiff made reference to the documents whose copies were annexed to his list of documents. Those documents were marked by the plaintiff as "WBM 1"; "WBM 2"; "WBM 3"; "WBM 4"; and "WBM 5", respectively. However, at no time did the plaintiff seek to produce the primary documents, as exhibits at the trial.

By virtue of section 67 of the Evidence Act, documents must be proved by primary evidence except in the circumstances otherwise specified.

Section 65 (1) of the Evidence Act provides that primary evidence means the document itself produced for the inspection of the court.

On the other hand, the defendant failed to adduce any evidence to controvert the oral testimony of the plaintiff. Therefore, I do find that the Agreement for sale dated 28th April, 1983 was unenforceable due to the lack of the requisite Land Control Board consent. In other words, the defendant could not seek to have it specifically enforced.

On the other hand, the plaintiff readily conceded that his father had not only intended to sell he suit property to the defendants but had also received the full purchase price. Therefore, the defendant is deemed to be in occupation of the suit property by virtue of a valuable consideration which was asked for and received by the registered proprietor of the said property. Accordingly, the defendant was not a trespasser.

To my mind, the fact that the title Deed to the suit property was only issued some three years after the defendant had executed an agreement to buy it, does not mean that the defendant had purchased a property that was different from the suit property. Had that been the position, the plaintiff would not be seeking to have the defendant evicted from the land which the defendant begun occupying pursuant to the agreement for sale.

By the plaintiff's own admission, he only obtained the power of attorney on 28th September, 2004. That would be about 20 years from the date when the defendant went into possession of the suit property.

As the actions undertaken by the plaintiff prior to 28th September, 2004, were without locus, I hold the considered view that they could not be deemed to constitute an interruption of the defendant's continuous peaceful occupation of the suit property.

In the result, even though the Agreement for sale dated 28th April, 1983 is not enforceable, I hold that the defendant was not a trespasser on the suit property, title number WEST POKOT/KERINGET A/841. Therefore, the court declines to order that he be evicted. If that were to be ordered, the court would have

enabled the plaintiff's father to unjustly enrich himself by keeping both the purchase price as well as the land which was deemed to be sufficient consideration for it, as at the date of the agreement.

As each of the parties to the suit is partially successful, I order that each of them should bear his own costs.

Dated and Delivered at Kitale, this 16th day of October, 2007.

FRED A. OCHIENG.

JUDGE.