



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Case 77 of 1996

WANGILA SITUMA WAKALI.....PLAINTIFF

VS

ANDREW MAKHANU MUTORO.....1ST DEFENDANT

HENRY SUDI MAKOKHA.....2ND DEFENDANT

JUDGMENT

In an originating summons dated 27th September 1996, filed pursuant to the provisions of Order XXXVI rule 3D of the Civil Procedure Rules, Sections 7,17, 37 and 38 of the Limitations of Actions Act and Section 30 (f) of the Registered Land act, Peter Wangila Situma Wakali the plaintiff herein, sought for the following orders against Andrew Makhanu Mutoro and Henry Sudi Makokha the 1st and 2nd respondents herein.

- (a) To be declared the owner or two (2) acres out of Land Parcel known as west Bukusu/North Myanga/1880.**
- (b) An order to the effect that the registration of 2 acres and validity of title NO. WEST BUKUSU/NORTH MYANGA/1880 in favour of the 2nd defendant be cancelled and in his place the Plaintiff be registered the Proprietor thereof.**
- (c) An order of declaration that the 1st Respondent's Land Parcel No.WEST BUKUSU/NORTH MYANGA/1880 is extinguished by adverse possession upon the expiry of 12 years during which period the Plaintiff had peaceful, open, uninterrupted occupation.**
- (d) An order of declaration that upon the expiry of 12 years, the 1st Defendant had no title to pass to the 2nd Defendant thus a transfer thereof was invalid and consequently, the 2nd Defendant holds the piece of land in trust for the applicant.**
- (e) An order of declaration that the Plaintiff's subsequent forceful eviction from the suit land comprising of 2 acres was unlawful and that he be reinstated thereon.**
- (f) Costs of the suit.**

When served, the Defendants each filed a response denying the Plaintiff's claim.

When the Originating summons came up for hearing, this court received oral evidence from the parties. On his part, the Plaintiff testified plus one independent witness. He testified as P.W1. He told this court that he bought a piece of land measuring 2 acres to be excised from **L.R. NO. WEST BUKUSU/NORTH MYANGA/586** from one Andrew Makhanu Mutoro, the 1st Defendant herein on the 27th day of August 1981. He said he paid a sum of Ksh.4000/= plus the value of one sheep as required by the Bukusu Customs. He produced as an exhibit in evidence an agreement duly executed by the Plaintiff and the 1st Defendant. P.W1 also produced as an exhibit in evidence a certified copy of the register. P.W1 summoned one John Wekula (P.W2) to testify on his behalf. P.W2 said he drew the agreement between the Plaintiff and the 1st Defendant. He said he witnessed its execution and payment of the consideration. P.W.1 said he immediately put up a house and commenced occupation of the land. P.W1 said he lived peacefully on the land until 1996 when he was forcefully evicted by the 2nd Defendant Henry Sudi Makokha (P.W.2) who claimed that, he had bought the land from the 1st Defendant. P.W.1 said he was prompted to do a search upon which he discovered that, the 1st Defendant had sub divided the entire parcel of land and had the portion he was occupying transferred to the 2nd Defendant sometimes in 1994. P.W1 said his search at the Lands Office indicated that **L.R. NO. WEST BUKUSUS/NORTH MYANGA/586** was closed upon subdivision on 27.6.94 giving rise to subdivisions Nos 1878 – 1885. P.W1 produced a certified copy of the register in respect of **L.R. NO.WEST BUKUSU/NORTH MYANGA/1880** to be in respect of the land he occupied since 1981 until 1996 when he was unlawfully removed. The register shows that the parcel of land was transferred to Henry Sudi Makokha, the 2nd defendant on 21st July 1994.

The 1st Defendant (D.W1) admitted in his evidence while testifying in his defence that he actually sold the land in dispute to the Plaintiff sometimes in 1981. D.W.1 said he later sold the same land to the 2nd Defendant (D.W.2) in 1994 when he disagreed with the Plaintiff. He claimed he refunded the purchase price to the Plaintiff though he did call for evidence to support that averment. D.W.1 said he decided to sell the land to the 2nd Defendant (D.W.2) because the Plaintiff was a very bad man who should not be his neighbour. He sold the land yet the Plaintiff has been in occupation for over 12 years. D.W1 further admitted that he told the 2nd Defendant (D.W2) of his past transactions with the Plaintiff and that he did not mind. D.W.1 said he was aware that the Plaintiff was evicted by the 2nd Defendant sometimes in 1996.

On his part, the 2nd Defendant (D.W.2) claimed that he bought the land now in dispute from the 1st Defendant for a consideration of Ksh.60,000/=. He said he bought the land while he was aware that the Plaintiff was in occupation. D. W. 2 contradicted the 1st Defendant when he denied that he was appraised of the past transactions between D.W.1 and the Plaintiff. He produced the original title as an exhibit in evidence to prove that he is the registered owner of **L.R. NO.WEST BUKUSU/NORTH MYANGA/1880**. D.W.2 claimed that he managed to obtain an eviction order against the plaintiff from the Bumula Land Disputes Tribunal which order has never been appealed against. He said he filed the Tribunal case after he obtained title to the land.

After receiving the evidence, learned counsels on both sides each filed written submissions in support of their positions pursuant to a consent order recorded before this court. I have considered the evidence and the submissions. The following matters and facts appear to be largely uncontested and admitted:

First, that the land in dispute is identified as **LR. NO. WEST BUKUSU/NORTH MYANGA/1880**.

Secondly, that the Plaintiff has been in occupation of the aforesaid land since 1981 until 1996 when he was forcefully evicted, hence the Plaintiff has been in continuous and an interrupted occupation for a period of over 12 years.

Thirdly, that the title to the land is in possession of the 2nd Defendant who acquired the same in 1994 by

purchase.

The question which must be answered is whether or not the 1st Defendant had any good title to pass to the 2nd Defendant? It is admitted that by the time the 2nd Defendant obtained title the Plaintiff had been in occupation of the land for a period of over twelve years. There are ample authorities that may be cited to answer this question. It suffices to cite the case of ***GITHU =VS= NDEETE (1984) KLR P.776*** where the court of Appeal held *inter-alia*: *That the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons' adverse possession.* I am bound by that decision. At the time, the 1st Defendant purported to confer title to the 2nd Defendant, the Plaintiff's rights by adverse possession had accrued hence he had nothing to transfer. His rights to two acres occupied by the plaintiff had been extinguished by effluxion of time. The 2nd Defendant knew that the Plaintiff has been in actual occupation for a long period of time. He is not an innocent purchaser as he purported to be. He took such a big risk.

It has been argued that there is a decision made by the Bumula Land Disputes Tribunal which was adopted by the subordinate court evicting the Plaintiff. It is said this case is resjudicata because the Land disputes Tribunal has made a finding touching on title to land hence this court should not revisit the issue. I have perused the proceedings taken before the Bumula Land Disputes Tribunal. It is clear that the complaint was lodged by the 2nd Defendant against the Plaintiff. The 2nd Defendant sought for an order of eviction and to be declared to be the owner of the land. At the end of the trial before the Land disputes Tribunal, the Tribunal declared the 2nd Defendant as the rightful owner of **L.R.NO.WEST BUKUSU/NORTH MYANGA/1880** and ordered for the eviction of the Plaintiff. Can this decision be said to make this case resjudicata? My answer to this question is no. One of the principles required to prove resjudicata is that a dispute must have been decided by a competent court or tribunal.

In this case, the Bumula Land disputes Tribunal decided on a dispute which did not fall within the matters specified under Section 3 of the Land disputes Tribunals Act. It therefore acted in excess of jurisdiction hence its decision is of no legal binding. The same cannot therefore be a bar to this action. The tribunal's decision confirmed the 2nd defendant's rights on the basis of a title which has now been set aside and declared invalid.

For the foregoing reasons, I am satisfied that the Plaintiff has established his claim. I allow the suit in terms of all the prayers set out in the Originating Summons dated 27th September 1996.

Dated and delivered this 7th day of July 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mrs Aburili for the plaintiff.

N/A Nanzushi for the defendants.

In the presence of the 2nd defendant.