REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL SUIT NO 89 OF 2002 (O.S)

BENJAMIN KOCHWE NANGELEKA …… APPLICANT

VS

1. FWAMBA NANGELEKA

2. COLLINS WERE JOSEPH …… RESPONDENT

R U L I N G

The plaintiff commenced an action by way of an originating summons dated 18th June 2002 pursuant to the provisions of Order XXXVI rule 3 D of the Civil Procedure Rules and made the following prayers:

> *(i) That the applicant be declared to have acquired prescriptive rights by adverse possession of Land Reference number West Bukusu/South Mateka/2059 having occupied without interruption since 1970 and therefore he be registered in place of the second defendant.*
>
> *(ii) A declaration that the registration of the second Respondent as the proprietor of the title No. West Bukusu/South Mateka/2059 was by fraud hence it should be cancelled.*
>
> *(iii) Costs*

The summons was supported by an affidavit sworn by the plaintiff(applicant) dated 18th June 2002 in which the following facts have been raised:

> *(a) That the plaintiff and the 1 st defendant are brothers and that they were jointly registered as co -proprietors of equal shares of the initial parcel of land known as L.R. No West Bukusu/South Mateka/1097 measuring 9.4 Hectares.*
>
> *(b) That neither of the defendants has resided on the land the subject matter of this suit.*
>
> *(c) That in the month of May 2002 the plaintiff discovered that L.R.No West Bukusu/South Mateka 1097 had been subdivided into two portions namely: West Bukusu/South Mateka/2059 and West Bukusu/South Mateka/2060 without his knowledge by the 1 st defendant in cahoots with the 2 nd defendant.*
>
> *(d) That the plaintiff also discovered that parcel number L.R.No. West Bukusu/So uth Mateka/2059 was registered without his knowledge or consent in the name of the 2 nd defendant* **.**

The originating summons was served upon the Respondents (now defendant) who in turn filed a memorandum of appearance through the firm of Wasilwa & Co Advocates. It would appear the Respondents did not file any replying affidavit as anticipated by the plaintiff. This prompted the plaintiff

to request for Judgment in default of defence in a request dated 10th September 2002. The Deputy Registrar of this court dutifully entered interlocutory Judgment against the Respondent on 1st October 2002 and subsequently ordered for the matter to be set down for hearing on formal proof.

Let me state the position regarding the procedure in respect of originating summons under Order XXXVI rule 3 D of the Civil Procedure Rules. When a party has been served with an originating summons accompanied by an affidavit, that party is only required to enter appearance. It is not mandatory for that party to file a replying affidavit. There is no provision for a party to request for an interlocutory Judgment. It is clear that when the Respondent has entered appearance, the next stage is to apply for directions before a Judge in chambers pursuant to Order XXXVI rule 8 A of the Civil Procedure rules. Consequently the ex parte interlocutory Judgment entered on 1.10.2002 has no basis in law. It is an error which I am entitled to set aside ex-debito justice. The erroneous Judgment is therefore set aside.

The record shows that directions were taken on 12th February 2003 in which the Hon. Mr. Justice Mitey directed the matter to proceed for hearing as though it was instituted by way of a plaint. It was also directed that oral evidence would be tendered.

When this suit came up for hearing the Respondents nor their advocate did not turn up despite having been served as evidenced in the affidavit of service of Raphael Pamba sworn on 4th July 2003. The plaintiff was then granted leave to proceed for hearing ex parte.

The plaintiff testified without calling an independent witness to support his case. The plaintiff, Benjamin Kochwe Nengeleka informed this court that he was jointly registered with the 1st Respondent, (1st defendant) Fwamba Nangeleka as co-proprietors of equal shares of the parcel of Land known as L.R. No West Bukusu/South Mateka/1097 measuring 9.4. Hectares.

He produced the copy of the register in form of a green card as an exhibit in evidence.

He further told this court that the 1st Respondent (1st Defendant) resided on the aforesaid piece of land for only six years after which he went to live with his father away from the farm.

It was his evidence that he went to the lands office to do a search when valuers sent by Barclays Bank of Kenya to the farm to carry out a valuation. He was shocked to find out that L.R. No. West Bukusu/South Mateka/1097 had been closed and subdivided into two parcels of Land namely: L.R. No West Bukusu/South Mateka/2059 and L.R. No. West Bukusu/South Mateka/2060. To his surprise the former parcel of Land Measuring 4.90 Ha. Was registered in the name of Collins Were Joseph, the 2nd Respondent (2nd Defendant). He produced the copy of the register in form of a green card as an exhibit in evidence. The plaintiff also produced the mutation forms in evidence which shows that he did not sign them though the same were presented and acted upon by the Land Registrar. The document produced reveal that the same were signed and executed by the 1st and the 2nd defendants.

The plaintiff further produced in evidence a copy of the application for partition of L.R. No. West Bukusu/South Mateka/1097. The same was executed by the 1st defendant alone and witnessed by the 2nd defendant.

The plaintiff complained that all these activities were done secretly and behind his back. He alleged fraud on the part of the defendants in the matter. He beseeched this court to have the name of the 2nd defendant removed from the register in respect of L.R. No. West Bukusu/South Mateka/2059 and in his place for his name to be registered. He alluded fraud on the part of the defendants.

From the evidence tendered by the plaintiff and from the affidavit in support of the originating summons the following main issue have emerged for my decision.

The issue is whether the plaintiff (applicant) has established his claim based on the law of Limitations i.e by adverse possession? The plaintiff gave oral evidence and repeated nearly all the averments made under oath via the affidavit in support of the summons sworn on 18th June 2002. The plaintiff does not

state both in his affidavit and in his oral testimony as to when he took actual possession and occupation of L.R. No West Bukusu/South Mateka/2059. It is only mentioned on the face of the originating summons and in the final submissions by the plaintiff's Advocate that the plaintiff has been in continuous and uninterrupted occupation of the suit premises since 1970. Of course this will remain as mere allegations unless backed by evidence. The gist of the evidence orally tendered and deponed on affidavit concentrate on proving fraud on the part of the 1st and 2nd defendants. This of course cannot be dealt with in these proceedings which the law only restricts litigants to prove the existence of prescriptive rights.

Further a party who alleges fraud must specifically plead particulars pursuant to the provisions of Order VI rule 8 of the Civil Procedure rules which is not the case here.

The court of Appeal of Kenya re stated the ingredients which a party must establish to succeed in a case based on adverse possession in the case of **WAMBUGU VS NJUGUNA (1983) K.L.R. 173**

Where it was held inter alia:

(a) That in order to acq uire by the statute of limitations 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. Dispossession of the proprietor that defeats his t itle are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

(b) The limitations of Actions, on adverse possession, contemplates two concepts, dispossession and discontinuance of possession. The pr oper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for t he requisite number of years.

(c) The occupation can only be either with permission or adverse, the two concepts cannot co - exist.

I will also refer to the decision of the court of Appeal in the case of **JONATHAN O. OYALO WABALA AND NYANGWESO MUSUMBA VS CORNELIUS OTAYA OKUMU C.A. NO. 208 of 1997 (U.R)**

In which the court of Appeal said:

> *"To be able to acquire a title to land registered in another person's name, one has to literally be in occupation of the land, for mere presence of crops on land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the Land."*

The testimony of the plaintiff herein and the pleadings reveal that the plaintiff's complaint revolve around the fact that the 1st Defendant acted fraudulently and surreptitiously to register title No. L.R. No. West Bukusu/South Mateka/1097 in their joint names on equal shares without his involvement. The plaintiff has not shown by evidence proof of occupation and dispossession. Even if there was evidence to prove occupation on the part of the plaintiff of the suit premises, there is no evidence as to when exclusive and uninterrupted occupation by the plaintiff took place. The plaintiff has stated that the 1st defendant moved out of the suit premises 6 years after occupation. The period when the 1st defendant moved out of the land in dispute has not been specified.

Having considered the evidence offered by the plaintiff and the material placed before me with the submissions made by the plaintiff's learned counsel I am not convinced that the plaintiff has proved his claim on a balance of probabilities. The originating summons is ordered dismissed with no order as to costs.

DATED AND DELIVERED THIS 26th DAY OF March 2004

J.K. SERGON

JUDGE