



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 29 OF 2017

CHRISTOPHER MUYODI OWADE.....PLAINTIFF

VERSUS

RICHARD JUMA ANDA.....DEFENDANT

J U D G E M E N T

1. Christopher Muyodi Owade sued Richard Juma Anda vide the plaint dated 8/2/2016 over land parcel No. Bukhayo/Lupida/364. He impleaded that he stands to suffer irreparable loss if the defendant continues to use the suit land. The plaintiff prays for judgement against the defendant for:

a) An order of eviction against the defendant by himself, his agents, and or servants from interfering with L.R No. Bukhayo/Lupida/364.

b) Costs of this suit.

2. In defending himself, Mr. Anda filed a statement of defence on 23rd May 2017 which he later amended on 7th December 2018 to include a counter-claim. The defendant pleaded that L.R No. Bukhayo/Lupida/364 was left under the care of his father by Sabastian Pamba. That he (the defendant) established his house on a portion of the suit land where he lives with his family from 1984 to date.

3. The defendant pleaded in the counter-claim that the plaintiff holds the suit title on his own behalf and on behalf and in trust for the defendant. He proceeded to itemise the particulars of trust. The defendant urged the Court to enter judgement in his favour against the plaintiff for:

a) An order that L.R No. Bukhayo/Lupida/364 be and is hereby sub divided and a portion measuring 2¼ acres in occupation of the defendant be transferred into his name (the defendant).

b) An order that the plaintiff do execute all the relevant documents to facilitate the transfer of a portion of land measuring 2¼ acres out of L.R No. Bukhayo/Lupida/364 in the name of the defendant and in default thereof, the Deputy Registrar do execute the said documents in the place of the plaintiff.

c) An order that costs of the suit and costs of the counter claim be paid by the plaintiff.

4. The matter proceeded to hearing with each of the parties relying on their sole evidence. The plaintiff testified on 8th July 2020 stating that he lives in Walachi village within Busia County. That the defendant is the son of his elder brother who died in 1995. It is his evidence that the suit land Bukhayo/Lupida/364 is his as shown in the copy of the title and green card produced as **Pex 1 & 2** respectively. The plaintiff stated that he is the one who showed the defendant where to build on the family land but the defendant while building his home encroached on the suit land by 3 steps. He produced earlier proceedings undertaken and related to this dispute as **Pex 3 – 6**. That the defendant uses the suit portion to date.

5. In cross-examination by Mr. Bogonko, learned counsel for the defendant, the plaintiff said that their father Owade Makau had very big land. That their father owned land parcel numbers Bukhayo/Lupida/381 and 364 and during adjudication L.R No. 364 was registered in the name of Sabastian Pamba. That Sabastian was not their brother as he was Ugandan but was permitted by the clan to have himself registered. The plaintiff stated that the defendant was born and lived on L.R No. 381. He stated that he occupies 1¼ acre of L.R No. Bukhayo/Lupida/364 and 2 acres from L.R No. Bukhayo/Lupida/381 while the defendant occupies 3 acres of L.R No. Bukhayo/Lupida/381.

6. The plaintiff maintained that he purchased L.R No. Bukhayo/Lupida/364 from Sabastian for Kshs.35,000 and the land was duly transferred to him on 29th July 1994. That the defendant entered the suit land in 1996. He denied obtaining the title through fraud. In re-examination, the witness said he filed the suit after the surveyors confirmed the encroachment in 2012.

7. The defendant gave his evidence on 29th September 2020. He adopted his witness statement dated 3/3/2020 as his evidence in chief. In the said statement, the witness said that the suit title belonged to Sabastian Pamba who was his uncle and a brother to the plaintiff. According to the defendant, he is occupying a portion of the suit land measuring 2¼ acres for where his home is and also for growing crops. That the plaintiff is holding the suit title on his behalf and in trust for him (the defendant). He is asking the court to order the land sub-divided into two and a portion measuring 2¼ acres in his occupation be transferred to his name.

8. In cross-examination by Mr. Ashioya learned counsel appearing for the plaintiff, the witness denied that case No. 563 of 2009 gave an order barring him from using the land. That he is still using the land to date. The defendant confirmed the suit title is currently registered in the plaintiff's name. That he lives on L.R No. Bukhayo/Lupida/381 and 364 given to him by his father. That the two parcels were ancestral land. According to the defendant, L.R No. Bukhayo/Lupida/364 is 3¼ acres out of which he was given 2¼ acres. In re-examination, the defendant stated that Sabastian is the older brother of his father. That when he was sued in 2009, he was already using the suit land.

9. After hearing closed, the advocates filed their respective written submissions. The plaintiff filed his on 29/10/2020 while the defendant filed on 11/11/2020. According to the plaintiff, he submits that trusteeship does not arise herein as the defendant is neither his wife, son or brother as provided for in section 28 of the Land Registration Act. That the defendant cannot make a claim on behalf of his deceased father because he had not taken out letters of administration of the father's estate. The plaintiff further submits that a claim for adverse possession cannot accrue because the plaintiff had obtained orders of permanent injunction in Busia CMCC 563 of 2009. He urged the court to grant the prayers of eviction sought.

10. The defendant in his submissions cited the case of *Isack Minanga Kiebia Vs Isaaya Theuri M'ginjari & Ano (2018) eKLR* where the Supreme Court of Kenya held as follows;

“Some of the elements that would qualify a claimant as a trustee are:-

a) The land in question was before registration, family, clan or group land.

b) That the claimant belongs to such family, clan or group.

c) That the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his or her claim fake or adventurous.

d) That the claimant could have been entitled to be registered as owner or other beneficiary of the land but for some intervening circumstances.

e) That the claim is directed against the registered proprietor who is a member of the family, clan or group.

11. It is the defendant's submissions that he has satisfied the test set in the case supra for proof of trustee relationship. He also submitted that the plaintiff's claim is time barred by dint of section 7 of the Limitation of Actions Act. That he has been in open and public occupation uninterrupted for a period of more than 12 years. He prayed that his claim be allowed as prayed in the counter-claim.

12. From the evidence on record (as contained in the copy of the title deed), the plaintiff is currently the registered owner of the suit land. Similarly, the green card shows that Sabastian Pamba was the 1st registered owner when the register opened on 15th March 1972. The plaintiff wants the defendant removed from the suit land by virtue of his ownership. The defendant on his part avers that he is entitled to the land under customary trusts. The court is called to determine the competing interests and whether the plaintiff has proved his case on the standards required.

13. It is a rule of evidence that he who alleges a fact must prove the existence of the fact to have a decision made in his favour. The plaintiff alleged that the defendant encroached on the suit title by 3 steps. That he discovered the encroachment after a visit by the County Surveyor in the year 2012. The plaintiff had earlier sued the defendant in BSA CMCC No. 563 of 2009 for orders of permanent injunction from L.R No. Bukhayo/Lupida/364. In paragraph 3 of that plaint, the plaintiff herein pleaded thus;

“The plaintiff is the legal registered owner of L.R No. Bukhayo/Lupida/364 whereof the defendant has put up structures and putting the said land to use without the authority and or consent of the plaintiff”.

14. As at 2009 when the plaintiff filed the case no 563 of 2009 he was already aware of the acts of trespass/encroachment alleged against the defendant. He is lying when in re-examination he stated that he discovered the encroachment in 2012 when the surveyor came and identified the two parcels and found the defendant had encroached by three steps. He ought to have included the prayer for eviction in BSA CMCC 563 OF 2009. The present claim is res judicata Busia CMCC 563 of 2009 and should be struck out on this account.

15. Be that as it may, the parties opted to proceed without raising the principle of res judicata so I will decide the case on its merits. The plaintiff stated in his evidence in chief that *“In 1995 the defendant beat his father and he was hospitalized. My brother never recovered so he died. The villagers wanted to beat the defendant but I supported him and showed him a place to build on the family land. While building his home, he encroached on my land L.R No. Bukhayo/Lupida/364 by 3 steps (feet)”.*

16. According to the plaintiff's own evidence, he showed the defendant where to build his home in 1995. The plaintiff does not explain why he was showing the defendant where to build when the defendant was born and brought up on plot number 381, i.e what happened to the home built by the defendant's father if any? During cross-examination, the plaintiff admitted that his father owned L.R Nos Bukhayo/Lupida/364 and 381. That the defendant was born and brought up on L.R No. 381. There was no map or survey report produced to

confirm that L.R No. Bukhayo/Lupida/364 and Bukhayo/Lupida/381 are neighbouring each other. In my view, this piece of evidence was necessary to ascertain whether or not the defendant's home is on L.R No. 381 and has encroached onto L.R No. 364.

17. Further, the plaintiff in cross-examination stated that there is a live fence to mark his share of 1¼ acres in L.R No. Bukhayo/Lupida/364. On L.R No. Bukhayo/Lupida/381 the plaintiff stated that he occupies 2 acres, which is also well defined. The plaintiff went on to confirm that the defendant occupies approximately 2¼ acres of parcel No. Bukhayo/Lupida/364 and 3 acres of parcel No. Bukhayo/Lupida/381. The total acreage of L.R No. Bukhayo/Lupida/364 as given on the title is 1.7 Ha translating into 4¼ acres. The plaintiff wants the defendant evicted from the entire parcel no 364 yet his evidence alludes that he is entitled to only 1¼ acres of the entire parcel. Who then is entitled to and in possession of the remainder 3 acres if he is denying the defendant's rights over the suit land? I have not been persuaded by the plaintiff's claim based on his evidence which is uncorroborated and contradicts his entitlement to the entire parcel. Accordingly, I find his suit is not proved and hereby dismiss it.

18. The defendant counter- claimed for a declaration that the plaintiff holds the suit title for himself and on behalf of the defendant under customary trusts. He stated that the first registered owner Sabastian Okwara was a brother to the plaintiff and his father Ander Okwara Owade – deceased. The plaintiff confirmed that the suit title belonged to their father Owade (and grandfather to the defendant). The defendant wants the land be sub-divided to enable him get his share of 2 ¼ acres pf the suit land.

19. The plaintiff does not deny the relationship between him and the defendant except that the defendant is not his son/brother or wife so he cannot claim a trustee relationship. Trusts is a question of fact which must be proved by evidence. The defendant relied on the Supreme Court of Kenya decision in *Isack Minanga Kiebis supra* which was also cited by the Court of Appeal in the Case of **Esther Nyamweru Waruhiu Vs George Kang'ethe Waruhiu (2019) eKLR**. In the Isack case the Supreme Court stated thus at paragraph 52 of the judgement;

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

20. Has the defendant herein met the criteria set out above? In my opinion I hold that he has indeed met the same. First, the plaintiff although denying Sabastian was his brother he confirmed that Sabastian was registered with permission from the clan members. He does not however say why the clan would allow a stranger to registered as owner of family land. Secondly, he confirmed that prior to registration of Sabastian, the land belonged to his father (ancestral lineage). Thirdly, the defendant is the son to the plaintiff's elder brother meaning they are from the same family. The defendant did not require to obtain letters of administration of his deceased father's estate to acquire the family rights. His belonging to the same family as the plaintiff bestowed him automatic rights to inherit a portion of what was regarded as family land.

21. It is also not disputed that the defendant is in occupation of a defined portion of the suit land measuring 2 ¼ acres and the claim has been brought against the registered proprietor who is a family member. The plaintiff stated that he bought the land from Sabastian in 1997 for KShs.35,000 yet by 1997, he was already the registered owner of the land. The green card is silent on how the plaintiff acquired the title from Sabastian. No evidence was led to support the allegations of sale. The upshot is that the registration of the plaintiff did not extinguish the rights of persons entitled to benefit under customary trust, the defendant included.

22. In light of the foregoing analysis, I am persuaded to find that the defendant has proved his case. I enter judgement for him in accordance with prayers contained in the counter-claim as follows;

(a) An order is hereby made that L.R No. Bukhayo/Lupida/364 is held by the plaintiff on his behalf and on behalf of the defendant.

(b) The suit parcel in (a) above shall be sub divided and a portion measuring 2¼ acres in occupation of the defendant transferred and be registered in the name of the defendant.

(c) An order is hereby made that the plaintiff shall forthwith execute all the relevant documents to facilitate the transfer of the portion measuring 2¼ acres out of L.R No. Bukhayo/Lupida/364 in favour of the defendant and in default thereof, the Deputy Registrar of this court shall execute the said documents in the place of the plaintiff.

(d) Costs of the suit and the counter-claim is awarded to the defendant.

Dated, signed & delivered at BUSIA this 18th day of Feb., 2021.

A. OMOLLO

JUDGE