



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 28 OF 2019

JAMES MIYABA KEMUMA.....APPELLANT

VERSUS

ISAAC OKEYO ONDIEKI.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant herein being dissatisfied with the judgment and decree of the learned Magistrate Hon. E.A. OBINA appealed to this Honourable Court on 11th day of November, 2019.

2. The case before the learned Magistrate was as follows; the Respondent was the registered owner of Land Parcel **NO. WANJARE/BOMERENDA/1596**. Sometimes in 2010 while he was out of the country, the Appellant without any justifiable cause entered into the said parcel of land and erected thereon a permanent structure. The Respondent sought the following orders;

- a) A declaration that the parcel of land **NO. WANJARE/BOMERENDA/1596** belonged to him
- b) An order of eviction of the Appellant, his agents and /or servants or any person holding on the said parcel of land on their behalf
- c) A permanent injunction restraining the Appellant, his agents and /or servants or any person holding onto the said parcel of land on their behalf from erecting structure and/or in any way interfering with the said land
- d) Costs of the suit.

3. The Appellant in his response pleaded that Land Parcel **NO. WANJARE/BOMERENDA /1596** formed part of Land Parcel **NO. WANJARE/BOMERENDA /1090** belonging to him and which the Respondent fraudulently, unlawfully and without any colour of right in connivance with others not party to the suit subdivided into two portions; **NO. WANJARE/BOMERENDA /1595** and **NO. WANJARE/BOMERENDA /1596**, and transferred the latter to himself.

4. He pleaded that Land Parcel **NO. WANJARE/BOMERENDA /1596** was not demarcated on the ground and has always formed part of his land and the Plaintiff has never had possession thereof. He pleaded that he without permission or licence of the Plaintiff had free, open and placeable possession of the suit land for a period exceeding 12 years and accordingly the Respondent's rights in the property had been extinguished by such adverse possession. The Respondent filed a reply to defence joining issues with the Appellant's statement reiterating the contents of the plaint in its entirety.

5. Further in his reply the Respondent pleaded that he had bought the suit land on a willing buyer willing seller basis and that the Appellant complied with proceedings of getting all approvals from the local Land Control Board and actually attended all sessions of the Land Control Board personally. He also pleaded that the Plaintiff voluntarily delineated and put boundary features on the suit land and only took advantage of the Respondents absence in Kenya, either by himself or through family members to enter into the suit land. He denied that the Defendant had acquired adverse possession of the suit land.

THE EVIDENCE

6. The matter proceeded to hearing wherein the Appellant testified through his wife Alice Nyaboke who produced a Power of Attorney to show the Authority given to her to testify on his behalf. She testified that her husband James Miyaba Kemuma bought the suit land from Kenyaga Bakari who had bought the same from the Appellant herein. That the Appellant did transfer the land to the Respondent by executing all the transfer forms and the Land Control Board documents.

7. In response to the testimony of Alice Nyaboke, the Respondent testified that between 1980 and 1986, he was registered as the owner of Land Parcel **NO. WANJARE/BOMERENDA /1090** measuring 1.1 HA. He offered to sell to BAKARI KENYAGA a portion of the property measuring 25 by 100 feet at a consideration of Kshs. 8000/= wherein Kshs. 5000/= was paid immediately leaving a balance of Kshs. 3000/=. The Agreement was reduced into writing. The Respondent later informed him that he was agreeable to paying the balance of the purchase price and taking over the transaction as the buyer of the said portion.

8. The Respondent paid Kshs. 5000/= followed by another Kshs. 1000/=. He later received another Kshs. 1500/= from the Respondent's wife.

9. He denied ever attending any Land Control Board sitting and also denied ever signing any documents in favour of the Appellant. He pleads that he was an alcohol addict and the Respondent took advantage of his drinking habit to fast track the transaction. His drinking habits were supported by his brother who testified that the Appellant was an alcoholic man who sold off the land to support his drinking habit.

10. The subordinate court, in the judgment challenged in this appeal, held that the Respondent in his claim had proved that he had acquired the property from the Appellant legitimately hence he was the legitimate registered owner of land parcel **NO. WANJARE/BOMERENDA /1596**. He directed the Land Registrar and the County Surveyor to show the boundaries Land Parcel **NO. WANJARE/BOMERENDA /1596** measuring 0.05 Hectares. He further ordered the Appellant, his servants and/or agents to stay out of the said property.

11. The Appellant being aggrieved by the said judgment dated 29/10/2019 filed this appeal and enumerated the following grounds of appeal against that decision of the trial court;

a) The learned Magistrate erred in law and fact in allowing himself to be misguided by improper considerations, manifest bias, subjective opinions and extraneous matter rather than sound well established legal principals and merits and merits of the case by allowing the Plaintiff's/Respondents suit.

b) The learned Magistrate in law and in fact in proceeding to hold that the sale agreement/contract between the Appellant and the Respondent with regard to Land Parcel Number **WANJARE/BOMORENDA/1090** that was subdivided to parcel number **WANJARE/BOMORENDA/1596** and to transferred and registered in the Respondent's name in spite of the overwhelming uncontradictory evidence and material placed before the court.

c) The learned Magistrate erred in law and in fact in holding and inferring that the Respondent was the registered legal owner of the Land Parcel Number **WANJARE/BOMORENDA/1596** even after the Appellant denied that he never executed the transfer and Land Control Board documents to facilitate the subdivision of Land Parcel **NO WANJARE/BOMORENDA/1090** and the subsequent transfer of Land Parcel Number **WANJARE/BOMORENDA/1596** in favor of the Respondent herein.

d) The learned Magistrate erred in law and in fact by allowing the Respondents suit even after the un-controverted evidence that the Appellant and his family have been without the Respondents permission had free, quiet and open uninterrupted and peaceful occupation of Land Parcel **NO. WANJARE/BOMORENDA/1596** for a period exceeding 12 years, and accordingly the Respondent's right over the property if any had been extinguished and the suit bared by the provisions of section of the Limitation of Action Act Cap 22.

e) The learned Magistrate erred in law and in fact by failing to appreciate the purpose and import if section 3(3) of the Contract and in particular the Respondent failing to produce an agreement or contract substantiating that he indeed purchased Land Parcel **NO. WANJARE/BOMORENDA/1596**.

f) The learned Magistrate erred in law and in fact by proceeding to introduce new matters and in particular that the Defendant is barred by the Doctrine of Estoppel that was never pleaded and proven by the Respondent.

g) The learned Magistrate erred in law and in fact in proceeding to formulate and grant prayers that were never pleaded and proven by the Respondent.

h) The learned Magistrate erred in law and in fact in ignoring and failing to assess and or apply the principles applicable and relevant authorities cited in the written submissions by the Appellant when reaching the impugned decision (Judgment).

12. The Appeal was canvassed by way of written submissions. The Respondent's learned counsel filed written submission on 28th July 2020 but the Appellant did not file its submissions.

ISSUES, ANALYSIS AND DETERMINATION

13. Having analyzed the Memorandum of Appeal, the record of Appeal and the Appellant's submissions, I find that the issues arising for determination can be summarized as follows;

a) Whether the Respondent is the legitimate registered owner of the of Land Parcel Number **WANJARE/BOMORENDA/1596** the suit property herein.

b) Whether the Appellant had acquired the property by way of adverse possession of the suit property.

Whether the Respondent acquired good title to Land Parcel Number WANJARE/BOMORENDA/1596 the suit property herein.

14. Sections **24, 25 and 26 of the Land Registration Act no 3 of 2012** envisages the vesting of absolute ownership of land to the person in whose name the property is registered together with all rights and privileges appurtenant thereto and that the rights of a proprietor should be protected as evidenced by the certificate of title unless acquired fraudulently or illegally. This sections provide that: -

24 Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by [Section 28](#) not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

15. In order to determine whether the owner had a legitimate title, it would be prudent to first of all determine whether there was a valid agreement in accordance with section 3 (3) of the law of contract before considering whether he acquired good title by following the required transfer process set out in the Land Registration Act.

16. It is not disputed that there was an oral agreement between the Appellant and the Respondent, wherein they agreed that the Respondent was to pay and did pay the remainder of the purchase price that had not been cleared by the previous buyer one Bakari Keyaga in order to take possession of the suit property. One of the grounds highlighted by the Appellant though is that the learned Magistrate erred in law and in fact by not considering that there was no agreement in **writing** as required by the subsection 3(3) between the respondent and the Appellant. Section 3(3) provides that;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

17. However, section 3(3) is subject subsection 7 which provides;

The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection

18. Subsection 7 above cures the danger of applying the provisions of section 3 (3) retrospectively. It important to note that Subsection 3

was amended in 1968, 1990, 1996, 2002 and lately in 2020. Having determined that the oral agreement took place around 1986 the appropriate amendment that would be the one for the 1968 specifically with regards to section 3(3). The said amendment reads;

Section 3 of the Law of Contract Act is amended by replacing the marginal note with "Certain contracts to be in writing."; and (b) by substituting for subsection (3) thereof a new sub section as follows (3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded. or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it: Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract(i) has in part performance of the contract taken possession of the property or any part thereof; or (ii) being already in possession, continues in possession in part performance of the contract and has done some other act the furtherance of the contract.

19. It is clear from the above amendment highlighted above that it was not mandatory that agreement for the agreement to be in writing and therefore, I find no fault in the learned Magistrate's finding that there existed a valid agreement between the parties.

20. Having found that there existed a valid agreement between the Appellant and the vendor the next question would be; did the Appellant legally transfer the title to the Respondent?

21. The Appellant vehemently denies that he executed any of the transfer documents nor did he attend the local Land Control Board meetings. I have keenly scrutinized all documents that gave rise to the Respondent's acquisition of title to the suit property. The documents placed before trial court are;

- a) a Land Control Board consent dated 30th July, 1986 signed by both parties,
- b) a mutation form together with a sketch map subdividing Land Number WANJARE/BOMORENDA/1090 into WANJARE/BOMORENDA/1595 and WANJARE/BOMORENDA/1596 dated 9 July 1986.
- c) copy of an official search for land parcel number WANJARE/BOMORENDA/1596 (the suit property) dated 30th July, 1986,
- d) copy of the transfer form executed by both the Appellant and the Respondent transferring the suit property to the 28th July, 1999
- e) a copy of the title deed issued to the Respondent on 30th July, 1999.

22. Having scrutinized the documents on record, I find that all the documents were executed by both parties. A keen consideration of the Appellant's statement filed in court in support of his defence, shows that he agrees that he received documents from the Surveyor together with the Respondent to take to the Land Control Board at Nyamarambe and to also attend a sitting of Land Control Board that was taking place on the same day. He acknowledges to have taken the documents to said place as instructed.

23. I am not persuaded by the Appellant's testimony on record that he did not attend the Land Control Board meeting or attest to the said documents. He tries further through the testimony of his wife to point out that the Land Control Board approval was voided vide a letter from the area chief and a caution she registered. Interestingly, both the caution and the letter touch on parcel No. **WANJARE/BOMORENDA/1595** and not the suit property. The caution that she claims to have registered to void the sale of the suit property did acknowledge that her husband had sold another section of the family property (**WANJARE/BOMORENDA/1090**) which most probably is the suit property and wanted to stop him from selling any part of **WANJARE/BOMORENDA/1595** again.

24. The Appellant has clearly not shown any step he took or has taken against the Respondent to show that the signature on the aforementioned document was fraudulently procured by the Respondent or his servants/agents.

From the forgoing therefore, I find that there was a valid agreement between the Appellant and the vendor and that the Respondent acquired good title to the property.

Whether the Appellant has acquired the suit property by way of adverse possession.

25. Having established hereinabove that the Respondent acquired a good title over the Suit Property, another very important aspect of this Appeal is whether the Appellant has acquired the property by way of adverse possession as against the Respondent.

26. I agree with the Appellant that the trial court did not give attention to his claim for adverse possession over the property. This being a first Appeal, the court will not shy away from relooking at the testimonies of the parties to determine whether the Appellant had acquired the property by way of adverse possession. Before doing so, it is important to discuss the requirements that need to be considered in making such a determination. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **MAWEU VS. LIU RANCHING AND FARMING COOPERATIVE SOCIETY 1985 KLR 430 where the court held;**

"Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

27. The Appellant averred in the statement supporting his defense that he has been residing on the suit property before and after the suit property was acquired by the Respondent. The said averments were corroborated by his wife, Jane Osebe Kemuma and his brother John

Sakawa Kemuma in their evidence. It quite interesting that during cross-examination the Respondent's Advocate concentrated on proving the legitimacy of the agreement and ignored to controvert the Appellants' claim that he was in actual, continuous and public occupation of the suit property thus acquiring the property by way of adverse possession.

28. It is also unfortunate that the trial court erroneously ignored the said claim which was raised by the Appellant in his Defence and plainly dismissed it without interrogating the glaring evidence in his statement and those of his witnesses. It is also interesting to also observe that from the Respondent witness statement he clearly stated he has never taken possession of the suit property since the same was transferred to him in 1999. Further during cross- examination, his wife who was testifying on his behalf confirmed she did not have any photographic evidence to confirm that the entry by the Appellant happened in 2010 and that the land had been vacant since the agreement was entered between the appellant and the Respondent.

29. There is no evidence that she has ever visited the suit property to controvert the Appellant's claim that they have continuously, openly, peacefully and publicly been in occupation of the suit property since the same was transferred to the Respondent in the year 1999. This period is beyond the 12-year period required for the claim for adverse possession to arise.

30. For the foregoing reasons, I find merit in the appeal and I allow it with costs to the Appellant.

Dated, signed and delivered at Kisii this 10th day of February, 2021.

J.M. ONYANGO

JUDGE