



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 165 OF 2014

JANE FRANCISCA AKINYI.....PLAINTIFF

= VERSUS =

JOHN OBAI OWANA

JOHN ELUNGAT

PATRICK OMUSE ETYANG

ALFRED ACHAKUNA

OUMA OUSURU.....DEFENDANTS

J U D G E M E N T

1. Jane Francisca Akinyi sued the 3 defendants for a claim over title No. South Teso/Apokor/1155 through her plaint dated 28th May 2014. She pleaded that she is the registered owner of the land which the defendants without any colour of right or her authority have erected structures on and are cultivating. She urged the court to enter judgment in her favour on the following terms;

a) An order of permanent injunction restraining the defendants by themselves, their agents, servants, and any other person claiming through them from cultivating, planting, putting into use or in any manner whatsoever interfering, with exclusive use, ownership, peaceful and quiet possession and occupation of the plaintiff's land L.R. No. SOUTH-TESO/APOKOR/1155.

b) An order of eviction to be issued against the defendants and anybody claiming through them from land parcel number SOUTH-TESO/APOKOR/1155.

c) Costs of this suit.

2. The defendant filed two joint statements of defences denying the plaintiff's claim. The first defence was filed in person on 14th November 2014 while the second statement of defence filed by J. P. Makokha & Co. Advocates was filed on 23rd March 2018. The first defence was a general denial while the second defence filed included at paragraph six (6) a defence of adverse possession stating that they have been in occupation of the suit land since 2004 hence they are entitled to the land by virtue of adverse possession.

3. Both parties called the evidence of a single witness in support of their case. The plaintiff testifying on 2nd October 2019 stated that she bought the suit land measuring 2.3Ha from Getu. She processed and obtained a title for the sold land on 22/11/2013. That she purchased the land to farm cane on it but which she has not been able to do because of the presence of the defendants on the land. She produced the documents of title as **Pex 1**.

4. On cross-examination, the plaintiff said she visited the land before buying it. That during the visit, one part of the land had houses while another part was ploughed. That the 1st defendant is deceased; the 2nd & 3rd defendants are on the land while the 4th defendant moved out in the year 2016 after this suit was filed. This marked the close of the plaintiff's case.

5. The 2nd defendant John Omuse Elungat gave his evidence on 5th October 2020. The witness stated that he knew the 1st, 3rd and 4th defendants as they all purchased portions of the suit land from Geoffrey Opache Omuse. The 2nd defendant continued stating that he purchased a portion of the suit land on 21/2/2004, the 1st defendant purchased on 2/10/2006 and the 3rd defendant purchased on 14th June 2004. He produced their sale agreements as **Dex 1, 2 & 3** respectively. It is his defence that the plaintiff bought the land while aware of their presence on the land.

6. The 2nd defendant stated further that they remained on the land because they were the first to buy and they were not informed by the vendor about the sale to the plaintiff. In cross-examination, the witness admitted their sale agreements do not indicate the plot number of the land sold. That he farms the land but does not live on it. This marked the close of the defence case.

7. The parties' advocates exchanged written submissions. The plaintiff's submission filed on 22/10/2020 submitted on the property rights of the plaintiff provided for under article 40 of the Constitution of Kenya 2010. The plaintiff further submits that the occupation and use of the suit land by the defendants is not legally tenable as it contravenes the provisions of section 24 and 25 of the Constitution. She urged the court to allow her claim and award her aggravated costs of the suit due to the hardship she has undergone to get what is rightfully hers.

8. In brief submissions, the defendants relied on the maxim "**caveat emptor**". They denied being trespassers on the land submitting that the plaintiff ought to have asked the seller to evict the defendants before purchasing the land. That out of an evil cause can never be found a good cause of action.

9. Having analysed the evidence adduced and the submissions rendered, my duty is to determine whether or not the plaintiff has proved her claim within the required standards of civil law. It is a rule of evidence that he who alleges a fact must prove its existence. From the evidence presented, it is not in dispute that the plaintiff is the current registered owner of the suit land. The defendants in their statement of defence and evidence have not denied registration of the plaintiff. Secondly it is not in dispute that all the defendants were in use and occupation of the suit land as at the time the plaintiff purchased and when this suit was filed. The dispute is whether the defendants' occupation constitutes an act of trespass.

10. The plaintiff stated that the defendants do not have her consent or authority to be on the suit land. To the extent that there is no contest on lack of authority from the plaintiff's for the defendants' continued remainder on the suit land after the land changed hands to the plaintiff then such occupation and use amounts to trespass. The obligation shifted to the defendants to controvert this position.

11. As at the time of adducing viva voce evidence, the court was informed that the 1st defendant is deceased. The plaintiff did not apply to substitute the deceased defendant making the suit against the 1st defendant as the court cannot make any orders against a deceased party. The plaintiff also indicated during her testimony that the 4th defendant moved out during the pendency of this suit. Whether the 4th defendant still has an interest on the suit land or not, he did not adduce any evidence to challenge the plaintiff's claim. The same applies to the 3rd defendant. For the record orders of permanent injunction as sought in the plaint succeeds against the 3rd and 4th defendant.

12. In regard to the defence of adverse possession fronted by the defendants, it is my considered opinion and finding that the same is not available to him. The 2nd defendant presented a sale agreement executed on 21/2/2004 between him and Geoffrey Opacha. By the time this suit was filed in September 2014, only 11 years 6 months had lapsed which is shy of the 12-year period for prescriptive rights to accrue. Time ceases to run under the Limitation of Actions Act as soon as a suit to recover the land is filed.

13. This court is of the opinion that the rights of the defendants if any for sale of their portions of the land to the plaintiff lies against Geoffrey Opacha and not against the plaintiff. The defendants did not join the vendor Geoffrey Opacha to these proceedings. His evil (as submitted by the defence) cannot be visited upon the plaintiff or condemn that seller unheard. Further the defendants pleaded fraud which they did not give particulars nor prove on how the plaintiff acquired the title to the suit land.

14. Consequently, the provisions of section 25 of the Land Registration Act comes into play. The section provides thus;

(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.

15. In light of the foregoing analysis, it is my finding that the plaintiff has satisfactorily proved her case. Accordingly, I enter judgment in her favour thus;

(a) An order is hereby issued of permanent injunction restraining the defendants by themselves, their agents, servants, and any other person claiming through them from cultivating, planting, putting into use or in any manner whatsoever interfering, with exclusive use, ownership, peaceful and quiet possession and occupation of the plaintiff's land L.R. No. SOUTH-TESO/APOKOR/1155.

(b) An order is hereby issued of eviction against the defendants and anybody claiming through them from land parcel number SOUTH-TESO/APOKOR/1155.

(c) Costs of this suit.

Dated, signed & delivered at BUSIA this 4th day of February, 2021.

A. OMOLLO

JUDGE