



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 11 OF 2018

JOSEPH OMACHI ODERA.....PLAINTIFF

= VERSUS =

PHANICE KAMIRA OMUSUGU.....DEFENDANT

J U D G E M E N T

1. Vide a plaint dated 13th February 2018, the plaintiff brought this claim over land parcel No. North Teso/Kolanya/351. He pleaded that in 2011 the defendant without any colour of right unlawfully and illegally trespassed on to the land Kolanya/351 (suit land) and erected a house thereon and continues to occupy the same to date. That on 6/12/2017 the High Court issued him with confirmed letters of grant in Succ. Cause No. 6 of 2012 and used the grant to have suit land registered in his name on 22/1/2018.

2. The plaintiff avers that the defendant has continued to trespass on the plaintiff's land thereby denying the plaintiff quiet, peaceful possession, use and enjoyment of his land causing him loss and damages. He pleaded that judgement be entered in his favour against the defendant for;

a) An order of the court declaring the plaintiff as the rightful owner of the suit property under land parcel No. NORTH TESO/KOLANYA/351.

b) An eviction order against the defendant, her family, servants, or any other person claiming on her behalf to be evicted from the land parcel No. NORTH TESO/KOLANYA/351.

c) Costs of this suit and interest hereon.

d) Any other or further relief as this court may deem fit.

3. The defendant filed a statement of defence and counter-claim on 29/3/2018. The defendant pleaded that the plaintiff got title to the suit land through misrepresentation and fraud. She set out the particulars thus;

(a) Causing the title to be registered in her names whilst knowing very well that the defendant's husband was entitled to.

(b) In her action, deliberately ignoring the plaintiff's rights and those of other beneficiaries of the plaintiff's late husband's estate to the subject property.

(c) Assuming rights she was not entitled to in respect of the subject property.

(d) Making a false presentation that she was wife to Samuel Osikol.

4. The defendant denied that the plaintiff has suffered any loss and damage and put him to strict proof. The defendant pleaded further that she is the legal representative of her late husband's estate who died on 21/10/1993. She contended that her late husband purchased 10 acres of the suit land in 1979 from Samuel Osikol. That the seller neither had a wife nor child. The defendant pleaded that after purchase they lived on the suit land with both Samuel and his aunt (plaintiff's mother) until their demise. It is her case that she and her family are rightfully occupying the land for a period of more than 12 years. That the said possession has been peaceful.

5. The defendant continued pleading that the plaintiff's title obtained through misrepresentation should be cancelled and or in the alternative, the defendant be declared to be entitled to the suit land by way of adverse possession. She urged the court to enter judgement in her favour on the counter-claim that;

(1) A declaration that Maritha Amweno Simon obtained title number North Teso/Kolanya/351 fraudulently and/or unlawfully and consequently the plaintiff's title had no valid fountain from which to flow. Both her mother's title and his were null and void.

(2) An order for cancellation of the title with a consequence that it reverts to its original position.

(3) In the alternative and without prejudice to the foregoing a declaration that the estate of John Omunyongori Inno acquired title to that property comprised in title number North Teso/Kolanya/351 by adverse possession.

(4) An order directing that the title number North Teso/Kolanya/351 be consequently transferred to and registered in the names of the defendant as the legal representation of the estate of her late husband – John Omunyongori Inno.

(5) Costs of this counter-claim.

6. The plaintiff filed on 31/8/2018a reply denying the claim by the defendant brought through the counter-claim. He urged the court to dismiss the counter-claim and allow orders sought in the counter-claim. At the close of the pleadings, parties presented evidence in support of their claims. The plaintiff relied on his sole witness while the defendant called 4 witnesses.

7. The plaintiff stated that the defendant is unlawfully occupying his whole land North Teso/Kolanya/351. That the land belonged to his late father Samuel Osikol who died on 18/7/1985. That his late mother became registered as owner thereof on 24/01/2001 through inheritance by taking out letters of administration. He produced copy of the green card as *Pex 1*; copy of title deed as *Pex 2*; death certificate of his late mother as *Pex 3* and certificate of confirmed grant as *Pex 4*. That plaintiff concluded his evidence stating he filed the suit to remove the defendant from the suit land.

8. In cross-examination, the plaintiff said he does not know Simon Omachi. That the father of Simon Omachi is Odera Kong'o – deceased. PW said his grandfather was Nyabora Masikol and his father Samuel Masikol. That he comes from Okisimo village in South Teso and he started living there in 2012 having come from Nakuru. That his mother lived with him on land he had purchased until she died. The land in dispute is in North Teso.

9. The plaintiff admitted that his mother was an aunt to the defendant's husband. He also admitted that the defendant's husband was buried on the suit land. That he (plaintiff) lived on the suit land from 1967 – 2000 before living in 2001 and he has some trees on it. However, he agreed he has not used the land since 2003. That he had a house on the land in 1985 when his father died but the house is no longer there.

10. Irene Mwangi, the Registrar of persons Busia County testified as DW1. She stated that having been served with summons to produce the details of ID serial No. 2043376027 she went through their records. That their records show the ID belongs to Mr Joseph Omachi Odera from Teso North, Kwanda Mor village son to Mata Omnyongori Simon and Simon Omachi Odera. He produced these particulars as *Dex 2*.

11. The defendant gave evidence as **DW2**. She adopted her witness statement made on 29/3/2018. **DW2** said they bought the suit land from Samuel Osikol in 1979. That the plaintiff's mother came to live with them citing marital problems for leaving her matrimonial home. **DW2** produced the sale agreements as **Dex 3(a)-(c)**. She also produced death certificate in respect of her husband as *Dex 4* and grant issued to her as *Dex 5*. That her husband was buried on this land and nobody came to complain. **DW2** continued that she discovered in 2011 the title was in Marita's (plaintiff's mother) name while she was tracing the title deed. That she got married when her husband was already living on this land and she has continuously lived on it now for over 30 years.

12. **DW2** stated further that during the proceedings before the Tribunal (*Dex 6*), plaintiff claimed his father was called Samuel Osikol yet Samuel died without any children. She urged the court to allow her claim as per the counter-claim. During cross-examination by Mr. Ashioya learned counsel for the plaintiff, **DW2** said that previously there was a land case filed by her (defendant) before the Angurai Land Disputes Tribunal No. 6 of 2011 whose award was adopted in Busia land case No. 140 of 2011. That Marita mother to the plaintiff was an aunt to her late husband (John Omnyongori). That in spite of the plaintiff taking out letters of administration, the defendant had not been asked to move out. That Marita did not have a relationship with Samuel as a wife. That the plaintiff has never used the suit land. She accused the plaintiff of fraud in taking out letters of grant in respect of the suit land.

13. Fredrick Evans Masai who was the area chief until 2020 gave evidence as **DW3**. He said that he knew Samuel Osikol sold his land to the defendant's husband. That Samuel was married to Ester and not Marita Amweno. In cross-examination, **DW3** said he came home when the defendant was already living on the suit land. That he knew Samuel before his appointment as a chief because they are neighbours. **DW3** could not tell if there was a marital relationship between Samuel and Marita but he would have known if Samuel got married to Marita.

14. Boniface Karani testifying as **DW4** gave evidence corroborating the evidence of DW2 & DW3. He added that Marita lived in the house of John Omnyongori– deceased. This marked the close of the defence case.

15. Parties exchanged written submissions which I have read and considered. Two questions arise for my determination;

(a) *Whether or not the defendant is trespassing on the suit land.*

(b) *Whether or not the defendant is entitled to the land by way of adverse possession.*

16. The plaintiff is claiming the land through ancestral inheritance. He stated that he brought this case as legal representative of Marita Amweno who was the registered owner. Marita got the title having taken letters of administration of the estate of Samuel Osiko who previously owned the land. The plaintiff stated that the said Samuel was his father through marriage to Marita. The defendant denied these facts set out by the plaintiff stating that the plaintiff secretly took out the letters of administration to disinherit her of their land. To support

her contestations, the defendant called the evidence of the Registrar of persons who produced the identification records of the plaintiff as Dex 2. The records reveal that the ID serial number 2043376027 showed the plaintiff's father is called Simon Omachi Odera and not Samuel Osikol.

17. The evidence of DW1 contradicted the plaintiff's claim over the land through ancestry. The plaintiff had an obligation to show how the ancestral claim over the land arose in this case where the original owner was not his father. The mere fact that his mother got the title registered in her name pursuant to letters of grant issued in the estate of Samuel Osikol did not confer automatic inheritance rights to the plaintiffs. This is so taking into consideration the evidence of DW3 and DW4 which corroborated the defendant's case which stated that the plaintiff's mother (who was an aunt to defendant's husband) lived with the defendant's family as a relative and was never married to the late Samuel Osikol who owned the suit land.

18. The plaintiff had pleaded that the defendant got on to the suit land in the year 2011. The burden was upon him to demonstrate that indeed the defendant took occupation of the land in the year 2011.

However, from the evidence he presented, he did not prove date/year when the defendant got on to the land. This was an important piece of evidence given the fact that he had been served with a counter-claim for adverse possession. In my opinion and I so hold, the plaintiff brought this suit because the title bore his mother's name and because he has taken letters of administration of her estate. I am thus not persuaded to find that the plaintiff has proved the case of trespass alleged against the defendant.

19. The next question is whether or not the defendant on her part proved her claim for adverse possession as set out in the counter-claim. In support of her claim she produced the sale agreements executed between John Omnyongori – deceased and Samuel Osikol-deceased as *Dex 3(a) – (c)*. The agreement dated 15/12/1982 gave the number of the land sold as North Teso/Kolanya/351 (suit parcel herein). The agreement was signed in the presence of 3 witnesses. The agreement of 9/8/1979 also referred to the same parcel number and witnessed by 3 people.

20. The defendant pleaded and stated that they took occupation of the sold land and has been living on it for over 30 years. That they took in the plaintiff's mother to live with them when she had marital problems. The defendant averred that her occupation of the land has been peaceful, open and uninterrupted. Her evidence was supported by that of DW3 who was born in that area and worked as the area chief between 1992 – 2020. DW4 also corroborated the defendant's occupation of the suit land.

21. The plaintiff had not attempted to disrupt the defendant's stay prior to the filing of this suit. The proceedings before the Angurai Land Disputes Tribunal was commenced by the defendant against Marita Omweno Simon and the plaintiff. The plaintiff in his evidence before the Land Disputes Tribunal (whose proceedings were produced as Dex 6) stated thus ***"we have done a case over the same piece of land from 2001 – 2002. The documents presented today I had not seen and the case ended at Busia Law Courts where I took the proceedings as the son to Marita Amweno Simon"***. Although the plaintiff pleaded that the defendant came on the suit land in 2011, his statement before the Tribunal contradicts that averment i.e why would they have a case between 2001-2002 if the defendant did not already have an interest in the suit land

22. Further, if these cases done between 2001-2002 was to be used to show that the defendant's occupation was peaceful, the plaintiff ought to have produced or elaborated the details of the cases by stating where they were done and between which parties. On account of the evidence presented by the defendant, I find that the rights of the title holder for L.R No. North Teso/Kolanya/351 had been extinguished by prescription. As at the time the plaintiff was taking out letters of administration of the estate of Marita Omweno Simon, there was no interest capable of being transferred to him or to the beneficiaries of the estate of both Marita and Samuel in so far as the suit land was concerned.

23. Consequently, I reach a finding that the plaintiff's case is without merit and is hereby dismissed. Instead I enter judgement for the defendant as sought in the alternative prayers in the counter-claim that;

(a) A declaration be and is hereby made that the estate of John Omunyongor Inno acquired title to that property comprised in title number North Teso/Kolanya/351 by adverse possession.

(b) An order directing that title number North Teso/Kolanya/351 be consequently transferred to and registered in the names of the defendant as the legal representative of the estate of her late husband – John Omunyangori Inno.

(c) Cost of the counter-claim awarded to the defendant.

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

A. OMOLLO

JUDGE