



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT CHUKA

ENVIRONMENT AND LAND CASE NO. 14 OF 2019 (OS)

EPHANTUS MPUTHIA M'ANYIRI.....APPLICANT

AND

BONFACE MARANGU.....RESPONDENT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. The Originating Summons in this case states as follows:

ORIGINATING SUMMONS

UNDER S. 38 CAP 22 LAWS OF KENYA.

UNDER O. 37 R. 3 OF THE CIVIL PROCEDURE RULES

CAP 21 LAWS OF KENYA

Let Bonface Marangu of Kaathi village, Magutuni Tharak Nithi County within 15 days after date of service on him enter appearance to this summons which is issued on the application of Ephantus Mputhia M'Anyiri who claims to have acquired $\frac{3}{4}$ acres of L.R. Magutuni East/952 by way of adverse possession for the determination of the following questions.

1. Whether the applicant herein acquired $\frac{3}{4}$ acres LR. Magutuni East/952 by way of adverse possession having lived in quiet and uninterrupted possession of the same for a period of over 12 years.
2. Whether the name of the respondent in title LR. Magutuni East/952 should be cancelled and in his place the name of Ephantus Mputhia M'Anyiri be entered as proprietor to the extent of $\frac{3}{4}$ acres.
3. Whether applicant is entitled to costs of the suit.

Dated at Meru this25thday of April,2019

M/S AYUB K. ANAMPIU & COMPANY

ADVOCATES FOR THE APPLICANT

3. PW1, Ephantus Mputhia M'Anyiri, the plaintiff told the court that he comes from Magutuni Location of Tharaka Nithi County and he is a retired employee of Delmonte Company at Thika. He told the court that the defendant went to his place in the year 2000 and informed him that he had land he wanted to sell. He told the court that after he bought the land he is claiming in this suit, the defendant refused to transfer it to him. He told the court that he had occupied the land, three quarter acres in size, since the year 2000. He told the court that he knew the acreage to be three quarters of an acre because he himself and the defendant paid Kshs.3,000/= each for the services of a private surveyor who conducted the necessary demarcation. He went on to say that he occupied the lower portion of the suit land and the defendant remained with the upper part.

4. During cross-examination PW1 told the court that he lived on the suit land with his children. Shortly after saying this, PW1 told the court that he had a separate piece of land where his family lived and added that what he had on the suit land was a second home.

5. PW1 told the court that he bought the suit land from the defendant. Asked by the defendant's advocate why the photocopy of a document he had produced as the agreement between him and the defendant did not contain the purchase price, PW1 was hesitant to answer that question. The court directed him to answer the question and he told the court that the purchase price was Kshs.60,000/= and not Ksh.90,000/= as claimed by the defendant. PW1 denied that he only paid Kshs.30,000/= and not the total purchase price. He could not explain to court why the purchase price had not been indicated in the agreement allegedly entered into between him and the defendant. He denied that after failing to pay the full purchase price, the defendant evicted him from the suit land.

6. The court notes that in the copy of the alleged handwritten agreement between the parties, the portion to be sold to the plaintiff was half an acre and not three quarters of an acre. The defendant did not explain this discrepancy.

7. PW1 told the court that when he bought the land in 2000, he was living at Thika but he would visit his family in his other home. He told the court that he did not do actual cultivation of the suit land and added that this was being done by his family. He went on to tell the court that he lived on his parcel 752 and was only farming on the suit land. Despite having said earlier on that he had a house on the suit land, he contradicted himself during cross-examination by saying that he only farmed the land where he had planted trees, maize and napper grass which he denied had been planted by the defendant.

8. PW2 told the court he lived at Kaare since 1999. He testified that the plaintiff lived at Kaathi approximately 17kilometres away. He contradicted himself by saying that he was a neighbor of the plaintiff who lived at Kaathi, 17 kilometres way from Kaare where he had told the court he stayed.

9. PW2 told the court that the plaintiff did not have a house on the suit land contrary to what the plaintiff had told the court at the beginning of his oral evidence. PW2 also told the court that he used to cultivate the suit land for the plaintiff's wife.

10. DW1, the defendant told the court that the plaintiff did not occupy the suit land and added that he did not have even a pit latrine on the land. He admitted that he had agreed to sell half an acre of land to the plaintiff. Thereafter he agreed to sell another quarter of an acre to the plaintiff but the plaintiff only paid Kshs.30,000/= instead of the agreed Kshs.90,000/=. He went on to tell the court that when the plaintiff failed to pay the balance of the purchase price, he told him that he had cancelled the agreement for breach of contract. He was unequivocal that the plaintiff has never lived on the suit land. He admitted that the plaintiff had initially moved into the suit land but he evicted him in December, 2000.

11. The parties filed and exchanged written submissions.

12. The Plaintiff's/Applicant's submissions are reproduced herebelow in full without alterations whatsoever, including spelling or any other mistakes.

APPLICANT'S SUBMISSIONS

Your lordship, I submit that the Applicant has proved his claim on a balance of probability.

The applicant's case is that in the year 2000 and precisely on 27/2/2000, the respondent herein disposed to the Applicant $\frac{3}{4}$ Acres of LR. KIERA EAST MAGUTUNI/952.

The Applicant's case is that pursuant to that sale, the Respondent allowed the Applicant to take exclusive possession of the $\frac{3}{4}$ Acres of LR. KIERA EAST MAGUTUNI/952 since year 2000.

The Applicant's evidence is that once he took possession he fenced the same and has done extensive developments of the suit land for the last 19 years. The Applicant therefore claims the said $\frac{3}{4}$ Acres by virtue of the doctrine of adverse possession having exclusively occupied the suit land more than 12 years.

Your lordship, the Applicant testified and called a witness who corroborated his evidence as to the issue of occupation and developments.

I submit your lordship that the evidence of the Respondent is not sufficient. He did not call even a single witness to support his defence.

I humbly submit that the Applicant has proved his case.

I urge the court to grant the prayers sought plus costs of the suit.

AUTHORITIES RELIED UPON:-

1. MURANG'A ELC NO. 323/2017 (O.S)

JAMES MAINA KINYA –VS- GERALD KWENDEKA aka GERALD MICHAEL KWENDEKA

2. MOMBASA ELC NO.248/2016

CELINA MUTHONI KITHINJI -VS- SAFIYA BINTI SWALEH & 8 OTHERS

DATED AT MERU THIS ...30TH .. DAY OFJANUARY,..... 2020.

M/S AYUB K. ANAMPIU & COMPANY

ADVOCATES FOR THE APPLICANT.

13. The Defendant's/Respondent's written submissions are reproduced in full herebelow without any alterations whatsoever, including spelling or any other mistakes:-

DEFENDANT'S FINAL SUBMISSIONS

Your Lordship,

INTRODUCTION

The respondent /defendant was at all material times the registered owner of all that piece of land known as **Kiera/ East Magutuni/952**.The respondent resides on that property and has never left the property since the year,2000 when the title deeds were issued. The plaintiff herein claims that land on the basis of adverse possession but has nothing to so in terms of occupation for he has never lived on the land at all leave alone living on it for twelve(12) years continuous, un interrupted occupation or any occupation at all. As for living on the disputed land he has never lived on it even for a single day.

Indeed the evidence that the plaintiff is not in occupation has not been challenged at all. How then can one claim adverse possession if one is not in possession?

PLAINTIFF'S CLAIM

The plaintiff's claim is not justiceable. It is also half- hearted. It half-hearted for several reasons.

Firstly, the originating summons does not provide any meaningful particulars to sustain a justiceable claim. .The originating summons dated **25 /4/2019** is too scanty on information to raise any serious claim in the sense that the plaintiffs merely says he acquired $\frac{3}{4}$ of an acre without substantiating how the $\frac{3}{4}$ of an acre were acquired except to say the land was disposed to the plaintiff.

The question that follows such a vague expression in the pleading is whether the land was given free of charge? No details of the sale were pleaded nor whether or not the plaintiff paid the agreed purchaser price in full.

Secondly, even the particulars in the supporting affidavit dated **28/4/2019** is rather too casual for a case of adverse possession.

In other words, even the date of the alleged occupation in the year 2000, has not been given bearing in mind that the title for **Kiera/East Magutuni/952** was also issued on **28/8/2000**.

THE DEFENDANT'S CASE

The defendant's case is that, the defendant sold a portion of land (3/4 of an acre) to the plaintiff for the price of **kshs.90,000/=** in the year, 2000. That the defendant paid only **kshs.30, 000/=** and failed and/or refused to pay the balance of **KSHS.60, 000/=**. It is for this failure to pay that the defendant expelled the plaintiff from the land in the same year, 2000. This evidence of being expelled out of the land by the defendant has not been challenged. That the plaintiff is not in the land and that has not been challenged either. It would appear from the evidence, once the plaintiff was ejected out, he went to Thika where he lived working for Delmonte, until his retirement, in 2018, when the plaintiff has tried to use force to re-enter the land but this has been actively resisted by the defendant. There is evidence that the plaintiff has even attempted to use the police to gain entry but the defendant has resisted this because he was never paid the balance of **kshs.60,000/=**. This suit therefore should be seen for what it is clearly is: an another attempt to get free land without paying for it. This court is invited to refuse this cynical attempt by the applicant to abuse the process of the court to get land without paying for it on false pretences of adverse possession.

ON THE TOTALITY OF THE EVIDENCE.

There is absolutely no evidence that the plaintiff is in occupation of the land **Kiera/East Magutuni/952**. It is the defendant who lives there. If the plaintiff is not in occupation, it is submitted that it is a mark of dishonesty for the plaintiff to say he is in occupation .There is no evidence that the plaintiff was in occupation for two (2) years, leave alone twelve (12) years.

On occupation, I invite the court, to find that the plaintiff on permission of the defendant, occupied the land briefly, in the year 2000 when the plaintiff was ejected out for non-payment of full purchase price. The court is further invited to hold that the plaintiff failed to pay the balance of **ksh.60, 000/=** hence no free land.

I also invite this court to find and hold that since being chased out in the year 2000, the plaintiff has only come back, in 2018, to cause trouble, by trying to use force to enter the land. That once force failed, the plaintiff has lied to this court that he is in occupation. This kind of approach to litigation is deplorable.

My lord, in cross-examination by the defence counsel, PW1 (Ephantus Mpathia M'Anyiri) failed to show any form of occupation to the extent that he does not have even a toilet on the defendant's land. The intrigues by the plaintiff to get the defendant's land by false pretences tells much about the credibility of PW1 as a witness. One is left to wonder why a person would come to court to lie about an occupation for 12 years, yet even an occupation for even one (1) year can not be proved.

This failure by PW1, to tell the truth to this court makes his case unbelievable and I do invite this court to dismiss this claim in its entirety. The evidence of DW2(Bundi Nguo) too cannot be believed for he does not live at Karii Village, where the disputed land **LR. Kiera /East Magutuni/952** is situated. DW2 lives at Kaare Village, about 17 kilometers away from Karii Village. He was unable to explain whether the plaintiff is in occupation or not. The other listed witness Munene Kinyua was not called to testify.

THE BURDEN OF PROOF

He who alleges must prove a fact that is the law in **S. 107** of the evidence Act. The plaintiff has alleged adverse possession but he has totally failed to prove the same on a balance of probability. For this failure to adduce evidence to prove adverse possession, within the meaning of **S. 7** of limitation of Actions Act, Cap 22 Laws of Kenya, that is to say continuous un interrupted, and peaceful use of **LR. KIERA/EAST MAGUTUNI/952** for a period exceeding 12 years, then this action must fail. No such evidence of adverse possession has been led.

It is respectfully submitted that the plaintiff has totally failed to prove that he was in occupation of the land at all at the time of bringing this claim to court.

THE LAW

It would appear with profound respect, that the plaintiff mis apprehended the law of adverse possession when filing this claim. That the moment one uses violence to gain entry, or to sustain the illegal entry as in **LR. Kiera /East Magutuni/952** adverse possession can not be pleaded. The maxim of the law on adverse possession has been "nec vi nec clam nec precario" which means without force, without secrecy, without permission. None of those ingredients in regard to adverse possession has been proved by the plaintiff. Instead, what has come out is a violent attempt to enter the disputed land **LR. Kiera /East Magutuni/952** which is unacceptable form of entry and could not lay a basis for adverse possession.

In other words, the plaintiff has totally failed to prove adverse possession and I invite the court to hold that the plaintiff has not discharged that burden of proof.

CONCLUSION

In conclusion, I do invite this court to be guided by a decision of this court, or its predecessor, in **NAIROBI CIVIL SUIT NO.1402 OF 1986: KIMEU VS. SYINA 1991 (K L R 421)** (copy of the report is annexed to these submissions) where Bosire J (as he then was) held that the onus of proof of adverse possession and its ingredients lies on the Plaintiff. The learned Judge in that that suit dismissed the claim in that the burden of proof had not been discharged by the plaintiff.

This court too can also get some guidance from the case of **STASSO PROPERTIES LIMITED VERSUS MANJI&OTHER 1991(KLR)167**(copy of the report is annexed to these submissions)

FINALLY

The plaintiff has virtually led no evidence in support of his case. He appeared not to believe in his cause. He made such a feeble attempt to adduce evidence so much so that only reliable evidence on record is that of the defendant. The little evidence led by the plaintiff was fatally destroyed in cross-examination by the defendant to the extent that it is fitting for this court to find that there was absolutely no evidence of occupation of the disputed parcel **KIERA/EAST MAGUTUNI/952** by the applicant.

The witness statement for the plaintiff (Ephantus Mpathia M'anyiri) is unhelpful. It is submitted with profound respect, that the statement is not only too brief, but also it does not even give the consideration of the alleged sale. How then would the plaintiff expect to prove his case without particulars?

I do pray most humbly, that Your Lordship dismisses this suit with costs to the defendant.

DATED AT CHIKA THIS.....6THDAY OFDECEMBER, 2019

P.M. MUTANI ADVOCATE

FOR THE DEFENDANT

14. I have carefully considered the pleadings, the oral evidence and the authorities the parties have proffered in support of their diametrically divergent assertions.

15. The principles enunciated by the authorities proffered by the parties have been fully elaborated upon in their written submissions which have been reproduced in full in an earlier part of this judgment. I opine that it is a veritably pyrrhic exercise to regurgitate them. I have, however, taken in full the principles they enunciated in my determination of this suit.

16. Just like for other civil cases, litigants must prove their cases on a balance of probability. I find that the evidence of the plaintiff and that of his one witness has material contradictions regarding occupation of the suit land by the plaintiff. At one point the plaintiff told the court that he had a house on the suit land where he lived with his family. Later on he told the court that he did not have a house on the suit land. This latter version of his evidence was supported by PW2, his one witness.

17. DW1 was consistent in his evidence that he had agreed to sell some land to the plaintiff who only paid Kshs.30,000/= instead of the agreed Kshs.90,000/= therefore leaving an unpaid balance of Kshs.60,000/=.He told the court that although the plaintiff had occupied the claimed land, that was only for a period of less than one year before he evicted him for non-payment of the balance of the agreed purchase price. His evidence that the plaintiff did not have a house on the suit land was corroborated by both the plaintiff and his witness, PW2.

18. I find that this court, in view of the inconsistencies in PW1's evidence cannot say when he is being truthful and when he is not being truthful. I, therefore, do not find it necessary to decide when the threshold for accrual of a declaration of ownership of the suit land through the doctrine of adverse possession commenced to accrue. I also do not find it necessary to delve into the other ingredients necessary for adverse possession to accrue. I also find that the occupation of the suit land by the plaintiff for any period of time has not been proved.

19. In the circumstances, I find that the plaintiff is not entitled to a declaration that he has acquired $\frac{3}{4}$ acres of LR. MAGUTUNI EAST/952 by way of adverse possession.

20. Judgment is entered for the defendant against the plaintiff/applicant in the following terms:

a) This suit is hereby dismissed.

b) Costs shall follow the event and are awarded to the defendant.

Delivered in open Court at Chuka this 5th day of May, 2020 in the presence of:

CA: Ndegwa

Ayub Anampiu for the plaintiff/applicant

Mutani for the defendant/respondent

P. M. NJOROGI,

JUDGE.