



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 123 OF 2015

FREDRICK OMONDI OKEYO.....PLAINTIFF

= VERSUS =

1. MARY WERE

2. DOUGLAS OTIENO WERE.....DEFENDANTS

J U D G E M E N T

1. The plaintiff Fredrick Omondi Okeyo sued the two defendants in his plaint dated 22nd October 2015 seeking to be granted the following reliefs;

(a) An order of injunction restraining the defendants, their agents, servants and or any other person under them from interfering with L.R. No. SOUTH TESO/ANGOROMO/xxxx and an order of eviction from the suit land.

(b) Costs of this suit.

(c) Any other relief this Honourable court deems fit to grant.

2. The plaintiff impleaded that he is the registered owner of L.R South Teso/Angoromo/xxxx measuring approximately 0.05ha which the defendants have invaded without any justifiable reasons. He added that the defendants illegal action has caused him great loss and he seeks an order for mesne profits.

3. The defendants filed a defence and counter-claim on 6th November 2015. However, this defence and counter-claim was withdrawn after an order was made on 1st March 2018 consolidating this suit and the originating summons cause No. 79 of 2017 between the same parties. The originating summons was turned into the defence and counter-claim.

4. In the originating summons dated 17th February 2017, the Applicants (hereafter referred to as defendants) raised the following questions for determination;

(a) Whether the applicants have been in open and notorious possession of a portion measuring approximately 0.05ha out of L.R No. South Teso/Angoromo/xxxx for a period exceeding 12 years.

(b) Whether the respondent's title to the whole L.R No. South Teso/Angoromo/xxxx measuring approximately 0.05ha became extinguished upon expiry of 12 years from the time the applicant went into possession of the said land.

(c) Whether the whole applicants have now acquired title to the whole L.R No. South Teso/Angoromo/xxxx by virtue of adverse possession.

(d) Whether the whole of L.R No. South Teso/Angoromo/xxxx measuring approximately 0.05ha.

(e) Who should pay the costs of this cause.

5. Upon determination of the above questions, they prayed for orders;

(i) That the respondent's rights over the whole of L.R No. South Teso/Angoromo/xxxx got extinguished by adverse possession upon expiry of the 12 years from the date the applicants came into possession.

(ii) That the respondent be perpetually barred from taking and or using L.R No. South Teso/Angoromo/xxxx measuring 0.05ha presently under the occupation and use by the applicants.

(iii) That L.R South Teso/Angoromo/xxxx be and is hereby registered in the name of the applicants as absolute proprietors thereof.

(iv) That the respondent do execute all the relevant documents to facilitate the transfer of L.R No. South Teso/Angoromo/xxxx into the name of the applicants and that in default the deputy registrar do execute the same in the place of the respondent.

(v) That the respondent to pay the costs of this case.

6. The matter proceeded to hearing after pleadings closed. The plaintiff relied on his sole evidence which he gave on 25th September 2019. He stated that he brought this suit because the two defendants got on to his land South Teso/Angoromo/xxxx in August 2010 without his permission. That the land initially belonged to his father and they (plaintiff) used to farm the land before demise of his father. The plaintiff inquired of the defendants why they were on the land and they answered that they had bought it from plaintiff's father. The witness produced a search and green card (Pex 1 & 2) showing the land is still registered in his father's name.

7. **PW1** continued that he reported the matter to the assistant chief who gave him a letter (**Pex 3**) to take to the Land Registrar and the Registrar advising him to file succession which he did (**Pex 4, 5 & 6**). That after succession, he returned to the lands office and was issued with a title deed (**Pex 7**). He urged the court to grant him the orders sought in the plaint since he has not been able to use the land from the year 2010. The plaintiff denied that the defendants have been on the land for over 12 years. He stated that he processed the title documents to sue them as soon as he learnt of their stay on the land.

8. In cross-examination by Mr. Otanga learned counsel for the defendants, the plaintiff admitted he did not plead the year of invasion in the plaint nor in the affidavit in reply to the originating summons. That he used to live in Nairobi and came home in 2010 when he heard about the invasion. The witness stated there are two semi-permanent houses and trees on the land. He also confirmed an existing boundary marking the portion occupied by the defendants and that he lives on a neighbouring plot. That the suit plot is amongst the numbers included in the mutation dated 31/1/1995 and approved on 13/3/1995. That in 1995 he was young and the chief's letter indicated the deceased had subdivided the land for sale without consent of his family. He denied the defendants entered the suit land in 1992 after purchasing it. This marked the close of the plaintiffs' case.

9. Andrew Were Otieno gave evidence as **DW1** on 17/2/2020. He adopted his written statement dated 20/7/2017 together with annexures to his affidavit which he produced as **Dex 1-3**. He stated that in 1992 he purchased a portion of land measuring 0.05ha now comprised in the suit title from the late Charles Odhiambo Nedia out of L.R No. South Teso/Angoromo/3455 at a cost of Kshs.30,000 which he paid in full. **DW1** continued that the said portion was clearly demarcated on the ground and he took possession immediately. It is his further evidence that he constructed three (3) semi-permanent houses and stay on the whole portion with his family.

10. **DW1** added that the late Charles O. Nedia subdivided the title No. 3455 with the intention of transferring the suit title to him and he died after executing a transfer form in favour of 2nd defendant. It is his averment that their possession has been quiet, peaceful and open without interruption since 1992 to date. In cross-examination, **DW1** stated that he lost the sale agreement in the fire which gutted down his house in Gem Siaya. That the Occurrence Book (OB) number given to him was also lost. The witness did not recognise the plaintiff as the owner of the suit land. That he was surprised the Registrar did not register the transfer to the 2nd defendant. He was also not aware the plaintiff was the appointed personal representative of his deceased father. In re-examination, **DW1** said **Dex 3** confirmed that his house got burnt.

11. Douglas Otieno Were testified as **DW2** and adopted his witness statement as his evidence in chief. **DW2** reiterated the evidence of **DW1** stating that they purchased the suit land in 1992 and immediately they took possession which they have held to date. In cross-examination, **DW2** said he was not present when the agreement was prepared. That he attempted to register himself in the year 2010. **DW2** had no dealings with the late Charles Nedia. He also did not recognise the plaintiff as owner of the land but in re-examination, he admitted the plaintiff is the registered owner of the land.

12. The 3rd defendant testified as **DW3** also giving similar evidence as **DW1** & 2 in her witness statement dated 20/7/2017 and filed in court on 24/7/2017. In cross-examination, **DW3** said she was a witness to the sale agreement. That she was aware the deceased and her husband appeared before the Land Control Board meeting in the year 2002 but she never saw the letter of consent. That the suit land belongs to all three of them.

13. Getrude Awinja Ochieng' testified as **DW4**. She said she knows the three defendants. That she started living at Airstrip South Teso Angorom on 18/12/1973. That **DW1** came there in 1992 when he came to buy land from Charles Nedia. **DW4** knew 3 of Charles-deceased children but the plaintiff was not one of them. **DW4** confirmed that it was within his knowledge that the 1st defendant purchased a plot from Charles Nedia in 1992 and took possession. That the defendants occupation has been peaceful and without interruption from the plaintiff. In cross-examination, **DW4** said she was a witness to the sale agreement. That she did not know 2nd defendant nor the person who holds title to the suit land.

14. Joseph Nyongesa Manyuru testifying a **DW5** said he lives in Amerkwai near the airstrip. He gave similar statement to the evidence of **DW1-4** as per his statement filed on 10th November 2017. In cross-examination, **DW5** said he did not recognise the plaintiff as the owner of the suit land. He also did not have a copy of the sale agreement executed between 1st defendant and Charles Nedia – deceased. This marked the close of the defendants' case.

15. The parties advocates filed their closing written submissions. The plaintiff opened his submissions by giving a background of the case putting reliance on the provisions of section 24 of the Land Registration Act No. 3 of 2012 which he submitted vested absolute ownership of the land to him. He submitted that the defendants' claim for adverse possession cannot succeed because the defendants claim:

(i) They reside on the suit land as owners thereof.

(ii) They do not recognise the validity of plaintiff's title.

(iii) The 2nd defendant at some point attempted to register himself as the owner of the suit land.

(iv) They are purchasers to the suit title (see NBI Civil Appeal No. 122 of 2001; Samuel Miki Waweru Vs Jane Njeri Richu).

16. The plaintiff submitted further that the defendants never produced the alleged sale agreement thus no proof made that the deceased sold the land. Instead it lends credence to the plaintiff's assertion that the defendants invaded the land in the year 2010 which period is less than 12 years to the date of filing of this suit in 2015. He urged that his claim be allowed and the defendant's counter-claim be dismissed with costs.

17. The defendants submitted on the facts of the case and raised the following two issues for determination;

(a) Whether the plaintiff's title to LR. No. South Teso/Angoromo/xxxx measuring approximately 0.05hectares became extinguished upon expiry of 12 years from the time Andrew Were Otieno went into possession of the said land; and

(b) Whether the defendants have now acquired title to the whole of LR. No. South Teso/Angoromo/xxxx by virtue of adverse possession.

18. The defendants relied on the finding of these two cases;

(i) *Peter Mbiri Michuki Vs Samuel Mugo Michuki, court of Appeal at Nyeri, Civil Appeal No. 22 of 2013;*

(ii) *Njuguna Nadatho Vs Masai Itumo & 2 others, Court of Appeal at Nakuru, Civil Appeal No. 231 of 1999.*

Which both held on what is required to prove adverse possession to wit;

“For the defence of adverse possession to succeed, the possessor(s) must show that the possession was adequate, continuous and exclusive. In other words such possession to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor”.

19. I have considered the evidence and submissions rendered. It is not in dispute that the plaintiff is currently the registered owner of the suit title. He obtained the registration after succeeding his late father in Busia HC Suc. Cause No. 195 of 2013. A copy of the grant and the title deed issued to him were produced as exhibits. It is also not in dispute that the defendants are in occupation/possession of the suit land. The two issues raised for my determination are;

(i) Whether or not the defendants are trespassers on the suit land or

(ii) Whether or not the defendants are entitled to the suit land by virtue of adverse possession.

(iii) Who bears the costs of the consolidated suit?

20. The plaintiff evidence is that the defendants invaded the suit land in the year 2010 without any justifiable cause therefore should be removed. The defendants countered this averment by stating they have been on the land since the year 1992. Since both parties herein have separate claims against each other they each have a burden to prove their claims. The plaintiff stated that he lives on a neighbouring plot. That he received a call while working in Nairobi informing him about the invasion in the year 2010. He did not disclose the source of his informant now called him/her as a witness. In the documents produced, there was evidence of a report made to an administrative office concerning the invasion in 2010. The Assistant Chief's letter dated 28/5/2013 only refers to the deceased owning the listed parcels of land, the next of kin and splitting of the land with intention to sell without the consent of family. The letter dated 21/6/2013 by the Chief to the Deputy Registrar, High Court Busia is also for disclosure of dependants to the deceased and his assets/liabilities. The plaintiff did not satisfactorily prove of entry of the defendants on the suit parcel.

21. The 1st defendant testified that he took possession of the suit land after purchasing the same in 1992. The 2nd defendant is son to the 1st defendant while the 3rd defendant is wife of the 1st defendant. The 1st defendant stated that he built 3 semi-permanent houses on the land which he occupies with his family, with the 2nd & 3rd defendant being part of this family. The defendants called the evidence of two independent witnesses (DW4 & DW5) who confirmed that they were witnesses to the sale agreement between the 1st defendant and Charles Nedia – deceased. The defence also produced the chief's letter dated 9th September 2015 confirming that the 1st defendant's house got burnt in May 2015 with valuables destroyed and amongst them the sale agreement.

22. The plaintiff submitted that because the defendants' entry was pursuant to a sale, then a claim for adverse possession cannot succeed. The position as taken in case law is that interest from purchase becomes adverse on the expiry date when a letter of consent to transfer is to be obtained and/or at the expiry of six years from the date of execution of the agreement. In the case of **David Akongo Obillo Vs Joyce Atieno Waga [2016] eKLR** at holding No. 13 that **“... on the evidence tendered by the plaintiff, I am satisfied the plaintiff was in possession of the suit property and was using the suit property as his own property. The agreement for sale to the extent that it was subject to the provisions of the Land Control Act, Cap 302 Laws of Kenya became null and void after the expiry of 6 months as the**

consent of the Land Control Board was not obtained as is required under the Act. The possession of the suit property by the plaintiff after the expiry of the 6 months became adverse to the rights and interests of the registered owner.”

23. The plaintiff also submitted that the defendants’ claim must fail because they do not recognize the title of the plaintiff. In the originating summons, it was not pleaded that the plaintiff’s title was illegal and or irregular. The pleadings were specific that the plaintiffs’ right over the suit land had been extinguished by prescription. The plaintiff attempted to build this defence from the answers given by the defendant’s and their witnesses during cross-examination when the witnesses answered that they “do not recognise the plaintiff as the owner of the suit land.” In my opinion, I find the plaintiff confusing the issue of ownership of the land with the question of holding title to the land. Counsel did not question the witnesses whether they doubted the title held by the plaintiff. In my view the defence witnesses were right in saying that they do not recognise the plaintiff as owner of the land because such rights had been extinguished by the defendants’ possession.

24. Besides this case, there was no evidence that the plaintiff had interfered with possession and or user of the defendant in respect to suit land. The plaintiff conceded that the portion occupied is clearly demarcated. Pex 3 (Assistant Chief’s letter) corroborates the mutation evidence that the deceased had splitted the land with intention to sell. The mutation for subdivision was registered in March 1995 and the register for the suit title opened on 18/9/1995. The expression by the Assistant Chief of splitting the land in 1995 with intention to sell lends credence to the 1st defendants’ assertion that he purchased a portion of the original No. 3455 at least prior to the sub-division.

25. In a claim for adverse possession, there was no requirement for production of a letter of consent from the Land Control Board. In the **Public Trustee Vs Wanduru (1984) KLR 314 at 320, 326**, it is stated that “**the provisions of Land Control Act have no application where the claim of title of agricultural land is by operation of law such as adverse possession**”. The applicant is only to demonstrate that if the entry was by permission (sale) when does the law treat the permission to terminate for the claim of adverse possession to accrue. In this instance, time began running from around 1999 (after the lapse of 6 years). Therefore by the time this suit was filed in 2015, 12 years had lapsed. The title the plaintiff obtained in July 2015 did not amount to cancellation of the prescriptive rights which had accrued to the defendants. In **Githu Vs Ndeete (1984) KLR 776**, the Court of Appeal held that “**the mere change of ownership of land occupied by another under adverse possession, does not interrupt such person’s adverse possession.**”

26. In conclusion, I am satisfied that the defendants have proved their case and hereby find in their favour as per prayers contained in the counter-claim (originating summons). Consequently, I enter judgment in respect of the consolidated suit in the following terms;

(a) The plaintiffs suit/claim for orders of permanent injunction restraining the defendants, their agents, servants and or any other person claiming under them from interfering with LR. No. South Teso/Angoromo/xxxx and an order of eviction from the suit land be and is hereby dismissed.

(b) The defendants claim is granted and it is ordered that:

(i) The plaintiff’s rights over the whole of L.R No. South Teso/Angoromo/xxxx got extinguished by adverse possession upon expiry of the 12 years from the date the applicants came into possession.

(ii) The plaintiff’s be perpetually barred from taking and or using L.R No. South Teso/Angoromo/xxxx measuring 0.05ha presently under the occupation and use by the applicants.

(iii) L.R South Teso/Angoromo/xxxx shall be registered in the name of the defendants as absolute proprietors thereof.

(iv) The plaintiff is directed to execute all the relevant documents to facilitate the transfer of L.R No. South Teso/Angoromo/xxxx into the name of the defendants and that in default the deputy registrar of this court do execute the same in the place of the plaintiff.

(c) The costs of the consolidated suit is awarded to the defendants.

DATED, SIGNED & DELIVERED AT BUSIA THIS 17TH DAY OF JUNE, 2021.

A. OMOLLO

JUDGE