



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 629 OF 2015

SAMUEL ODHINGO WERA.....PLAINTIFF

VERSUS

JOHN OTIENO WERA.....DEFENDANT

JUDGEMENT

Samuel Odhingo Wera, the Plaintiff has come to court against the defendant by way of Originating summons claiming to be proprietor of a portion of land comprised in land NO. WEST ASEMBO/SIGER/555 measuring 0.5 hectares or thereabouts or as defined by an access road by virtue of adverse possession and trust for the determination of question namely whether the Plaintiff should be registered as the proprietor of a portion of land comprised in title NO. WEST ASEMBO/SIGER/555 measuring 0.5 hectares or thereabout or as defined by access road by virtue of adverse possession and trust, or whether the Plaintiff should be registered as proprietor of the said portion, and or whether the registration of the Respondent as proprietor of the whole the land parcel NO. WEST ASEMBO/SIGER/555 should be cancelled and the Respondent to transfer a portion of land measuring 0.5 hectares or thereabout comprised in the said land to the Applicant. Lastly, whether the registration of the Respondent as the proprietor of the whole land parcel NO. WEST ASEMBO/SIGER/555 is void and null for reasons set out in the Annexed affidavit of SAMUEL ODHINDO WERA and other reasons to be adduced at the hearing hereof.

The Plaintiff prays for a declaration that he is entitled to a portion of land comprised in land parcel NO. WEST ASEMBO/SIGER/555 measuring approximately 0.5 hectares or thereabouts by virtue of adverse possession. He further prays for a declaration that upon the expiry of 12 years the Respondent held a portion comprised in a land parcel NO. WEST ASEMBO/SIGER/555 measuring zero decimal five (0.5) hectares or approximately thereabouts in trust of the Plaintiff.

Moreover, a declaration that upon expiry of 12 years, the Respondent interest in a portion of land occupied by the Plaintiff comprised in title NO. WEST ASEMBO/SIGER/555 measuring zero decimal five (0.5) hectares or approximately thereabouts got extinct.

Furthermore, a declaration that the Respondent do transfer the portion of land occupied by the Plaintiff comprised in title NO. WEST ASEMBO/SIGER/555 measuring zero decimal five (0.5) hectares or approximately, thereabouts to the Applicant and/or in default the executive officer of this court do execute all the necessary document to effect the transfers.

He also seeks a declaration that the registration of the Respondent as the sole proprietor of land approximately 0.5 hectares or thereabout be excused from the said land in question and an order section 38 of lamination of the Action Act Cap 22 laws of Kenya that the Plaintiff be registered as the proprietor of a portion of land comprised in land parcel NO. WEST ASEMBO/SIGER/555 measuring approximately 0.5 hectares or thereabouts instead of respondent. Last but not least, an order of costs.

In the supporting affidavit the plaintiff states that the Defendant is his step brother and the registered proprietor of Land parcel NO. WEST ASEMBO/SIGER/555. The said land was before registration owned by his father, who died in 1966. Prior to his father's death, the deceased had constructed a homestead of his mother Benedeta Nyangweso Wera now deceased, in 1963.

The Plaintiff had established a homestead on a portion of land comprised in title NO. WEST ASEMBO/SIGER/555 measuring approximately 05 hectares or thereabouts on the said portion is distinct from the rest of the said land in question as it is separated by an access road. That he established his homestead in 1974.

During the registration, their father's land was demarcated and he got parcel NO. WEST ASEMBO/SIGER/555. The portion where his mother's homestead and his were is Land Parcel NO. WEST ASEMBO/SIGER/558 and not in parcel NO. WEST ASEMBO/SIGER/555. He was brought up on the said portion of land comprise in title NO. WEST ASEMBO/SIGER/555 and he been in the quiet possession and occupation of the said of portion to-date, without any interruption and his use of the said land has been open and without force.

That he came to know the said portion he occupied was part of the land parcel in question when the Respondent, in 1998 purported to chase

his deceased mother from the said land in 1998, when the Respondent brought in gold prospectors and whom he refused permission to work on the portion he occupied.

There have been no disputes between him and the Respondent prior to and after land adjudication period in 1972 to-date. That the Respondent has never used the portion of land he occupies comprised in the land in dispute. The Plaintiff's mother filed Land Dispute no. SYA/381/97 in Siaya Land Dispute Tribunal, which Tribunal lacked jurisdiction. That the Respondent has never been in occupation or use of the said portion the plaintiff occupies since time immemorial and the plaintiff had developed it by planting mangoes and trees and also cultivate the land.

That the Respondent's registration of the portion the plaintiff occupies to be part and parcel No. West Asembo/Siger/555 was fraudulent and ought to be cancelled for reasons that respondent fraudulently registered the proton of land in question when he knew or ought to have known that it does not form part of the land parcel NO. WEST ASEMBO/SIGER/555.

The particulars of fraud are misleading land officials that the portion the plaintiff occupies was part of the land parcel NO. WEST ASEMBO/SIGER/555, when the Respondent knew or ought to have known that this land reached the access road and registering the said portion secretly, when the plaintiff was away in Tanzania and registering land parcel NO. WEST ASEMBO/SIGER/555 in the plaintiff's name without including his homestead and failing to disclose material facts to the land adjudication officers.

That the Plaintiff has occupied the said portion of land for over twelve years. His occupation to the said portion of land in issue is known to the Respondent. Upon the expiry of 12 years the plaintiff continued use of said portion of land comprised in title NO. WEST ASEMBO/SIGER/555, the Respondent interest on the said got extinguished.

The defendant never filed a replying affidavit and did not attend court to testify. The plaintiff's evidence was not contested.

When the matter came for hearing, the Plaintiff relied on the supporting affidavit which is not controverted and testified that he has been in possession of the suit land for more than 12 years. He produced the register and maps for the suit parcel. I do find that the Plaintiff has proved his case on a balance of probabilities and do find that the plaintiff should be registered as the proprietor of a portion of land comprised in title NO. WEST ASEMBO/SIGER/555 measuring 0.5 hectares or thereabout (or as defined by access road) by virtue of adverse possession and trust.

The registration of the Respondent as proprietor of the whole the land parcel NO. WEST ASEMBO/SIGER/555 should be cancelled and the Respondent to transfer a portion of land measuring 0.5 hectares or thereabout comprised in the said land to the Applicant.

I do grant a declaration that the Plaintiff is entitled to a portion of land comprised in land parcel NO. WEST ASEMBO/SIGER/555 measuring approximately 0.5 hectares or thereabouts by virtue of adverse possession and an order that the Respondent do transfer the portion of land occupied by the Plaintiff comprised in title NO. WEST ASEMBO/SIGER/555 measuring zero decimal five (0.5) hectares or approximately, thereabouts to the Applicant and/or in default the executive officer of this court do execute all the necessary document to effect the transfers. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28th DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE