



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**LAND CASE NO. 1288 OF 2015**

**BENJAMIN OMANWA MOKUA.....PLAINTIFF**

**=VERSUS=**

**BISHENDASS BERI & 3 OTHERS.....DEFENDANT**

**JUDGEMENT**

**Background.**

1. This is a judgement in respect of two suits which were consolidated on 2<sup>nd</sup> February 2016. The first suit is *ELC 692 of 2014 (Benjamin Omanwa Mokua Vs Bishendass Bevi)*. The second one is *ELC 1288 of 2015 (Benjamin Omanwa Mokua Vs Bishendass Beri, Maalim Dakane Ali, Chief Land Registrar Nairobi and The Attorney General)*.

2. In the first suit, the plaintiff seeks the following reliefs:-

- 1. A declaration that the Defendant's title to all that piece of land known as LR No.209/3630 registered under Grant No.I.R 9417 (Nairobi South B) has been extinguished in favour of the Plaintiff by virtue of adverse Possession in pursuant to section 37 and 38 of the Limitation Actions Act Cap 22 Laws of Kenya having occupied the said land for more than 12 years preceding the filing of this suit.***
- 2. That the Plaintiff is entitled to be registered forthwith as owner of all that piece of land known as LR No.209/3630 registered under Grant No.I.R 9417 ( Nairobi South B) which said land he has held on adverse possession since 12<sup>th</sup> March 1998 to date for a period of more than 12 years immediately preceding the filing of this suit, the same being land which the Plaintiff has occupied openly and continuously as of right and without any interruption from the Defendant or its predecessors in title.***
- 3. That the Land Registrar at Nairobi to delete the name of BISHENDASS BERI the Defendant herein and register the name of BENJAMIN OMANWA MOKUA the Plaintiff herein in place thereof absolutely.***
- 4. That the costs of this application be provided for.***

3. In the second suit, the Plaintiff seeks the following reliefs:

- a) A Declaration that the transfer of All that piece of land known as L.R No.209/3630 Nairobi to the 2<sup>nd</sup> Defendant was fraudulent null and void.***
- b) A cancellation of the transfer affected by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant.***
- c) An order for the rectification of the Certificate of Title to read the name of Bishendass Beri the 1<sup>st</sup> Defendant herein as the registered owner of all that piece of land known as L.R No.209/3630 Nairobi.***
- d) Costs of this suit***
- e) Interest of Court Rates***

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were served through substituted service by advertisement but they neither entered appearance nor filed

defence. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants entered appearance and filed a defence but during the hearing, they did not appear.

### **Plaintiff's case.**

5. The Plaintiff testified that his son Kenned Nyasimi Omanwa was a tenant in a house which was erected on LR No.209/3630 at South B in Nairobi. When his son relocated to the United States of America (USA), he moved into the house in 1998. He peacefully lived in the house and paid all the utility bills but did not pay any rent to anyone. On 31<sup>st</sup> March 2014, a letter addressed to his son was dropped at the house. The Letter was written by an advocate and demanded for rent arrears with effect from 1<sup>st</sup> June 2000. The letter also asked his son to vacate the house by May 2014.

6. It is after this notice that the Plaintiff moved to court and filed the first suit on 4<sup>th</sup> June 2014 whereby he sought to be declared as having acquired the suit premises by adverse possession. He applied for injunction against the defendant in the first suit. When he obtained injunction orders, he went to the lands office to register the injunction against the title. The injunction could not be registered as he was told that the suit premises did not belong to the Defendant in the first suit. He was informed that the Defendant in the first suit had transferred the suit premises to one Maalim Dakane Ali on 19<sup>th</sup> July 1989.

7. It is after this that he filed the second suit in which he contends that the transfer of the suit premises to the 2<sup>nd</sup> Defendant in the second suit was fraudulent and was meant to render the first suit nugatory. It is his evidence that the transfer is a collusion between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the second suit to defeat his claim in the first suit.

8. The Plaintiff testified that he was evicted from the suit premises after auctioneers came calling on grounds that his son was in rent arrears. He contends that the distress for rent was based on a forged tenancy agreement which is alleged to have been signed by his son who had long-relocated to USA. He reported his eviction to the Directorate of Criminal Investigations (D.C.I) who promised to investigate the matter. He even recorded a statement with DCI but no action has ever been taken.

### **Analysis**

9. I have carefully considered the evidence adduced by the Plaintiff as well as his written submissions. I have also perused all documents which were produced by the Plaintiff. The law requires that a person who claims to have acquired a property by adverse possession has to apply to court and provide a certified copy of the register. In the instant case, the Plaintiff in the first suit did not provide a certified copy of the register. What he provided when he filed the first suit is a photocopy of the title. According to the photocopy, the registered owner of the suit premises is the Defendant in the first suit that is Bishendass Beri.

10. The first issue to be addressed is whether the plaintiff has proved that he is entitled to a declaration that he has acquired the suit property by adverse possession. The other issue to be addressed is whether the transfer from the 1<sup>st</sup> Defendant in the second suit to the 2<sup>nd</sup> Defendant in the second suit was fraudulent. I have already said herein above that the Plaintiff did not provide a certified copy of the register. If indeed he obtained the photocopy from lands Office, the question which begs an answer is why the same was not certified as a true copy of what was in the register.

11. When the Plaintiff went back to the Lands Office, he obtained a certified copy of the title which shows that the suit premises are in the name of the 2<sup>nd</sup> Defendant in the second suit. This therefore means that the first suit cannot stand as it is against a person who is not the registered owner of the suit premises. The Plaintiff contended that the transfer of the suit premises from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant in the second suit was fraudulent. There was absolutely no evidence adduced by the Plaintiff to show that the transfer was fraudulent and that it was backdated. Had the Plaintiff obtained a certified copy of the register when he filed the first suit, then the court would have questioned the subsequent entries. The photocopy which the Plaintiff annexed to the originating summons in the first suit does not show when it was obtained. There is therefore no basis upon which the court can make findings that the transfer was made after the Plaintiff had obtained his photocopy of title.

12. The manner in which the Plaintiff was evicted may have been unprocedural but this does not have any bearing to the transfer which was effected on 19<sup>th</sup> July 1989. The Plaintiff having failed to adduce any evidence of fraud, there is no basis upon which he can base a claim for adverse possession. Even if the court were to find that the registered owner of the suit premises was the 1<sup>st</sup> Defendant in the second suit, the Plaintiff would not have succeeded in his claim on adverse possession. This is because he was invited into the house of his son who was a tenant. He was living in the house at the invitation of his son who was a tenant and there is therefore no way he would have claimed ownership through adverse possession.

### **Conclusion.**

13. Based on the analysis hereinabove, I find that the Plaintiff has failed to prove the two suits on a balance of probabilities. The two suits are hereby dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi on this 13<sup>th</sup> day of February 2020.**

**E.O .OBAGA**

**JUDGE**

In the Presence of:-

Mr Kefah for Mr Kangata for Defendant and

M/s Gachohi for Mr Gomba for Plaintiff.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**