



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 82 OF 2016**

**GILBERT OKOCHI NALIALI.....PLAINTIFF**

**= VERSUS =**

**AMOS MAGUNIA.....DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff in this case – **GILBERT OKOCHI NALIALI** – initially filed the matter in the lower court against the Defendant – **AMOS MAGUNIA** – whom he accused of unlawfully entering his land parcel No. SAMIA/BUDONGO/2373 (“suit land” hereafter) and using it without his consent. At the time, the main order sought by the Plaintiff was injunction. Later on, the Plaintiff engaged services of counsel and the plaint was amended re-dated 8/7/2014 and re-filed on the same date. The initial plaint was filed on 14/3/2013.

2. The complaint remained the same but the prayers sought this time round were as follows:

Prayer (aa): Eviction order against the Defendant.

Prayer (ab): A permanent order of injunction to issue against the Defendant or his agents, servants and/or any person under him from interfering with L.R. SAMIA/BUDONGO/2373.

Prayer (b): Costs of this suit.

3. The Defendant responded to the suit vide a defence dated 10/5/2013 filed on the same date. The Plaintiff’s claim was denied and the Defendant pleaded, *inter alia*, that he had lived on the suit land for over 12 years and was therefore an adverse possessor. Jurisdiction of the court was denied as the Defendant viewed the matter as a boundary dispute.

4. At some point, the Defendant ceased to be represented by counsel. This matter was also transferred here. I conducted the trial on two dates: 21/1/2018 and 21/2/2018. The Plaintiff testified as PW1 on 21/1/2018. His evidence was brief. He said he owns the suit land but he was not using it. The Defendant, he said, was the one using it without his permission. The Plaintiff produced the title deed for the land and a copy of search confirming he is the owner. The cross-examination done by the Defendant show the Plaintiff saying that he bought the land from Ogolla Onyango and that, at the time, it was part of land parcel No. 1072.

5. The Defendant testified on 22/1/2018. He said, *inter alia*, that on 20/11/1990 he got to know that land parcel No. SAMIA/BUDONGO/1072 was being sold. The seller was Margaret Ogolla (DW3) and the Defendant decided to buy the land. He bought three acres and started living on the land in 1998. He produced the sale agreement as DEX No. 1. Then sometimes in 2010 he was told the surveyors were coming to the land. The survey was done and since the Defendant was unaware as to what was happening, he went to the seller who told him that the survey had been done by the “**wrong people**” and that they knew him as “**the person they sold the land to**”. The Defendant also availed DEX No.2, which is an agreement showing he had completed paying for the land. The agreement is dated 2/7/2010. During cross-examination, the Defendant admitted that he has no title to the land.

6. Unlike the Plaintiff, the Defendant called witnesses. His first witness – Barasa Ogolla – testified as DW2 on 21/2/2018. He said, *inter alia*, that the suit land belongs to the Defendant, having been sold to him by the witness’s mother – MARGARET OGOLLA (DW3). And the reason for selling was explained: DW2’s sister had been married to a man who divorced her and was claiming back the dowry he had paid. It would appear that the matter had gone to court and the dowry had to be paid back. Non-payment would see another parcel of land – parcel No. 1077 – sold to realise the payment. The Defendant was therefore sold a portion of parcel No. 1072 to raise money to pay back the dowry and thus prevent sale of parcel No. 1077.

7. DW2 explained that the plaintiff came into the picture after the death of DW2’s father. The Plaintiff is said to have cheated DW2’s

brother – PATRICK MUKANDA OGOLLA – and obtained the death certificate of DW2’s late father. Armed with the death certificate, he instituted succession proceedings, obtained a grant, and then proceeded to subdivide parcels Nos. 1072 and 1077 into several portions. All said, DW2 seems to be accusing the Plaintiff of fraudulent dealings.

8. The alleged seller of the land to Defendant testified as DW3. She adopted her statement as evidence. Her position is like that of DW2. To her, the Plaintiff illegally got the land. In her statement, she is seen asking the Plaintiff **“where did you get power to steal my children’s land?”**

9. There was also DW4 – PATRICK G. ODUKE. He also adopted his statement as evidence. Another one was DW5 – VICTORINA SHIKUKU OWINO – who likewise adopted her written statement as evidence. DW4 said, *inter alia*, that he witnessed the sale of land to Defendant by DW3. He said also that the Defendant has lived on the land since 1998. DW5 also said the same thing.

10. After hearing, both sides filed written submissions. The Plaintiff’s submissions were filed on 19/3/2018. The Plaintiff gave an overview of the case and then said that he is the bonafide owner of the suit land. The Defendant on the other hand was said not to have proved **“any possessory, beneficial or ownership rights for this court to sustain and protect”**. The Defendant was faulted further for not filing a counter-claim. The court was urged to enter judgement in favour of the Plaintiff.

11. The Defendant’s submissions were filed on 21/3/2018. He submitted, *inter alia*, that **“it is very clear beyond any contradiction”** that he **“legally acquired portion of land SAMIA/BUDONGO the land (sic) 1072 in the year 1990 and started occupying the land in 1998”**. To the Defendant, the Plaintiff failed to demonstrate to the court how he acquired the suit land. The Defendant was categorical that the Plaintiff acquired the land fraudulently. It would appear from his submissions that he wants the Plaintiff’s title cancelled.

12. I have considered the pleadings, evidence, and rival submissions. The strength of the Plaintiff’s case is based on possession of title. In other words, he is the registered owner of the suit land. The Defendant does not deny that he uses the land. It is also clear that though he has filed no counter-claim, he also view himself as an owner, having purchased it from DW3. Infact, all the evidence availed by the defence seems to point to the Defendant as the defacto bonafide owner. The main weakness of the defence case however is that though fairly serious allegations were made against the Plaintiff, no one deemed it necessary to file a claim against him. In other words, no one is seeking to defeat the Plaintiff’s title. Infact this point was stated in a rather different manner in the Plaintiff’s own submissions.

13. The scenario that presents itself here is that even if the Plaintiff’s case is dismissed, the Plaintiff would still continue being the registered owner of the suit land. In law, a registered owner of land has rights and privileges arising from such ownership. And such rights and privileges are always construed in favour of the registered owner as long as his title is not defeated or displaced. That is the situation that obtains here.

14. Since the Plaintiff has shown he is the registered owner, and the Defendant has not filed a claim to defeat his title, it is obvious that the Plaintiff cannot continue being a title holder without enjoying possessory rights. In law, unless shown otherwise for good reason, registered ownership should go together with possession. And if, for any reason, the registered owner is not the possessor, any other possession, except adverse possession, should derive from his authority. The Defendant would have done well to advance the issue of adverse possession mentioned in his defence but he did not do so.

15. I also seems to see that though the Defendant showed he purchased the land from the DW3, I really do not know whether DW3 had the requisite capacity to sell land belonging to her deceased husband. And even assuming that she had, it is clear that parties did not go to land Control Board to obtain the requisite consent after the Defendant had finished paying for the land. He finished paying allegedly on 2/7/2010. According to Section 8 the Land Control Act (cap 302), he was supposed to get a consent from the Land Control Board of the area within six (6) months. It appears clear that he did not do so. And even if one were to go by the first agreement which shows the first payment, that agreement is dated 20/11/1990. Six months also expired without the Defendant obtaining consent after that agreement was made. Section 6 of the Land Control Act (cap 302) says that such transaction **“is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated had given its consent in respect of that transaction in accordance with”** the Act.

16. It is therefore clear that there are all these weakness noticeable in the Defendant’s case. The upshot is that the Defendant has not given a defence that successfully assails the Plaintiff’s case. I therefore make a finding that the Plaintiff’s case is proved on a balance of probabilities. I grant him prayers (aa) and (ab) in the plaint. As for prayer (b), which is about costs, my considered view that each side should bear its own costs and I so order.

**Dated, signed and delivered at Busia this 7<sup>th</sup> day of May, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendant: Present

Counsel for the Plaintiff: Absent

Counsel for the Defendant: N/A

Court Assistant: Nelson Odame