



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 8 OF 2011 (O.S)

WILLIAM ODUORY MUKANGAH.....PLAINTIFF

= VERSUS =

MICHAEL RADIDO AYWAK.....DEFENDANT

AND

GEORGE OBUYA NAMBUBI.....1ST INTERESTED PARTY

JOSEPH MAJIMBO OMONDI.....2ND INTERESTED PARTY

J U D G E M E N T

1. This suit was instituted on 4/3/2011, by the Plaintiff – **WILLIAM ODUORY MUKANGA** – against Defendant – **MICHAEL RADIDO AYWAK** – vide an Originating Summons dated 2/3/2011 which was later amended on 4/6/2013 and further amended on 24/4/2015. The Plaintiff claims four acres of land from the original property, LR BUNYALA/MEDEMBI/2688 (hereinafter “the suit property”) by way of adverse possession. The suit property has currently been sub-divided into BUNYALA/MUEDEMBI/2927 and 2928.

2. The court has been invited to determine the following questions:

- (i) Whether or not in 1985 the Applicant purchased a portion of land measuring 2 acres from one Teresa Nerima Opondo at a purchase price of Kshs.5,000 to be excised from original LR. BUNYALA/MUEDEMBI/2688.
- (ii) Whether or not in 1988 the Applicant bought from the said Teresa Nerima Opondo another parcel of land measuring 2 acres at an agreed purchase price of Kshs.10,000.
- (iii) Whether or not the Applicant immediately took possession thereof and had been in quiet peaceful and uninterrupted occupation for over a period of twelve years.
- (iv) Whether or not the said piece of land has boundaries on the ground save for areas where the Respondent has uprooted sisal.
- (v) Whether or not the transfer to the Respondent of the whole of LR.BUNYALA/MUEDEMBI/2688 had any effect on the Applicant’s adverse possession of the portion of land occupied by him.
- (vi) Whether or not the Applicant is entitled to the suit land by adverse possession of four (4) acres from the original LR. BUNYALA/MUEDEMBI/2688.
- (vii) Whether or not the Applicant is entitled to costs of this suit?
- (viii) Whether or not the Deputy Registrar of this Honourable Court would be authorised to execute transfer documents on behalf of the Respondent.

3. The Defendant entered appearance on 23/3/2011. He filed his replying affidavit dated 7/4/2011 on the same date and a successive replying affidavit on 2/8/2013 in response to the Plaintiff’s amended originating summons. The first interested party, GEORGE OBUYA NAMBUBI was enjoined based on his purchaser’s interest in the suit property and filed his replying affidavit on 3/6/2014. The 2nd Interested Party JOSEPH MAJIMBO OMONDI was enjoined due to an ancestral entitlement to the property which he claims adversely against the Defendant

in his statement of claim dated 26th August 2016.

4. On 12/7/2017 the parties consented to dispose of the suit by way of written submissions in lieu of viva voce evidence with reliance on statements, documents and pleadings on record. The Plaintiff and 2nd Interested Party filed their submissions on 28/8/2017 but the Defendant and 1st Interested Party failed to do so after numerous extensions.

5. The Plaintiff claims that he purchased 2 acres of land from one Teresa Nerima Opondo (deceased) to be excised from the original land parcel LR No. BUNYALA/MUDEMBI/2688 for a consideration of Kshs.5,000 on 30/12/1985. He bought two more acres from her from the aforesaid original land parcel for Kshs.10,000 on 1/12/1988. He annexed a copy of handwritten agreement as proof of the same. On 11/1/1990, Hakati Land Control Board approved the sale and consequent sub-division of 2 hectares from LR. No. BUNYALA/MUDEMBI/2688.

6. The Plaintiff then discovered that Teresa Nerima Opondo sold a portion of two acres from the original parcel to the Defendant in 1988 who instead transferred the parcel to himself inclusive of the Plaintiff's 4 acre parcel. The Plaintiff reported the matter to the District Officer, Budalangi division. The parties were summoned whereupon it was agreed that the Defendant would subdivide the land into three parts. One for himself, the second for Nerima's family and the third for the Plaintiff. The Defendant had subdivided the original parcel into two halves of 7½ acres each. The Defendant's half subsumed the Plaintiff's portion. He further began the process of subdividing the half registered in his name and selling it to third parties.

7. The Defendant did not re-transfer the Plaintiff's 4 acre portion of the suit property even after promising to do so. He only attempted to take possession of the suit property in October 2010. The Plaintiff avers that he has had quiet possession of the suit property since 1985. Two witnesses have corroborated this fact, one Raphael Magio who is his neighbour states that the Plaintiff has been on the suit property for 20 years. Joseph Majimbo Omonyo who is also the 2nd Interested Party states that sometime in 1989 the late Teresa Nerima Opondo who was his grandmother informed him that she had sold the suit property to the Plaintiff.

8. The 2nd Interested Party adopted the Plaintiff's claim. However, he also claims to be entitled to the Defendant's portion of land, LR No. BUNYALA/MUDEMBI/2928 by way of adverse possession. He claims to have been in quiet possession of the said property for over 40 years which his grandmother, Nerima Apondo allotted to him in 1972. He has not specified the dimensions of the portion which he is claiming nor adduced any evidence in support of his claim. Further, he contradicts himself in his statement of claim by stating that the land was given to him by his aunt. (please see para 5 of the said claim).

9. The Defendant is of the view that the suit was wrongly instituted against him and is therefore bad in law. He contends that it should have been filed against the estate of Teresa Nerima Opondo. He has no contractual obligations with the Plaintiff and is the rightful owner of LR No. BUNYALA/BULEMIA/2928 that was a resultant partition of the original property, LR No. BUNYALA/MUDEMBI/2688.

10. The 2nd Interested Party bought 0.8Ha at Kshs.150,000 from the Defendant to be excised from his portion, LR No. BUNYALA/MUDEMBI/2928. He annexed a sale agreement dated 30/10/2010 in support of his claim. The 2nd Interested Party also paid for the cost of sub-division which process is not yet completed. Before the purchase, he conducted due diligence and satisfied himself that LR. No. BUNYALA/MUDEMBI/2928 was duly transferred to the Defendant. He claims that he is an innocent purchaser for value without notice of the Plaintiff's claim in the original suit property.

11. I have considered the parties' pleadings specifically their statements, documents, submissions and authorities. From a reading of the same, the following issues arise:

(i) Whether the Plaintiff is entitled to the suit property by way of adverse possession?

(ii) Whether the 1st Interested Party is entitled to 0.8Ha of LR. No. BUNYALA/MUDEMBI/2928 pending sub-division as an innocent purchaser for value without notice of the Plaintiff's and Interested Party's claim?

(iii) Is the 2nd interested party entitled to a portion of LR. No. BUNYALA/MUDEMBI/2928 by way of adverse possession?

12. It is evident that the Plaintiff has been in occupation of four acres of the suit property form 1988. He gained possession of the same through the permission of the seller Teresa Nerima Opondo (deceased) who sold it to him. The Hakati Land Control Board approved the sale on 3/8/1990 authorizing the sub-division and transfer which document dated 11/1/1999 has also been produced.

13. It is also not in issue that a dispute arose after the seller sold 2 acres of the same property to the Defendant who mischievously registered a larger portion than that which was agreed in his name. The complaint made before the District Officer, Budalangi Division was made by the Plaintiff himself. The letter to the seller dated 16/7/1990 and the title of the case in the minutes of the ensuing meeting dated 14/5/1990 confirm this fact. Apart from having a deficit on the purchase price, the Defendant admitted that the agreement was for 2 acres of land yet he appropriated to himself 7½ acres. Since the Defendant already had a title of 7½ acres of the suit property, it was decided that he subdivides the land into two and that he re-transfer 5½ acres back to the seller. This is stipulated in the letter from the District Officer dated 2/8/1990. Unsuccessful attempts were also made at the seller's behest to have the suit property re-surveyed to reflect the correct position. These facts tally with the Plaintiff's version of events.

14. The Defendant's response consists of bare general denials. No details are given to rebut the Plaintiff's case. He is quite economical with information, which conduct by way of material non-disclosure has claimed a victim, the 1st Interested Party. On scrutiny of the sequence of events, it is clear that the Defendant took advantage of the demise of the seller and had the caution registered by her removed so that he could freely deal in the suit property and sell or transfer it to third parties. He is purporting to sell and subdivide the suit property without abiding by the decision agreed upon by the parties before the District Officer whose jurisdiction he had submitted to.

15. The 1st Interested Party claims to have conducted sufficient due diligence. However, a simple site visit would have revealed that the Plaintiff occupies the portion of the suit property which he claims.

16. The Defendant and 1st interested party also have something else going against them. And it is this: both failed to file written submissions. As I write this judgment, I do not have their submissions. I mentioned earlier, that parties agreed to file written submissions in lieu of oral hearing. The prosecution of this case therefore was to be through submissions, not hearing. What this in effect means is that if a party has not filed submissions, he has not prosecuted the case. A case is brought to court to be prosecuted. If it is not prosecuted, it fails. By failing to file submissions, the Defendant and 1st interested party were courting failure.

17. The 2nd Interested party made a serious mistake in the manner or capacity in which he joined the suit. He joined the suit as an interested party and thereafter filed what he called a statement of claim. It is clear that the 2nd interested party is, like the Plaintiff, also claiming to be an adverse possessor. Claims of adverse possession are filed in court by way of Originating Summons. It should have been easy for the 2nd interested party to join this case as 2nd Plaintiff. That way, the Originating Summons herein would have been amended to include his questions or issues for determination. As things stand now, the 2nd interested party's claim is unknown to Law.

18. Besides, the 2nd interested party has not adduced any evidence in support of his claim. It is not clear whether he contests ownership of the whole of L.R. No. BUNYALA/MUDEMBI/2928 or just a portion of it. His occupation is neither demonstrated nor corroborated. And when one looks at what the court is invited to determine in the further Amended Originating Summons or even in the submissions later filed by counsel for both parties, everything relates to the Plaintiff, not the 2nd interested party. Simply stated, the 2nd interested party's case was incompetently handled right from the beginning.

19. I now come back to the Plaintiff. He was right to sue the Defendant as a suit on adverse possession can only be instituted against the registered owner of the property in question. The Defendant is wrong to view the matter as one of contract. If the matter had been such, it is true that the Plaintiff could move against the estate of the seller. But it is not. It is a matter of adverse possession. The Defendant had full knowledge of the Plaintiff's occupancy. To date, he has not attempted to assert his right over the suit property by evicting the Plaintiff. It is clear to me that the Plaintiff's possession and/or occupation of the portion he claims has been peaceful, open, and continuous, that is "*nec vim, nec clam, nec precario*".

20. It is clear that the Plaintiff went into possession immediately after purchase. The Defendant seems to have manipulated things to become a registered owner shortly after. Even then however, the Plaintiff continued in possession and by the time he was filing the suit, his possession had been adequate in continuity, in publicity and in extent. That possession had also been actual, visible, exclusive and hostile. I say all this because the Defendant seems to have become owner in 1988. This suit was filed in 2011. The Plaintiff had gone into possession and occupation much earlier. As the Plaintiff was already in possession when the Plaintiff became owner, it is clear that time started running against the Defendant, or was indeed already running, at the time he became such owner.

21. My answers then to the questions on the face of the Further Amended Originating Summons dated 24/4/2015 – Questions 1, 2, 3, 4, 5, 6, 7 and 8 – are YES to each of the questions. And it is YES because the Plaintiff has proved his case on a balance of probability.

22. I need to add that the claim of the 2nd interested party is not successful. He never proved it. The interest or claim of the 1st interested party is also not successful. He neither prosecuted nor proved it.

Dated, signed and delivered at Busia this 15th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Present

1st Interested Party: Absent

2nd Interested Party: Absent

Counsel of Plaintiff and 2nd Interested Party: Absent

Counsel of Defendant and 1st Interested Party: Present

Court Assistant: Nelson Odame