



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 76 OF 2015**

**IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011**

**AND**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION OF LAND**

**MEASURING 1 ACRE TO BE CURVED OUT OF LAND**

**PARCEL NO. S. TESO/APOKOR/552**

**BETWEEN**

**FLORENCIO OKITUK OPILIO.....APPLICANT**

**VERSUS**

**KAROLI PANYAKO OMULEPU.....RESPONDENT**

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

1. The plaintiff took out the Originating Summon dated 27/7/2015 against the defendant asking to be granted the following orders;

(i) That the respondent's rights over a portion measuring 1 acre out of L.R. No. SOUTH TESO/APOKOR/552 got extinguished by way of adverse possession upon expiry of 12 years from the time the Applicant came into possession in 1999.

(ii) That the applicant be awarded a portion of land measuring 1 acre of L.R. No. SOUTH TESO/APOKOR/552.

(iii) That the respondent be ordered to execute all relevant statutory documents required of him to facilitate transfer of a portion measuring 1 acre out of L.R. SOUTH TESO/APOKOR/552 into the names of the applicant; and in default, the Deputy Registrar of this court do execute the same in place of the respondent.

(iv) That the respondent be permanently enjoined from taking, using, claiming and or from in any way interfering with the applicant's portion measuring 1 acre out of L.R. No. SOUTH TESO/APOKOR/552.

**(v) That costs of this suit be borne by the respondent.**

2. The Originating Summon is supported by the applicant's affidavit sworn on the same date (27/7/2015). He deposed that he purchased one (1) acre portion of land comprised in title No. L.R. No. South Teso/Apokor/552 from the Respondent on 25/6/1999. The applicant deposed that the said portion was immediately demarcated on the ground and he assumed possession. It is the applicant's case that he has been in peaceful possession quietly and notoriously for a period of 14 years and he built two semi-permanent houses and settled his 2<sup>nd</sup> wife Alice Baraza thereon.
3. The plaintiff continued that he later on moved Alice from the land but continued to use it for farming food crops such as maize, millet, sorghum and indigenous varieties of vegetables. Consequently, he is entitled to the suit portion and should be registered as such.
4. The respondent in opposing the plaintiff's claim swore a replying affidavit dated 3<sup>rd</sup> August 2015 filed on the same date. He agreed that there was a sale agreement dated 25/6/1999 drawn between him and the plaintiff and proceeded to annex a copy of the same as "KPO-1". The respondent admitted receiving Kshs.23,500 from the applicant but added that there was a balance of Kshs.1,500 which is outstanding to date.
5. The respondent deposed that the applicant did not erect any semi-permanent houses on the said piece. He also denied that the sold piece was demarcated stating the same was to be done after completing payment of the purchase price. The respondent stated that he demanded for the balance through the office of the area chief on 12/7/2015 and 20/7/2015. The defendant denied the signatures acknowledging receipt of the balance in plaintiff's copy of the agreement which he annexed as "KPO-3".
6. At the close of the pleadings each of the parties called 3 witnesses. The plaintiff testified on 20/3/2018 reiterating the facts set out in his pleadings. He produced the sale agreement as **Pex 1**. **PW1** stated that the agreed sale price was Kshs.25,000 which he paid in full on various dates i.e. 25/6/1999, 30/8/1999 and 16/12/1999. He stated further that he took possession in 1999 and started cultivating the land. That they have lived peacefully with the defendant but the defendant refused to transfer the land to him. That he has cultivated the land for over 12 years. He produced photographs of his crops on the land as **Pex 2(a), (b) and (c)**. He urged the Court to declare him as the owner of this portion. In cross-examination, **PW1** said there is a boundary demarcating the sold land. The plaintiff denied he has not paid the balance of Kshs.1,500 as claimed by the defendant.
7. Apollinaris Omusugu gave evidence as **PW2**. He adopted his written statement dated 27/1/2016 as his evidence in chief. **PW2** said he knew both the plaintiff and the defendant. **PW2** stated he bought one (1) acre of land from the defendant but the defendant started interfering with his use of the sold land forcing him to accept to be refunded after one year. **PW2** said he is the one who searched for and introduced the plaintiff to buy the suit land. That on 25/6/1999, a sale agreement was executed between the two and Kshs.23,500 paid. That it is from this payment he received his refund of Kshs.18,000.
8. **PW2** continued that the plaintiff took possession in 1999 and he has remained on it to date. In cross-examination **PW2** said the defendant got his copy of the sale agreement. That on the date the balance was paid to the defendant, the defendant said his daughter had his copy of the agreement the reason it does not show the balance was paid. **PW2** said the balance was paid in the defendant's house on both occasions in the presence of his wife (the first time).
9. JOHN BARASA testified as **PW3**. He also adopted his witness statement as his evidence which said that he was present during the sale transaction between the plaintiff and defendant on 25/6/1999, 30/8/1999 and 16/12/1999. In cross-examination, **PW3** said he is a brother to the plaintiff. That he saw the balance being paid. **PW3** said the plaintiff neighbours the defendant. This marked the close of the plaintiffs Case.
10. The defendant began his evidence on 7/5/2019. He said that he was selling land to the plaintiff but he never paid all the money. That a balance of Kshs.1,500 remained. The defendant said he was selling half an acre. That he reported the plaintiff to the area assistant chief and learnt that the plaintiff had included in his sale agreement that he had finished payment. He produced a copy of his agreement as **Dex 1**. The defendant also produced summons issued by the assistant chief and the chief as **Dex 2 & 3**. It is the defendant's Case that the plaintiff has cheated him. That he has been on the land yes but let the money be treated as lease money. He asked the Court to dismiss the plaintiff's Case with costs.
11. In cross-examination, **DW1** admitted the sale agreement showed the land sold is one acre not half acre. That no one else has bought that land. He denied that he was paid all the money. That the chief was not there when he sold the land. But the village elder was plus other witnesses.
12. BONFACE WAFULA gave evidence as **DW2**. He is the assistant chief for Kamunut sub-location. **DW2** stated that the defendant visited his office on 11/7/2015 complaining that he had sold land to the plaintiff 15 years ago but he had not paid the balance of Kshs.1,500. **DW2** summoned the plaintiff to his office on 17/7/2015. He heard both of them and the plaintiff claimed he had paid the balance being demanded. **DW2** noted however that when the sum of Kshs.23,500 was paid there were 3 witnesses but when the balance was paid there was no witness. He also noted that the defendant's signature on the subsequent payments was different. The plaintiff however insisted he had paid the balance. **DW2** decided to refer the matter to the area chief.
13. **DW3** Stephen Ouma said he is a nephew to the defendant. **DW3** said that at the time of selling the land the defendant did not inform all the family members. **DW3** denied that the plaintiff has built anything on the land or that there are any boundary marks. **DW3** in cross-examination said he was not present during the sale transaction but he heard the plaintiff had paid Kshs.23,500. **DW3** admitted the suit land is registered in the name of the defendant. **DW3** further admitted that the plaintiff has been using the land for farming food crops and sugarcane for over 20 years now. **DW3** said they did not file a suit because they thought the plaintiff had leased the land. This marked the close of the defendant's case.

14. The issues for determination which I adopt are as set out in the Originating Summons which are;

(a) *Whether the applicant has been in open, quiet and notorious possession of portion measuring 1 acre out of SOUTH TESO/APOKOR/552 for a period exceeding 12 years.*

(b) *Whether the plaintiff should be registered as the proprietor of land measuring 1 acre to be exercised out of L.R. SOUTH TESO/APOKOR/552 on the ground that since 1999, the applicant has been openly and peacefully enjoying occupation for over 12 years preceding the presentation of summons.*

(c) *Whether the respondent should execute a transfer and all acts necessary to convey the said title to the applicant as the rightful proprietor and enable it to be registered as such and in default the deputy registrar to be authorized to sign the relevant documents on behalf of the respondent.*

(d) *Whether the applicant should be paid the cost of this suit.*

15. From the evidence adduced by both sides, it is not in dispute that there took place a sale transaction between the plaintiff and the defendant on 25<sup>th</sup> June 1999 and a sum of Kshs.23,500 paid to the defendant. Both parties produced the sale agreement as exhibits (**Pex 1 & Dex 1**). In the sale agreement, the land sold is stated as one (1) acre portion from title No. South Teso/Apokor/552. It is also not in dispute that the land is registered in the name of the defendant.

16. Further the evidence confirms that the plaintiff is in possession of the disputed portion. All the plaintiff's witnesses confirmed it is the plaintiff using the land for farming food crops. The defendant did not deny that the plaintiff is farming the land. Infact the defendant wanted the money paid to him to be treated as lease money. DW3 also stated that the plaintiff has been using the land to plant food crops and sugarcane although he thought the plaintiff was using the land under lease. DW3 further stated that he heard that the plaintiff had paid Kshs.23,500 for purchase of the disputed portion. DW3's only problem was that the defendant did not inform the family when he was selling the land.

17. In a claim for adverse possession, the claimant is required to show that he has dispossessed the land owner the purpose for which the registered landowner intended to put the land for use. This was the position stated by the Court in the case of **Sisto Wambugu vs Kamau Njuguna (1983) eKLR** quoting *Bramwell LJ in Leigh v Jack (1879) 5 Ex D 264, 272* thus:

**“The next question, therefore, is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner ‘acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it’.”**

18. In the case before me, the possession of the applicant has not been interrupted from the time he entered the land in the year 1999. His possession has also been open as he has been using the land for farming at the watch of the defendant and the defendant's family (including DW3). The defendant's attempt to demand for the balance of Kshs.1,500 in the year 2015 did not amount to disruption as there is no evidence adduced to show that the defendant took steps to stop the plaintiff from using the land by filing a case.

19. In any event, the plaintiff stated he completed payment in December 1999. The defendant contested his signature on the plaintiff's document acknowledging receipt of the balance as a forgery. The defendant did not go further to prove the forgery. The rule of evidence in section 108 & 109 of the Evidence Act provides that he who alleges a fact must prove its existence. The evidence of **DW2** does not add any value to the defendant's case as he only attempted to adjudicate the dispute after the expiry of 12 years. Secondly he is not a handwriting expert so his opinion on the defendant's signature on *Pex 1* for the dates 30/8/1999 and 16/12/1999 does not count in the absence of corroboration.

20. In light of the evidence adduced, I am satisfied that the plaintiff has proved that he has been in peaceful and uninterrupted occupation of a defined portion measuring one (1) acre of L.R. No. South Teso/Apokor/552 for a period of over 12 years. He is therefore entitled to be registered as owner thereof under the doctrine of adverse possession. Consequently, I enter judgment for him as prayed in his Originating Summons dated 27<sup>th</sup> July 2015.

**Dated, signed and delivered at BUSIA this 30<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**