



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 106 OF 2015**

**JOSEPH OGUTU GAUNYA .....PLAINTIFF**

**= VERSUS =**

**BONFACE RESSA OBWAMO .....DEFENDANT**

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

1. Vide a plaint dated 28<sup>th</sup> September 2015, the plaintiff brought a claim against the defendant stating that he is the owner of Samia/Wakhungu-Odiado/286 measuring approximately 3.0ha. The plaintiff avers that the defendant has unlawfully and without any justification invaded his parcel of L.R No. Samia/Wakunghu-Odiado/286 and has structures thereon and put the same to his own use.

2.The plaintiff pleaded further that upon discovering the defendant's fraudulent dealings, he filed Busia SRMCC No. 3 of 2002 seeking to cancel the said title. That this case was decided in his favour and the Court mandated the executive officer to sign transfer documents in his favour. It is the plaintiff's case that the defendant holds no interest in the suit land having been refunded his purchase price voluntarily on 26/11/1994.

3. It is pleaded that the defendant decided to vacate the suit land but later decided to erect structures on it claiming ownership. The defendant also registered a caution thus hampering the plaintiff's plan to subdivide the land. That these actions of the defendant are illegal and the plaintiff seeks judgment against him for;

**a. A permanent order of injunction restraining the defendant, his agents, and representatives from alienating, developing, wasting, damaging and interfering with the plaintiff's land parcel number SAMIA/WAKHUNGU-ODIADO/286.**

**b. An order of eviction against the defendant from L.R No. SAMIA/WAKHUNGU-ODIADO/286.**

**c. Costs and interests of the suit thereon.**

**d. Any other relief this Honourable Court shall deem fit and just to grant.**

4. The defendant denied the claim and filed his defence on 6<sup>th</sup> November 2015. He stated that he bought 2½ acres which he occupies from the plaintiff in 1979. He also pleaded that in or about 1989, he bought the suit parcel from a public auction to satisfy a civil debt owed by the plaintiff to one Pauline Ayuma Ochieng. Thereafter he was registered as the owner thereof.

5. The defendant stated that the plaintiff in the year 2001 filed a suit to have the suit land to be sub-divided between them. The defendant attempted to have the decision revoked in HCCC No. 53 of 2005 but his suit was struck out for being incompetent. He added that he has been in peaceful and continuous possession since 1979 and has since acquired equitable interest to the portion of land measuring 2½ acres hence he cannot be evicted. The defendant also pleaded that this suit is *res judicata* Busia CMCL.D Case No. 3 of 2002 hence it should be dismissed.

6. The plaintiff had also filed CMCC No. 16 of 2015 on 23<sup>rd</sup> January 2015 which he later withdrew on 31<sup>st</sup> August 2015. However, the defendant had filed a defence and counter-claim on 11<sup>th</sup> June 2015 before the said suit was withdrawn. The defendant had his suit as contained in the counter-claim transferred to this Court and later consolidated with this suit pursuant to an order made on 9<sup>th</sup> May 2018.

7. In the counter-claim, the defendant/plaintiff pleaded that although the sale of 2½ acres did not receive the consent of the Land Control Board but he has been in continuous and peaceful occupation to date. That in 1989, the suit was threatened to be sold by a public auction which would have resulted in the defendant losing his 2½ acres. The defendant thus decided to buy the whole parcel to secure his 2½ acres. That the plaintiff is actuated with malice in his demand for eviction.

8. The defendant pleaded fraud and also denied the jurisdiction of the Court (magistrate's court). The defendant urged the Court to enter

judgment in his favour that;

*a. Registration of the plaintiff as the sole owner of L.R Samia/Wakhungu-Odiado/286 be cancelled.*

*b. It be ordered that the suit land be sub-divided so that the defendant be registered as proprietor of portion measuring 2½ acres from L.R Samia/Wakhungu-Odiado/286.*

*c. The plaintiff be ordered to pay costs of both this claim and his counter-claim.*

*d. Any other relief as this honourable court may deem fit to grant.*

9. Parties then gave oral testimonies each giving evidence of one witness. The plaintiff gave his evidence on 10<sup>th</sup> December 2019. He is a resident of Samia and knew the defendant who is a son to his elder brother. He adopted his witness statement dated 28/9/2015. He also relied on the documents in his list as his exhibits to support his case. The documents produced were; copy of title deed as **Pex 1**; certificate of official search as **Pex 2**; copy of his ID as **Pex 3**; order in Land Dispute Tribunal Case No. 3 of 2002 as **Pex 4**; Compensation Agreement as **Pex 5**; Land Control Board Consent to transfer as **Pex 6**; letter of consent as **Pex 7**; mutation form as **Pex 9**.

10. The plaintiff stated that he wanted the defendant evicted from his land because he had refunded his money. That the counter-claim is not true for asking that the plaintiff retains the upper part while the defendant retains the lower part. According to the plaintiff, the Tribunal gave him the whole land.

11. In cross-examination, **PW1** denied that they talked with the defendant concerning sale of the land in 1978. He said that the defendant built on the suit land while he was in Tanzania and he returned from Tanzania in 1980. **PW1** denied making any changes in the green card. He agreed that he used the title deed as security to get money from Paulina. That he requested the defendant to pay for him that loan. That they agreed the defendant would leave the land after being refunded his money. Paulina had sued him in Civil Case No. 150 of 1985. The plaintiff stated that the defendant is living on his land against his will. This marked the close of the plaintiff's Case.

12. The defendant testified on the same day. **DW1** said that the plaintiff is his uncle and they both live on the same land (suit land). **DW1** said he entered the suit land in 1978. He adopted his witness statement dated 15/1/2015 and the documents in the list dated 15/1/2015 as exhibits **Dex 1 – 6**. The defendant stated that he bought 2½ acres of land comprised in the suit land although the land was not transferred to him. That all along, he lives on his portion while the plaintiff also lives on his portion of the same title.

13. **DW1** continued that the Land Disputes Tribunal decided that they both continue staying as they were living on the suit land. The defendant made reference to the sale by auction of the suit land pursuant to a Court order for recovery of a civil debt. **DW1** said he decided to redeem the land as it would affect him too. Later on he paid the plaintiff Kshs.4,700 on 14/7/2003 after the plaintiff had written seeking compensation. That the money the plaintiff is claiming as compensation was given to him for money he spent when the land was being auctioned.

14. **DW1** further said that after redeeming the land, they continued staying peacefully until the plaintiff attempted to evict him through Funyula Land Disputes Tribunal case. It is his evidence that he lawfully acquired the 2½ acres therefore he is entitled to remain in possession of the same.

15. In cross-examination, **DW1** said he was aware the Land Dispute Tribunal ruled that he stays on the eastern part of the land while the plaintiff stays on the western part. He conceded that the order cancelled his title. That the Land Dispute Tribunal did not specify the size of the land he was occupying. That he bought part of the land from plaintiff and later the whole land through public auction. He denied paying money for the suit land not to be auctioned. That he was to be refunded Kshs.7,000 but the plaintiff only paid Kshs.500. **DW1** admitted that in **Pex 5** he acknowledged receipt of the sum of Kshs.7,000. **DW1** said he lives on part of the suit land measuring 2½ acres. In re-examination, **DW1** said he had no problem with the findings of the Land Disputes Tribunal.

16. The advocates for the parties filed written submissions which I have read and considered. The issues raised for my determination are as follows;

*a. Whether or not this suit is res judicata.*

*b. Whether or not the defendant has unlawfully occupied and settled on the portion of the suit land measuring 21/2 acres .*

*c. Whether the plaintiff is entitled to the orders sought.*

*d. Whether or not the defendant is entitled to the prayers in his counter-claim.*

*e. Who pays the costs of this suit?*

17. The defendant stated in his defence that this suit is *res judicata* Busia SRMCC Case No. 3 of 2002. The plaintiff produced the order in that Case which he used to re-transfer the suit land to his name. The defendant presented the proceedings of the Tribunal case which was adopted as a decree in Busia SRMCC 3 of 2002. From the proceedings, the parties before the Land Disputes Tribunal were the same as the parties in this Case. In his evidence, the plaintiff stated that he had sold to the defendant a piece of his land measuring 2½ acres for Kshs.4,500. He told the tribunal that he had not given the defendant title because he had not cleared the purchase price. The plaintiff also said that he asked the defendant to clear a debt of Kshs.5,329 on his behalf to stop the land from being sold.

18. The tribunal after hearing both parties made the following finding;

**“And therefore the Court rules that Mzee Ogutu Joseph (plaintiff) remains in the eastern part of the land and Ressa (defendant) remains on the western part of the land where his second wife lives and that land to be demarcated officially by the District Land Surveyor as per the map sketch below. The name of the defendant should be cancelled from parcel No. Samai/Wakhungu-Odiado/286”.**

19. The defendant attempted to challenge the Land Dispute Tribunal’s award vide H.C.C. Case No. 53 of 2005 but that suit was struck out for being incompetent. Both parties concede that the decision of the Tribunal adopted as a decree remains to date. The present claim at paragraph 10 of the plaint is pleaded thus,

**“The plaintiff avers that the defendant never challenged the verdict of Busia Senior Resident Magistrate’s Court Land Dispute Case No. 3 of 2002 vide its order dated the 20<sup>th</sup> day of March, 2006”.**

20. Once the plaintiff pleaded that the Order in Case No. 3 of 2002 remained valid then he needed to demonstrate that the cause of action in this case is different from the cause of action in the former suit. In my opinion and I so hold, the cause of action in the two suits were similar. Nothing changed from the evidence of the plaintiff rendered in this suit and in the suit before the Tribunal. The defendant placing a caution on the suit title rightly did so to secure his interest pursuant to the award/decree of the Tribunal which had directed that the land be demarcated by the District Land Surveyor based on how the parties were living on the land. I therefore hold that the present suit is *res judicata*.

21. Is the defendant unlawfully occupying the suit land? The plaintiff stated that because he refunded the defendant his money the defendant should leave the land. Their agreement was reduced into writing on 26/11/1994. It stated thus in paragraph 2;

**“The purpose of the money is for land compensation so that we can sub-divide the land between Mr. Ressa and Mr. Ogutu”.**

22. Comparing the evidence of the parties especially; of the plaintiff’s admission that the defendant paid a civil debt on his behalf and the defendant’s that the monies paid to him were compensation for the debt. The line of evidence by the defendant is corroborated by the evidence of the plaintiff given before the Tribunal. The money paid was clearly not for refund of the portion of land already occupied by the defendant. If it were so, they ought to have specifically said so in the agreement of 26/11/1994. My answer to the second question is that the defendant is lawfully on the portion of the suit land he is in purchased.

23. In regard to the 3<sup>rd</sup> question based on the analysis given above on *res judicata* and lawful occupation by the defendant. I do come to the conclusion that the plaintiff is not entitled to the prayers he is seeking. Accordingly, I dismiss his suit.

24. Is the defendant entitled to the orders in his counter-claim? My answer is yes for two reasons. First; the award of the Tribunal which confirmed that he remains on the portion he occupies has not been set aside. Secondly he has been in peaceful and uninterrupted occupation of the suit portion for a period in excess of 12 years. He therefore acquired ownership of the 2½ acres portion of the suit land by virtue of adverse possession. I do hereby enter judgment in his favour in the following terms;

**a. Registration of the plaintiff as the sole owner of L.R Samia/Wakhungu-Odiado/286 be and is hereby cancelled.**

**b. It is ordered that the suit land be sub-divided so that the defendant be registered as proprietor of a portion which he is in occupation of measuring 2½ acres from L.R Samia/Wakhungu-Odiado/286.**

**c. The plaintiff shall pay the defendant the costs of the counter-claim.**

**Dated, signed & delivered at BUSIA this 29<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**