



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 148 OF 2013 (FORMERLY HCC 72B OF 2012 (O.S))

IN THE MATTER OF LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF PARCEL OF LAND KNOWN AS BUKHAYO/KISOKO/5352, 6364 AND 6365

AND

IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF PROPRIETARY RIGHTS BY PRESCRIPTION

BETWEEN

SYLVESTER JOSEPH MAKOMERE (Suing as Legal Rep. of the estate of

FABIAN MAKOMERE WAMBADA.....APPLICANT

= VERSUS =

1. JONATHAN NAKHALE

2. TERESINA NYAFUA NAKHALE.....RESPONDENTS

J U D G E M E N T

1. The Originating Summons was taken out by Sylvester Joseph Makomere suing as the legal representative of the estate of Fabian Makomere Wambada against Jonathan Nakhale and Teresia Nyafua Nakhale. The applicant prays for ORDERS;

a) That the applicant be and is hereby declared to have acquired ownership and title to a portion of land measuring 2 acres by virtue of adverse possession to be excised from parcel No. BUKHAYO/KISOKO/6364 & 6365.

b) That the respondent be ordered to sign all the necessary documents for consents for sub-division and transfer of 2 acres from parcel No. BUKHAYO/KISOKO/6364 & 6365 to the applicant and in default thereof the Deputy Registrar be empowered to sign on the respondent's behalf.

c) That the respondents do meet the costs of these proceedings.

2. The Originating Summons was opposed by the 1st respondent's replying affidavit sworn on 9th July 2013. The 1st respondent deposed that in the year 1970 he entered into an agreement of sale of 1 acre of land with Faviano Makomere Wambada at an agreed sum of Kshs. 2,500 from portion L.R. No. Bukhayo/Kisoko/24. That the said Fabian paid him a sum of Kshs.450 leaving a balance of Kshs. 2,050 in the year 1972. That Fabiano passed on before paying the balance.

3. The 1st respondent pleaded further that Fabiano – deceased was in breach of the terms of their agreement. He deposed that the copies of agreements annexed in the applicant's affidavit are falsified as it does not reflect what he was paid. He also denied that the applicant has been in peaceful and uninterrupted occupation of the suit parcels in view of the existing suit CMCC No. 48 of 2020 between the 2nd respondent and the applicant's brothers named Augustine Oduori and Zakayo Magomere that was pending judgment. The 1st respondent deposed further that the applicant is not entitled to the orders of adverse possession and should be directed to pay him the balance for the value of 1 acre at current market rates and the summons be dismissed with costs.

4. The parties thereafter called oral evidence. The applicant gave his evidence on 25/4/2017. He stated that his father passed away in 1990 as shown in the death certificate (**Pex 1**). His mother is alive and they are living on L.R. No. Bukhayo/Kisoko/6364 and 6365 before sub-division from parcel No. Kisoko/5352. The mutation form was produced as **Pex 2** and green cards for parcels 6354, 6365 and 5352 produced as **Pex 3(a) – (c)**. The applicant produced the grant ad litem as **Pex 4**. The witness continued that his father bought the land he was claiming in 1972 and paid Kshs.800 for the same (sale agreements **Pex 5**). That they started living on it from 1973 after his father put up a semi-permanent house and they have lived there to date. That seven of them have never been removed from the suit land measuring 2 acres. **PW1** stated that later on the 1st respondent started demanding for more money but no formal demand was made. He urged the Court to grant the orders sought.

5. In cross-examination, **PW1** said he was not a witness to the agreements he produced as he was young. The suit land was sub-divided without their knowledge. That he has not been shown any other agreement. He admitted the defendant took his mother before the village Liguru demanding for more money. That his father is not buried on the suit land. He agreed his other name is Zakayo but denied the 2nd respondent has never sued him. In re-examination, **PW1** said his father and 1st defendant had agreed on payment mode. That the 1st respondent never involved them in the sub-division process.

6. **PW2** was Okello Kefwa who gave evidence on 17/4/2018. He has been the area village elder since 1980 for Msoma Village in Iwanyonge sub-location. **PW2** said he knew Fabiano – deceased and the applicant who is his son. He is related to the defendants. **PW2** said that when he came back to the village from Nairobi in 1980, he found Fabian staying on the suit portion with his family having bought it from the 1st respondent. That Jonathan had never made any complaints through him against Fabian during his lifetime. **PW2** continued that the 1st respondent declared during the funeral of Fabian that he was not owed any money. It is only in 1992 when the 1st respondent raised a complaint asking him to stop the burial of Fabian's daughter on the suit land. That at a meeting held at the assistant Chief's office resolved the burial should go on. **PW2** contends the applicant who has been on the land for 34 years is entitled to be registered as owner thereof.

7. In cross-examination, **PW2** agreed that he was not there when Fabian entered the land as he was working in Nairobi. That he knew Fabian died either in 1999 or 1994 but he was not certain. In re-examination, **PW2** said the plaintiff's father died before his daughter.

8. Henry Wesonga Olango testified as **PW3**. He said he knew Fabian when he came to their village and bought land from the 1st respondent in 1972. **PW3** said he is the one who built Fabian's house. That the family of the plaintiff stayed peacefully on the land. In cross-examination **PW3** said they are from same village with the 1st respondent. **PW3** knew Fabian bought land from 1st respondent in 1972 and only heard the 1st respondent objecting to burial of applicant's sister in 1992.

9. **PW4** is Augustine Makomere, the applicant's elder brother. He referred to the photographs annexed to his statement which he said belongs to his mother Leonida Makokha and their houses. In cross-examination, **PW4** said he is the one who took the photograph. That the houses are on the land they live on. This marked the close of the plaintiff's case.

10. The defendants opened their evidence on 25th June 2018. The 1st respondent testified as **DW1** and said the 2nd respondent is his wife. He said he was selling 1 acre land to Fabian in 1972. That he was selling it at Kshs.550. **DW1** said Fabian paid him Kshs.450 and he gave him one acre where Fabian built his house. That he sub-divided the land to ensure Fabian got registered as owner of the 1 acre. That he asked the plaintiff for the balance of Kshs.150 and even took him to the Land Control Board. He produced the application to subdivide as **Dex 1**. That the plaintiff's father never paid the balance.

11. In cross-examination, **DW1** said he sold 1 acre piece of land to the late Fabian in 1972 for Kshs.550. That Fabian took possession and built his home on it. That he never demanded for payment of the balance nor did he sue the deceased or any of his sons. **DW1** said he gave a portion of the land to his wife.

12. The 2nd respondent testified as **DW2** on 21/5/2019. She knew Fabian – deceased as she got married to the 1st respondent in 1948. **DW2** said Fabian bought one (1) acre portion of land from her husband (1st respondent). That Fabian paid Kshs.450 leaving a balance of Kshs.1,050. **DW2** said she was given LR. No. Kisoko/6365 by the 1st respondent (**Dex 2**). That the sons of Fabian got on to this land before she got her title so she decided to sue them vide BSA CMCC No. 48/2010. That Case is still pending and she produced the proceedings as **Dex 3**. He denied that the applicants are living on her land.

13. **DW3** was Lawrence Omondi Wandera. He adopted his witness statement filed on 23/7/2018 as his evidence in chief. **DW3** is the grandson to the respondents. He said that the 1st respondent sold the plaintiff's father one (1) acre of land and that is where he found them when he was born. In cross-examination **DW3** said it is the 1st defendant who told him he that he had sold the land to Fabian. **DW3** said he was born in 1995.

14. The plaintiff filed his written submission on 21st November 2019 while the respondents filed theirs on 21st January 2020. I have read and considered both and will make reference where applicable. From the evidence adduced by both parties, it is not in dispute that the late Fabiano Makomere entered into a sale of land agreement with the 1st respondent. The 1st respondent concedes the agreement was reduced into writing although he contests the copies of sale agreement exhibited by the applicant.

15. The issues I frame for my determination in this case are;

(i) *Whether or not the time ran in favour of the applicants pursuant to the sale transaction.*

(ii) *If no (i) above is yes, what was the size of land sold to the late Fabian Makomere?*

(iii) Whether or not the applicant is entitled to the orders of adverse possession.

(iv) Who bears the costs of this suit?

16. The defendants in their submissions referred this Court to the decision in the case of **Public Trustee Vs Wanduru Ndegwa (1984) eKLR** where it was stated thus;

“That adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”

In the instant case the plaintiff was put in possession in 1983 when he completed payment of the purchase price. It therefore follows that time started running for purposes of limitation from 1983 when he was granted possession on payment of the purchase price”.

17. In the instant case, the respondents in their evidence conceded that Fabian Makomere was put in possession in 1973 and he built his home on the sold portion. **DW1** said he put Fabian – deceased into possession although according to him there was a balance of Kshs.150 which was never paid. **DW2** confirmed that Fabian came to live on the sold portion which was one acre. **DW3** born in 1995 said he was born and found the applicant living on the land. **DW3** said he was told by **DW1** that he is the one who had sold the portion occupied to Fabiano Makomere. The defendants submit the plaintiff was put in possession in 1983 which is incorrect as the pleadings and their evidence state that the possession was from 1973.

18. The question on whether there was unpaid balance was not proved as the evidence presented by the defence was full of contradictions. In his Replying Affidavit the 1st respondent pleaded that the purchase price was Kshs.2,500 of which Kshs.450 was paid leaving a balance of Kshs.2,050. In his oral evidence, the 1st respondent (**DW1**) stated that the balance was Kshs.150. According to **DW2**, the balance was Kshs.1,050. The respondents never produced any agreement to challenge the one presented by the applicants.

19. In any event even if there was a balance, the right to claim the said balance was terminated on the 6th year since this was a contract. Section 4 of the Limitation of Actions Act provided that, **“Actions of contract and tort and certain other actions (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued— (a) actions founded on contract”.**

20. Further assuming time ran from 1983 that is admitted the Defendants, the 6th year still ended in the year 1989. Thus time still ran in favour of the applicant whether from 1980 or 1983 to 2010 when the 2nd respondent filed suit No. CMCC 48 of 2010 or when this suit was filed. Either of the dates, there is evidence that the occupation of Fabiano and his family was uninterrupted for a period in excess of 12 years.

21. The second issue is what size of land was sold. The applicant is claiming 2 acres which he said the 1st respondent already demarcated and which they are in occupation of. The respondents on their part maintained that what was sold was one acre. In the sale agreement dated 30/1/1973 produced by the applicant, the size of land is indicated as 1½. The applicant submitted that they are entitled to be registered as owners of Kisoko/6364 and 6365. L.R. No. 6364 measures 0.39Ha while L.R. No. 6365 measures 0.31ha. The sizes of both parcels added gives a total of 0.70ha (an equivalent of 1¾ acres).

22. L.R. No. 6364 is in the name of the 1st respondent which from their evidence it appears they have no objection to the applicant and his family getting. L.R. No. 6365 is in the name of the 2nd respondent. The 2nd respondent stated that the sons of Fabian got on to this land before she acquired the title in her name. This is the reason she filed CMCC 48 of 2010 seeking orders for their eviction. **DW2**'s evidence thus confirms the applicant is in occupation of this portion as well. She deposed that the applicant and his brothers' invaded the suit portion in 2008 (*paragraph 6 of her replying affidavit*) yet she got her title on 26th November 2007. Her oral evidence was again contradicting what she pleaded which creates doubt whether the invasion was in 2008 or when the original sale was executed in 1973. In my opinion and I so hold that the applicant has proved that they have dispossessed the respondents of both parcels of land by operation of the law.

23. The last question is whether the applicant is entitled to the orders of adverse possession. As already demonstrated above, the applicant has indeed satisfied this court that they have been in possession of the suit land bearing title numbers Kisoko/6364 and 6365 openly (corroborated by the evidence of **PW2** and **PW3**) and uninterrupted.

24. By the time the 2nd respondent was acquiring title for L.R. No. 6365 to defeat the claim by the applicant in the year 2007, the 12 years had already lapsed. Therefore, her registration did not defeat the interest of the estate of Fabiano Makomere-deceased. The implication is that she is holding the title in trust and for the benefit of the estate of Fabiano Makomere – deceased (As presented by the applicant).

25. I am therefore persuaded to find as I hereby do that the applicant is entitled to be granted the orders sought for in this originating Summons because the estate of Fabian Makomere is entitled to the two suit titles by dint of adverse possession. Costs of the suit is awarded to the Applicant.

Dated, signed and delivered at BUSIA this 15th day of April, 2020.

A. OMOLLO

JUDGE