



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 151 OF 2014 (OS)

PAUL KWOPA WASIKE

FAUSTIN NAROTSO WASIKE

(Suing on behalf of the estate of **MOSES WASIKE KWOPA**) **APPLICANTS**

VERSUS

BASIL CHAMADARI PAPA **RESPONDENT**

J U D G E M E N T

1. The two Applicants took out the Originating Summons dated 31st July 2014 against the Respondent claiming a portion of land measuring 4 acres comprised in title No. L.R South Teso/Amukura/895. They raised the following issues for determination;

- a) **A declaration that Moses Wasike Kwoba, his estate and or the applicants have acquired the rights and interest including ownership of 4 acres of portion of L.R South Teso/Amukura/895 by the operation of the law.**
- b) **A declaration that the respondent holds the 4 acres of the subject matter in trust for and on behalf of the estate of Moses Wasike Kwoba and the applicants to who it should be transferred.**
- c) **A declaration that the respondent's rights and interest was extinguished by operation of the law at the end of 12 years by the applicants or those claiming on behalf of Moses Wasike Kwoba's occupation.**
- d) **An order that the 4 acres of L.R South Teso/Amukura/895 be curbed off and transferred to the estate of Moses Wasike Kwoba.**
- e) **An order that the respondent or in default the Deputy Registrar of this court do execute all relevant documents to transfer the 4 acres of L.R South Teso/Amukura/895 to the estate of the deceased or the applicants.**
- f) **An order that the respondent do pay costs of this suit.**

2. The summons was opposed by the replying affidavit filed on 21st November 2014. The Respondent admitted that he sold to Moses Wasike Kwoba - deceased only one acre of land at an agreed price of Kshs.6,000 in the year 1983. That the said Moses paid Kshs.5,000 leaving a balance of Kshs.1,000 which has never been paid to date hence the refusal to get or obtain consent to subdivide or a title deed. That the entire land is 1.9ha and the Respondent could not have sold the 4 acres yet he has twelve children and two wives who entirely depend on him. He urged the Court to strike out the suit and the Applicants be granted only one (1) acre of land which is their rightful share.

3. The case proceeded by way of oral evidence. The plaintiffs called 4 witnesses while the Respondent called two (2) witnesses. The 1st plaintiff gave evidence as **PW1**. He said the 2nd plaintiff is his mother and he is the son of Moses Wasike Kwoba – deceased. That they obtained a grant of letters of administratrix before filing this case which he produced as **Pex 1**. **PW1** stated that his father bought land from the respondent in 1983 and he produced the agreement of sale as **Pex 2**. That his late father took possession immediately after buying.

4. **PW1** continued that the entire land is measuring 4.75 acres (1.9ha) and he produced the greed card as **Pex 3** to confirm. **PW1** said his father died in the year 2010 and was buried on that land. That he lives on the land with his mother and siblings, having seven (7) houses on the land and planted crops. **PW1** stated that the defendant has never chased them away from this land neither has he ever used it. **PW1** denied that only one (1) acre was sold and that the agreed purchase price was paid in full. It is **PW1's** evidence that they are entitled to 4 acres and urged the court to help them get the title to their portion. The defendant did not ask him any questions in cross-examination.

5. The 2nd plaintiff testified as **PW2**. She adopted the evidence given by the 1st plaintiff. **PW2** added that she was present when the defendant was paid. That they are occupying the land that is clearly demarcated with trees called Lusiola which trees mark their land. **PW2** said they want 4 acres of the suit title. In cross-examination, **PW2** said she was present when the Kshs.1,000 was paid to the defendant. That the defendant never took the late Moses to the Land Control Board but Moses reported him to the area chief.
6. **TOBIAS WESONGA SAKWA** testified as **PW3**. He said he knew the parties in this case. **PW3** said the deceased showed him the land he bought in 1983 and that it had a boundary. That the boundary he saw in 1983 is still there today. **PW3** said he is aware the family of Moses lives and uses the land. That he witnessed the defendant being paid Kshs.1,000 in September of 1983. **PW3** said the land demarcated is less than 4 acres but more than one acre and approximated it at 3½ acres. In cross-examination **PW3** stated that the amount of Kshs.1,000 was paid to the defendant in the house of Moses – deceased.
7. James Odima Onyinkwa testified as **PW4**. He is a land surveyor working with the County survey office Busia. **PW4** stated that he visited the suit land on 26/4/2019 where he found that the plaintiffs are living on a portion measuring 1.17ha while the defendant lives on 0.73ha. He made a report dated 9/5/2019 which he produced as **Pex 5**. That the plaintiffs live on the land with their families and also cultivate it. In cross-examination, **PW4** said there was no boundary separating the plaintiffs' and the defendant's portion. That the sisal are on the outer boundary surrounding the whole land. This marked the close of the plaintiffs' case.
8. The defendant gave his evidence on 31/1/2020. The defendant said he is a farmer. He agreed to selling land to Moses Kwoba on 12/12/1982 following the involvement of his wife in an accident. That the price agreed was Kshs.6,000 of which Kshs.5,000 was paid leaving a balance of Kshs.1,000. That one month after their agreement, Moses Kwoba was arrested, charged and convicted to serve a prison sentence of one year. That upon release from prison, Moses went to Nairobi. Later he fell very ill and they agreed he gives Moses some money. That he gave Moses Kshs.3,290 for his treatment.
9. **DW1** continued that between 1985 – 1986, Moses would be taken to hospital using the defendant's bicycle. That he was never paid his balance and he reported the matter to the chief. It is **DW1's** evidence that Moses was living on the one acre he sold him although they were not in good terms from 1985 but he did not ask Moses to leave. That in the year 2008, the 1st plaintiff beat his wife over trees he felled down. That instead of the 1st plaintiff being arrested, it is the defendant's wife who was arrested and convicted to serve community service. They continued living as neighbours until he was served with summons in this case. He denied that the plaintiffs are entitled to 4 acres.
10. In cross-examination **DW1** denied the signature on Pex 1 as his. That they had a home-made agreement and his copy got lost. That he showed Moses the land sold and Moses took possession living on it with his family. That when the witness went to Kitale, the plaintiff increased the land. **DW1** confirmed he was present when the government surveyor visited the land in April 2019. That he did not have a survey report prepared for his benefit. He has never caused the eviction of Moses or any member of his family from the land. **DW1** denied refusing to execute transfers in favour of the plaintiffs.
11. Margaret Toto who is a wife to the defendant testified as **DW2**. **DW2** confirmed that the defendant sold one (1) acre of land to help save the life of her co-wife. That Moses fell ill and he sent the plaintiffs to come inform the defendant. **DW2** continued that the defendant then took Moses to hospital. When he asked for refund of his money used during the treatment, the dispute began. **DW2** also confirmed Moses and his family lived on the suit land. That Basil only sold one (1) acre but she was not present when the agreement was written. In cross-examination **DW2** said the plaintiffs are using the same portion showed to Moses in 1982. That no measurement was done at the time of sale. That she had no problem with the portion being used by the plaintiffs. This marked the close of the defence case.
12. Both parties filed written submissions which I have considered. It is not in dispute that the defendant sold a portion of his land title South Teso/Amukura/895 to the plaintiff. It is also not disputed that the buyer (Moses Kwoba – deceased) took possession of the land on payment of Kshs.5,000 being part of the Kshs.6,000 agreed as the purchase price. That the late Moses settled with his family on the sold portion and cultivated parts thereof.
13. The only question in dispute for my determination is whether the plaintiffs are in occupation of 4 acres of land to which they are entitled to by virtue of adverse possession. The defendant's evidence was that he sold only one acre and not the 4 acres the plaintiffs are claiming. He however did not have a copy of his agreement signed between him and the late Moses to contradict the plaintiffs' evidence. The defendant although denied the existence of a boundary separating his portion from the plaintiffs' portion but it appears from the evidence of **PW1**, **PW3** and **DW2** that there is a boundary which is identifiable.
14. I am alive to the fact that the burden is on the plaintiffs to prove their case. The ingredients to be proved in a claim for adverse possession are settled in Case law. For instance in the case of *Mbira Vs Gachuhi (2002) 1EALR 137* it was held that;
- “..... a person who seeks to acquire title to land by method of adverse possession or the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious exclusive and adverse use by him or those under whom he claims for the statutory period without interruption”.**
15. In this case, Moses Kwoba entered the land with permission of the defendant pursuant to a contract of sale executed between them. That consent/permission ended after the lapse of 6 years which is the period set under Section 4 of the Limitation of Acts when a claim under contract can be brought. It was within the six year period (from 1983) when the defendant would have demanded for payment of the balance of Kshs.1,000 which he states remain unpaid today or when he would have sued Moses Kwoba for occupying more land than what was sold to him.
16. The plaintiff continued occupation after the lapse of the 6 years (which ended in about 1989) and the defendant have never taken any steps to remove him or any of their family members. They have thus been in peaceful and notorious occupation for over 20 years. The arrest and conviction of the defendant's wife did not interrupt the plaintiffs' use of the land as it did nothing to stir their possession. In any event no documents were produced in respect of the alleged arrest/criminal case to create any nexus to this case.

17. The plaintiffs are claiming 4 acres i.e. a defined portion of L.R No. South Teso/Amukura/895. To prove that they are in occupation of the 4 acres; they called the evidence of PW3 and PW4. PW3 stated that Moses Kwoba – deceased showed him the land which he bought and he approximated the size at 3½ acres. PW3 added that the same place where the plaintiffs land end is still visible to date. PW4 visited the land in the presence of the parties herein on 26/4/2019 and identified the plaintiffs' portion as measuring 1.17ha while the defendant's portion measures 0.73ha. He produced this report as Pex 5. The defendant did not produce any expert report to contradict the evidence of PW4. DW2 also said that she had no issue with the portion occupied by the plaintiffs.

18. The defendant alleged that the plaintiffs moved their land while he was living in Kitale. This evidence was uncorroborated and the witness did not counter-claiming for any encroachment. The plaintiffs thus satisfied the court that they are in occupation of a defined portion put by the surveyor at 1.17ha for a period in excess of twelve (12) years.

19. Accordingly I find that their case is proved on a balance of probabilities and find that they are entitled to a portion of South Teso/Amukura/895 measuring 1.17ha by the method of adverse possession. Judgment is entered in their favour in terms of **paragraph (a), (b), (c), (d) and (e)** of the plaint that;

(a) A declaration be and is hereby made that the estate of Moses Wasike Kwoba, and or the applicants as his administrators have acquired the rights and interest including ownership of 1.17ha of portion of L.R South Teso/Amukura/895 by the operation of the law.

(b) A declaration be and is hereby made that the respondent holds the 1.17ha of the subject matter in trust for and on behalf of the estate of Moses Wasike Kwoba and the applicants to who it should be transferred.

(c) A declaration be and is hereby made that the respondent's rights and interest was extinguished by operation of the law at the end of 12 years by the applicants or those claiming on behalf of Moses Wasike Kwoba's occupation.

(d) An Order is hereby made that the 1.17ha of L.R South Teso/Amukura/895 be curved off and transferred to the estate of Moses Wasike Kwoba.

(e) An Order is hereby made that the respondent or in default the Deputy Registrar of this Court do execute all relevant documents to transfer the 1.17ha of L.R South Teso/Amukura/895 to the estate of the deceased or the applicants.

(f) Each party to meet their respective costs of the suit.

Dated, signed and delivered at BUSIA this 25th day of June, 2020.

A. OMOLLO

JUDGE