



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
LAND & ENVIRONMENT CASE NO.177 OF 2014
CHRISTOPHER WANGA SIMITI.....APPLICANT
VERSUS
DAVID WEPUKHULU KASAMBULA.....1ST RESPONDENT
GRACE NAMAKWA WEPUKHULU.....2ND RESPONDENT
JUDGEMENT

[1]. The Applicant Christopher Wanga Simiti brought this Originating summons against the respondents who are sued as the beneficiaries of the estate of Musa Kasambula Murefu (deceased) and currently registered owners of land parcel Ndivisi/Khalumuli/1326.

[2]. The Originating summons is filed under section 18 of the LRA Act 2012 and section 3 3A of the Civil procedure Act and order 37 of the Civil Procedure Rules and section 7,17, 37 and 38 of the Limitations Act chapter 22 Laws of Kenya.

[3]. The applicant claim is that he and his family members have been in overt continuous occupation, possession of land parcel Ndivisi/Khalumuli/1326 comprising of 3.7 ha for a period in excess of 12 years and that the respondents' rights over the said land got extinguished by operation of the Law of adverse possession. Further that the applicant is entitled to be registered as owner thereof as owners under section 37 and 38 of the limitations of Action Act and that the respondents should sign all relevant transfer documents to transfer the land to the applicant. That if they do not do so, the Deputy Registrar of this Court do execute the said documents on their behalf.

[4]. The applicant also prays for an order to evict the respondents who have recently invaded the suit land and permanent injunction do issue to prevent them from using the said land in any manner.

[5]. The defendants admit they are the administrators of one Musa Kasambula Mrefu as a father for the 1st defendant and the husband of the second defendant. They state that the said Musa Kasambula was the absolute registered owner of land parcel Ndivisi/Khalumuli/1326. That they have settled on the land and have built a semi-permanent home and that they have cultivated crops and trees. They say that the family of Musa has been in exclusive possession of the land. That their brothers and the said Musa are buried on the land. That during the Ceremony "LUFU" held after a person dies in this case Musa's death, the applicants never stated their claim. They state that the applicant has never been and is not in occupation of the suit land or any part thereof. That he is a fraudster who surfaced after the death of the father and husband of the 1st and 2nd defendants.

[6]. Christopher Wanga Simiti died. He was substituted by his son Eliud Nyongesa Simiti and his wife Grace Namakwa Simiti. Grace also died and on 28/9/2016 and by consent of the parties she was removed from the record. Mr. Eliud Nyongesa Simiti gave evidence and relied on his written statement. He stated that he was given a grant ad litem vide Bungoma Administration Succession Cause No.27 of 2015 on 21/4/15. He said that the respondents are now the registered proprietors of Ndivisi/Khalumuli/1326 vide Bungoma Administration Succession Cause number 387 of 2012 as the beneficiaries of Musa Kasambula Mrefu now deceased.

[7]. He said that vide an agreement dated 2nd June 1974 the said Musa Kasambuli Mrefu sold to his father, Christopher Wanga Simiti land parcel Ndivisi/Khalumuli/701 comprising of 11.5 acres for a consideration of Kshs.10,000/- an amount paid in full. That the said Musa Kasambula Mrefu gave vacant possession of the land to the applicant's father. The said Mrefu relinquished his interest on the said land, he went to the Land Control Board at Kimilili on 8/6/1978, signed the transfer form to transfer the said land to the applicant's father's name. He surrendered the original Land Certificate for purposes of transfer. Mr. Nyongesa said the file and consent burnt in the house when their house burnt down in an accident reported to the authorities. That the applicant and his family moved in to the land and completely occupied the same.

[8]. That in 1978 the Government of Kenya through Kenya Airports authority showed interest in compulsorily acquiring the said land Ndivisi/Khalumuli/701 for purposes of building Webuye Airstrip.

The land was then subdivided into Ndivisi/Khalumuli/1326 and 1327. That the said Mrefu who was still registered as owner though he had moved out gave consent to subdivide parcel 701 into parcels 1326 and 1327.

[9]. That on 9/6/1978 the compensation for the acquisition of the land Ksh.32,813 was paid to the father of the applicant by the Government of Kenya. However the title Ndivisi/Khalumuli/1326 remained in the name of Musa Kasambula Mrefu pending transfer to the applicant's father's names.

That the said Mr. Kasambula went and purchased another land in Trans Nzoia.

[10]. That in 1983 the said Musa Kasambula Mrefu came back and said that he had been chased away from the place where he had gone to purchase land and he then beseeched the father of the applicant to have mercy on him and give him a small portion of land to settle his family since he had no land to settle in. That after several requests and pleas by Mr Kasambula, and since he was related to the applicant's father he was given 1½ acres to settle in in Ndivisi/Khalumuli/1326. That an agreement was drawn showing that he was given 1½ acres and Christopher Wanga Simiti remained with 7½ acres. The applicant said that Mr. Musa Khasambula Mrefu died in 2009 before he transferred 7½ acres comprised in Ndivisi/Khalumuli/1326 to the Applicant's names.

[11]. Eliud Simiti went on to say that after Mrefu died the respondent filed a succession petition in the High Court in Bungoma in Succession Cause number 387 of 2012 and they were granted the entire land. That the applicant has filed an application for the annulment of that grant as they say it was granted through misrepresentation and fraud. That after the grant was confirmed in the absence of the applicant, the respondents went to the lands office in Bungoma and had the grant registered and had themselves registered as owners of Ndivisi/Khalumuli/1326 as the beneficiaries of Musa Kasambula Mrefu.

[12]. The applicant states the possession and occupation of the said land to the extent of 7½ acres remained in the full possession of the applicants. This has been so until recently after the respondents registration, when the respondents started uprooting the boundary features amalgamating their 1½ acres with the 7½ acres of the applicant and grazing their animals on the Applicant's land.

[13]. The applicant produced the following documents to prove his claim;

- (1). The original sale agreement of 12/5/1974 showing full payment for the land duly stamped.

(2). Application to the Land Control Board for consent of land parcel Ndivisi/Khalumuli/701 comprising 4.6 hectares.

(3). Certified true copy of the minutes number 197/78 Ndivisi Khalumuli/701 of the Kimilili Land Control Board held on 4th May 1978 showing the consent to sell land parcel Ndivisi/Khalumuli/701 by Moses Khasambula Mrefu to Christopher Simiti Wanga consideration stated as Ksh.7000.

(4). Application for registration dated 9/5/78 for 701 comprising of 4.6 hectares duly signed by Christopher Simiti Wanga of P.O. Box 735 Webuye received in the Land Office on 9/5/78 and duly signed for.

(5). Transfer for Ndivisi/Khalumuli/701 by Moses Kasambula Mrefu ID/241119/618 in consideration of Kshs.10000 (which he Acknowledged) to Christopher Simiti Wanga ID/18357 of Khalumuli sub-location dated 3rd April 1978 duly signed by Moses Khasambula Mrefu in the presence of District Officer Kimilili Division who were identified by Festus Khaemba Assistant Chief Khalumuli sub-location on 4th April 1978.

(6). Lease for 2½ acres from the suit land by Eliud Nyongesa Simiti to Martin Mukhebi Masika dated 19th January 2008 for Ksh.30,000 for 1st and 2nd ratoons of Sugar cane. The lease is duly drawn and signed by Dan Omukanda Advocate on 19/1/2008.

(7). Agreement to allow Moses Khasambula Mrefu to have 1½ acres dated 3/4/1983 duly signed by all the parties herein and their advocates.

The applicant called 3 witnesses who supported his claim. That his father purchased the land and had been in the land all along without any interruption.

(8). An award from the Department of Lands pursuant to section 10 of the land acquisition act 1968 on Parcel of land 701/Ndivisi/Khalumuli showing an acquisition of 0.8924ha showing value of the land to be 30,813 to be paid to Mr. Christopher Simiti Wanga dated 9th June 1978 signed by E.W. Muchiri Senior valuer (Agriculture) for Commissioner of lands.

[14]. The defendants relied on their statements dated 2/11/2015. They generally denied everything and said that the plaintiff is not in occupation of land or any part thereof and that he is a fraudster and that if he had a claim on the suit land he would have made it during the traditional 3 days before burial known as Lufu. They produced the following documents;

(a). 'Lufu' proceedings

(b). Green card

(c). Certificate of confirmation of a grant in Bungoma Succession Cause No.387/2012

(d). Photographs.

[15]. The issue for determination is whether the applicant is entitled to the orders sought in the Originating Summons.

[16]. The applicant entered in the suit land through a contract of sale on 12/5/74. The land was Ndivisi Khalumuli/701. The land that was supposed to be sold was agricultural land. It was subject to Land Control under the Land Control Act Cap 302. This consent was obtained on 8/6/1978. The transfer was signed by the vendor Christopher Simiti Wanga ID/18357 on 3/4/1978. The beneficial Interest on the suit land then passed to Christopher Sauti Wanga on 8/6/1978 when consent was obtained. See case of *Registered Trustees Anglican Church of Kenya Mbeere Diocese Vs. David Waweru Njoroge Civil Appeal 108 of 2002*. The transfer was signed on 3 April 1978 by Mr. Murefu for the benefit of Mr. Christopher

Wanga. There was then nothing left for Mr. Moses Kasambula Mrefu to do in this case after the transfer of the land to the applicant herein.

When beneficial interest passes, there is no claim of adverse possession that could accrue to the applicant. The land was already by operation of law in the ownership of Christopher Simiti Wanga. All that was required of him was to present the consent, the transfer to the land Office and have the land registered in his name.

Indeed, that is why Mr. Christopher Simiti was paid the compulsory acquisition compensation by the Government of Kenya Ksh.30,813 on 9/6/1978 even when he was not the registered owner of Ndivisi/Khalumuli/701. The registration of Ndivisi/Khalumuli 1326 in the name of Moses Khatolobwa Mrefu after the compulsory acquisition aforesaid, was subject to the said beneficial interest. He was a trustee for Christopher Wanga Simiti. By the time High Court Succession Cause No.387 of 2012 was filed the land parcel Ndivisi/Khalumuli/1326 was **not** part of the estate of Musa Kasambula Mrefu. It is apparent that the learned High Court Judge who confirmed the grant was not presented with that fact. Had he been presented with the true facts, it is almost certain that his decision in that Succession Cause would have been different.

I need not say more on that as the matter since this is a Court of concurrent jurisdiction and this matter is subjudice before the High Court on annulment of the grant aforesaid.

[17]. For this Court, I find I do not have to make any findings on adverse possession as the land had already beneficiary passed on to the applicant's father one Christopher Wanga Simiti in 1978.

I also find that Christopher Wanga Simiti gave of his own free will 1½ acres to the father of the respondent and was left with 7½ acres. That 7½ is what he should have. He will be registered as owner of 7½ acres of land parcel Ndivisi/Khalumuli/1326 and the respondent shall have 1½ acres of the same as earlier agreed between Mr. Christopher Wanga Simiti deceased and Moses Kasambula Mrefu deceased. The land Ndivisi/Khalumuli/1326 will be subdivided so that the applicant and his family gets 7½ acres and the respondents will get 1½ acres.

The parties herein are relatives each party shall bear their own costs.

DATED and DELIVERED at BUNGOMA this 10th day of March, 2017

S.N. MUKUNYA

JUDGE