

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO.41 OF 2008

GEORGE MASINDE MURUNGA.....PLAINTIFF

VERSUS

BARASA NYONGESA MAMATI.....DEFENDANT

JUDGEMENT

[1]. Richard Nalwelise Masinde and his two brothers being the legal representatives of George Masinde Murunga filed an amended originating summons requiring Barasa Nyongesa Mamati to enter appearance to the summons which had been issued on application of George Masinde Murunga who claims all that parcel of land known as East Bukusu/South Nalondo/661 comprising of 3.6 hectares by virtue of adverse possession for the determination of the questions whether the applicant had openly and continuously and peacefully occupied the said land for 12 years and whether the respondent's title to the said land had been extinguished by operation of law and whether the applicants should be registered as proprietors of the said land due to the concept of adverse possession.

[2]. The applicants swore a joint affidavit in support of their application and stated that their father purchased land parcel East Bukusu/ South Nalondo/661 measuring 3.6 hectares from one Nyongesa Mamati Mikwende (now deceased) who moved to Saboti Trans Nzoia after pulling down his homestead comprising of two houses. The witness state that their father extensively used the land by constructing a four bedroom permanent house and semi-permanent houses for the sons and planted food crops and various types of trees. They averred that their late father had occupied the land since 1967 exclusively, openly, continuously and adversely without any interruption. They state that the respondent who is the administrator of the estate of Nyongesa Mikwende got himself registered as proprietor of the suit land when he knew the land did not form part of the estate of Nyongesa Mikwende. They said that they have been on the suit land for 40 years and are entitled to the same by adverse possession.

[3]. Barasa Nyongesa Mamati the respondent herein swore a replying affidavit and stated that the allegations that the applicant's father bought land parcel No. East Bukusu/South Nalondo/661 from Nyongesa Mamati Mikwende in 1967 is mischievous and full of falsehoods as the registration of the suit land took place on 20th June 1972. He produced a certified copy of the register to prove that fact as BNMI. He argues that if it is the applicants claim that the applicant that he purchased parcels East Bukusu/South Nalondo/662 and 661, then, he is guilty of laches since he never raised any objection before the adjudication Committee that carried the registration and registered Nyongesa Mikwende was registered as first proprietor of land parcel No. East Bukusu South Nalondo 661. The respondent states that the applicant has never been in occupation of parcel No.661 continuously for a period of 12 years or at all and if there was any such occupation the same has been forceful and acrimonious. The respondent states that the applicant has been in occupation of parcel No. East Bukusu/South Nalondo/662 not 661. That today land parcel No. East Bukusu/South Nalondo/661 is under cultivation by the applicant, where he has planted maize. The respondent states that there is no distinct boundary between land parcel 662 and 661 and that is why the applicant while contracting Nzoia Sugar Company has been submitting the particulars of parcel 661 instead of 662. The respondent admitted that he is the administrator of the estate of Baraza Mikwende and hence his registration of land parcel No. East Bukusu/South Nalondo/661 as the only beneficiary.

[4]. The issue for determination is whether the questions posed by the applicants can be answered in the affirmative.

[5]. The applicant's claim that the suit land E. Bukusu/S.Nalondo/661 was bought by their father in 1967. This land did not exist in 1967. The first entry on the green Card is made on 20/6/72 when Nyongesa Mamati was registered as the first owner. What did George Masinde Murunga buy in 1967? Can the affidavit of the applicants supporting the originating summons paragraph 2 be correct? If Mr. Murunga was on the ground in 1967 as a purchaser, why was he not registered as the owner by the adjudication Committee that consolidated, adjudicated and registered the fragments people occupied prior to 1972? Did he make any representations to be registered as the owner of those fragments since the owner is alleged to have demolished his houses and went to Saboti in Trans Nzoia? Strange as it may seem, the land was registered in the name of Barasa Nyongesa Mamati. There was no agreement for sale produced in Court between George Masinde Murunga and Barasa Nyongesa Mamati to prove any sale between the two. In a case of adverse possession when parties enter into an agreement for sale of an agricultural land which is subject to Land Control time runs from the time the period of obtaining consent expires. This was agricultural land, when did time start to run for adverse possession? Barasa Nyongesa Mamati filed a Succession Cause in Bungoma High Court *Succession Cause No.13 of 2006* and the High Court awarded him land parcel E.Bukusu/S.Nalondo 661 and he was registered as owner on 26/2/07. This fact is known to the applicants. They were served with the certified copy of the Register with those entries. The ownership of this land has been determined by the High Court. This Court has no jurisdiction on Succession matters. I cannot review those orders. Indeed, there is a provision under the Succession Act Cap 160 to annul a grant if it is granted by the Court through fraud, mistake or misrepresentation by the applicant.

In dealing with the ownership there was absolutely no need of filing a parallel suit as is the case herein when the matter could and can still be reopened in the High Court Succession Cause aforesaid. Even if I am wrong on that one, from the evidence given I am not satisfied that there is evidence of adverse possession. The applicant is not now in possession. When he came into possession is in doubt. The planting of cane in the suit land is not in my view by itself, sufficient use that can give rise to adverse possession.

I am unable to answer the questions raised in originating summons the affirmative.

If I were to do that, there would be two parallel orders granting the ownership of East Bukusu/South Nalondo/661 to two different people in view of the High Court Succession Cause No.13of 2006. This would not be in the interests of justice and it would lead to abuse of the process of the Court. The Originating Summons is therefore dismissed with costs to the respondent.

Judgement read in open court.

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

S.N. MUKUNYA

JUDGE

In the presence of:

Court Assistants - Chemtai/Joy

Mr. Maloba - For Situma for the defendant

Mr. Makokha - For Mumalasi for Plaintiff