



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND & ENVIRONMENT CASE NO.61 OF 2013

JUSTUS WANJALA NABUI.....PLAINTIFF

VERSUS

FRANCIS NYONGESA NABUI.....DEFENDANT

JUDGEMENT

[1]. The plaintiff filed this case against the defendant praying for orders of eviction of the defendant from land parcel East Bukusu/W.Sang'alo/1930. It is the plaintiff's case that he is the registered proprietor of the suit land. That the defendant who is a brother of the plaintiff entered this land without any colour of right and without any consent from the plaintiff in the year 2008. The plaintiff avers that the defendant had his land given by his father.

[2]. The plaintiff annexed title deed for the suit land issued to him on 11/12/2007. He said in his affidavit sworn on 12/1/2010 that his father allocated each of his sons including the defendant equal shares of land and that the defendant sold his share and moved on to the plaintiff's land. In an affidavit dated 6th February 2006 by Robai Namalwa Nabui the mother of the plaintiff, she swears in paragraph 2 that she was registered as a proprietor of land parcel No. E. Bukusu/W. Sang'alo/1930 jointly with her son Wanjala Nabui, then a minor. She annexed a title deed for the said land showing the plaintiff being registered as a minor on 26th February 1993 by the Land Registrar Bungoma District Lands Registry.

[3]. The defendant filed a defence. He claimed that the land was registered in the name of the plaintiff by fraud. He set out the grounds of fraud in his defence. In paragraph 6 of his defence, he alleged that he acquired the suit land from his father Naboyi Masayi in the year 1984 as a gift. The defendant states that he filed *Bungoma HCCC No.69 of 2003(O.S)* for adverse possession which case was terminated.

He says that he has been on the land for 26 years and that any suit against him is barred by limitation of Actions Act Cap 22 Laws of Kenya.

The defendant had initially filed *Bungoma High Court Civil Case No. 69 of 2003*. This suit was dismissed for non prosecution and abatement of the suit. Later the defendant filed *Bungoma High Court Civil Case No.126 of 2010* claiming adverse possession over the suit land as against the plaintiff herein. On 21/10/2015 he withdrew the suit and gave a reason that his brothers had agreed to give him two acres in Namisi Area.

The plaintiff in this case produced a title deed in his name. Infact this land was registered jointly with his mother Robai Wamalwa Nabui on 26th February 1993. The mother held the title for the plaintiff since he was a minor. It is worth of note that the plaintiff is a younger brother of the defendant by (different mothers) and that this land was an inheritance from his father. All sons of the deceased got Equal shares.

There is ample evidence from the record that the defendant got his share, borrowed money from the bank and when he was unable to repay the loan, he sold his land (inheritance from his father). It is at this stage then, that he moved to the plaintiff's land.

Over the years he has filed many suits in an attempt to get the suit land. These suits includes *Bungoma Civil Case No.124 of 2010* in which he claimed to own the land through adverse possession. A claim of Adverse possession presupposes that the land is not his, that it has a registered owner through whom time can run against and that his entry must be through a trespass or a sale which became void.

Though Bungoma HCCC No.124 of 2010 was withdrawn by the defendant, it clearly shows that the land had an owner when he was filing the suit. That owner is of course, the plaintiff herein.

The defendants claim that the plaintiff was registered through fraud is therefore not tenable. You cannot argue that one is registered as owner through fraud then you file a suit of adverse possession.

I find that the suit land belongs to the plaintiff. I also find that the defendant moved into the suit land, unlawfully. He should move out and vacate out of the said land within 60 days.

If he does not do so, the plaintiff shall evict him with the assistance of the Court broker and policemen of the nearest police station. The Plaintiff shall have the costs of the suit.

Judgment read in presence of Mr. Makokha for Defendant.

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

S.N. MUKUNYA

JUDGE

In the presence of:

Court Assistants: Joy/Gladys

Defendant In person