



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 8 OF 2004
IN THE MATTER OF THE ESTATE OF THE LATE
PETER MABONGA MUSUNGU

BETWEEN

ALBERT MUSUNGU [suing As personal representative of.

PETER MABONGA MUSUNGU..... PLAINTIFF/APPLICANT

VERSUS

JACKTON OHUTSO DEFENDANT/RESPONDENT

JUDGMENT

[1]. On 3rd June 2003 the plaintiff herein filed this suit saying that he is the legal representative of the estate of Peter Mabonga Musungu whose estate comprised of land BUNGOMA/NAITIRI/980. He averred that on or around January 2003 the defendant without any color of right trespassed on land parcel Bungoma/Naitiri/980 measuring approximately five (5) acres and put the same under maize crop. The plaintiff prayed for a permanent injunction restraining the defendant from tilling or in any other manner interfering with land parcel No. Bungoma/Naitiri/980. On 26th July 2003, the plaintiff amended his plaint and pleaded that the defendant was a trespasser and he therefore prayed for an order of eviction.

[2]. On 8th June 2004 the defendant filed his defence. He denied the allegations of the plaintiff. He stated in his defence that there was a valid agreement for sale of the five (5) acres out of the suit land. He averred that he took possession of the said five (5) acres on 25th March, 2003 and has been in quiet peaceful and continuous possession of the same since then. The defendant in his defence states that there has been previous proceedings between the parties over the said portion of five acres out of the suit land. He stated that the current suit is an abuse of the process of the court.

The defendant further pleaded that he had acquired the five acres by adverse possession after having occupied it quietly and peacefully for a period of over 12 years and shall at the relevant time bring a suit to obtain title documents.

He finally stated that the suit is *Res judicata* because of civil suits Bungoma SPMCC no. 731 of 1994 and Bungoma SPMCC no. 101 of 1995 which suits were heard and determined by courts of competent jurisdiction in favour of the plaintiff.

On 3rd March 2011 the defendant amended his defence to deny the allegations in the amended plaint.

[3]. One Peter Mabonga Musungu, the registered owner of land parcel Bungoma/Naitiri/980 filed, Bungoma SPM's civil suit no. 731 of 1993. The suit was filed against the defendant herein. In that suit he wanted the agreement for sale of five acres, entered between himself and the defendant herein to be consolidated by the court. When the matter came to the court for hearing and after the plaintiff was heard it was referred to the Land Disputes Tribunal for hearing and final determination. The court argued that the matter fell squarely under the new Act.

The matter was then heard by the Land Disputes Tribunal which decided that the registered owner of the land Bungoma/Naitiri/980 one Peter Mabonga Musungu, had received Kshs. 128,750/= for five acres from the suit land. It determined that those five acres therefore, belonged to the defendant herein Jackson Ohutso, and that the said Peter Mabonga Musungu should transfer the five acres to the defendant.

The defendant herein filed an application to have the elders award to be made an order of the court vide Bungoma Miscellaneous application No. 101 of 1995 and the court on 7.3.96 confirmed the same as the order of the court and gave 30 days for the respondent herein to appeal. The respondent appealed to the Western Provincial Land Disputes Appeals Tribunal. On 5.2.2001 the appeal was dismissed and the orders of the Divisional Lands Tribunal Tongaren were upheld. The appellant Peter Mabonga Musungu was ordered to transfer 5 acres to the respondent Peter Jackson Onyango. There was no appeal filed to the High Court against those orders of that court.

[4]. That is the background and history of this case. The plaintiff and the defendants filed statements of appeal and agreed issues on 24th January 2005 as follows:

- 1. Whether or not the plaintiff is the legal representative of the estate of the late Pater Mabonga Musungu whose estate comprised among other properties land parcel No. BUNGOMA/NAITIRI/980.***
- 2. Whether or not the defendant trespassed on the said portion of land measuring approximately 5 acres and had the title.***
- 3. Whether or not the defendant has been in quiet peaceful and continuous occupation of the said 5 acres of land since 25th March 1990.***
- 4. Whether or not the plaintiff is entitled to a prayer of injunction restraining the defendant from tilling on or in any other manner interfering with the plaintiff's use of land parcel NO. BUNGOMA/NAITIRI/980.***
- 5. Whether or not the defendant herein has acquired the aforesaid 5 acres of land to be curved from land parcel no. BUNGOMA/NAITIRI/980 by adverse possession.***
- 6. Whether or not this suit is Res – judicata.***
- 7. Whether or not the plaintiff's suit is entitled to the orders sought.***
- 8. What are the appropriate orders as to cost.***

After having perused the agreed issues, I think the salient issue here in no. 6. Dealing with this issue will sort out all the other issues. This matter has previously been litigated on by the parties. The issue of sale of the five acres by the plaintiff to the defendant was brought to court by the plaintiff himself in 1993. The matter was then caught up by the newly created Land Disputes Tribunal Act no. 18 of 1990. It was referred there by the court. It was conclusively decided. Judgment was entered in terms of the award by the Bungoma Senior Resident Magistrate on 7.3.96. An appeal was preferred to the Western Province Land Disputes Tribunal as per the requirements of Land Disputes Tribunal Act 19 of 1990. The appeal was dismissed. There was no appeal to the High Court. This matter of the five acres sold by the plaintiff to the defendant was conclusively decided.

The parties herein are the same. The land is still the same. The disputed piece of 5 acres is still the disputed portion herein. There is a determination by the Provincial Appeals Tribunal. That determination was not appealed against. It is now 15 years since. The five acres clearly belongs to the defendant pursuant to those determinations.

One cannot be evicted from a piece of land which courts of competent jurisdiction has adjudicated to be his. The issue herein is clearly Res- Judicata.

[5]. Another issue worth considering is the fact that the personal representative of the plaintiff has gone to the Bungoma High Court and filed a Succession Cause No. 3 of 2000. A confirmation of grant was issued on 12th July, 2007 and a grant of representation of the estate of Peter Mabonga Musungu was made to Albert Mabonga Musungu the plaintiff herein and land parcel Bungoma/Naitiri/980 was distributed to seven persons namely;

Alex Musungu	4.28 Acres
Albert Musungu	4.28 Acres
Pascal Mulongo	1.28 Acres
Matias Musungu	1.28 Acres
Patrick Musungu	1.28 Acres
Moses Babu	1.28 Acres
Robert Bagbai	1.28 Acres

The fact that the defendant had been awarded five acres by the Tribunal does not appear to have been communicated to the court. Obviously the defendant's five acres did not and could not form part of Peter Mabonga Musungu's estate since the five acres had been adjudged to belong to the defendant in 1995. This fact should have been brought to the notice of the judge in Bungoma Succession Cause No. 3 of the year 2000. Had it been brought to the attention of the judge, she should not have distributed it as she did. The five acres of land was not available for distribution. Suffice to leave this point at that. It is now up to the defendant to move the court in that succession cause for the appropriate orders.

It is only after the grant is interrogated through the relevant procedure under Cap 160 that then, the Land Registrar Bungoma can be ordered to make the necessary registration in his register. In the meantime the orders granted to the defendant stopping any further action on the land shall be upheld for a period of 12 months to enable the defendant to move the high court in that succession cause in regard to the distribution of his five acres.

The end result is that the plaintiff's suit for eviction is dismissed with costs to the defendant.

It is so ordered.

DATED at BUNGOMA this 11th day of May 2016

S. MUKUNYA

JUDGE.