



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

LAND AND ENVIRONMENT CASE NO. 64 OF 2014

RAJAB OUNDO TABIROPLAINTIFF

VERSUS

RUKIYA NECHESA TABIRODEFENDANT

JUDGEMENT

[1] The Plaintiff/Applicant herein filed an Originating Summons on 7th March 2014 claiming adverse possession of 4 acres from land parcel number South Wanga/Ekero/381 and required the Respondent Rukiya Nechesa and Mwanahawa Aloice Boyi to enter appearance for the determination of the following questions:-

1. Whether the Applicant together with his family members have been in continuous and peaceful occupation, possession and use of the said 4 acres of land at the exclusion of the Respondents for a period of more than 12 years.

2. A declaration that the Respondent's right as the administrator of the estate of the late Haji Boyi Tabiro deceased over a portion of land measuring 4 acres from land parcel number South Wanga/Ekero/581 with all the artificial and natural features thereon got extinguished by operation of the law of adverse possession upon expiry of twelve(12) years when the applicant and his family members were in actual possession and use.

3. That even though the said land by virtue of a confirmed grant issued recently got registered or is to be registered in the names of the Respondents herein together with their sons from the previous deceased owner which registration is by transmission then their title in a portion of land measuring 4 acres has been extinguished by the operation of Section 7,17,37 and 38 of the Limitation of Actions Act Chapter 22 the Laws of Kenya.

4. Whether the applicant is entitled to be the registered owner of the aforesaid portion of 4 acres by way of adverse possession instead of the Respondents in accordance with Section 37 and 38 of the said Act and by virtue of the new constitution 2010.

5. A Declaration that the registration of the whole portion of land herein in the names of the Respondents their capacity as the administrators of the estate of the late Haji Boyi Tabiro (deceased) without giving a share of 4 acres to the Applicant who was a beneficiary in the said portion was unconstitutional and fraudulent.

6. An order that the Respondents do sign all the relevant documents including land control board forms, mutation forms, maps, partition form and provide their pin number certificates, identity cards and coloured passport photographs and appear before the necessary land control board for the purposes of obtaining a letter of consent to transfer the said 4 acres of the Applicant.

7. That in default of order 6 above, this honourable court to order its Deputy Registrar to execute or sign the said documents to enable the Land Registrar and the District Surveyor to create, register and transfer a portion of land measuring 4 acres to the Applicant.

8. An order condemning the respondents to pay costs of this summons.

[2] The first defendant entered a statement of admission on the following terms:

1. The 1st defendant herein admits to all the averments and prayers stipulated in the Originating Summons, verifying affidavit, supporting affidavit, list of documents, written statements and list of documents filed by the plaintiff/applicant.

2. The 1st defendant therefore pleads that this court go ahead to enter judgement in favour of the plaintiff and that as a co-administrator of the 2nd defendant in the estate of the late Haji Boyi Tabiro (deceased) she is ready to sign all the relevant document pertaining to registration and transfer of land so that the plaintiff who is a bonafide beneficiary in a portion of land measuring 4 acres from the deceased land comprised in title number South Wanga/Ekero/581.

[3] There was no appearance for the 2nd defendant. The plaintiff requested for judgement on 5th May 2014. The case was subsequently fixed for hearing on 29th February 2016. Mr. Rajab Tabiro gave evidence while formerly proving his case and said that the defendants are his sister in laws. He said that the administrators of the estate of Haji Boyi Tabiro who was his brother. The one he follows in birth lineage. He said that the deceased was the registered owner of Wanga/Ekero/581. The he started living on the land in 1967 when the lands were demarcated. The applicant said that his brother brought him up because he was his elder brother and that the applicant has lived on that land since he was born. He said that the elders had earlier put on a boundary. That he needs four acres. He said that after his brother died, his brother's children filed a Succession Cause and that they wanted him to move out of the land. He produced the Ruling of the Succession of the Kakamega High Court Succession No. 680 of 2012 as Pexh No. 2. He said that he has lived on the land and has developments on the land. Those developments were named as:

5 fish pods, 3 houses for himself and six houses for his children. A chimney for charcoal and a green house with vegetables therein. That he had a family of 40, two wives, five sons and grandchildren. He produced various photographs to prove his claim. He said that he is 57 years old and requested the court to give him his four acres.

[4] From the evidence adduced by the applicant has he proved a case of adverse possession as alleged? In a case of adverse possession one must be a trespasser who enters the land of another person peacefully and without permission and who stays there on the land for a period of 12 years without his said stay being interrupted by a notice by the registered owner to move out and vacate the land. Is that the case here? No it is not.

[5] The Applicant says he has lived on the land since he was born. He was brought up by the elder brother (now deceased) who was the registered owner. The land initially belonged to their own father. In fact in the Originating Summons the first ground supporting the Originating Summons states:

The applicant is the brother of the late Hajji Boyi Tabiro (deceased) who held land parcel number South Wanga/Ekero/581 in trust of the applicant in a portion of land measuring 4 acres out of a total of 9 acres.

[6] If then land was held in trust for the applicant by his elder brother in a proportion of four acres, how

then would the applicant claim adverse possession of the same? Trust and adverse possession are totally different concepts. They cannot run in tandem for the applicant on the same land and at the same time. The applicant can only have one and not the other. The questions No. 1,2,3 and 4 are answered in the negative.

[7] In considering question number five as to whether the applicant is entitled to four acres from the administrators of the estate of Hajji Boyi Tabiro, one would have to look again at the Ruling in Kakamega High Court Succession Cause No. 680 of 2012.

My brother Justice Dulu said,

“The asset in question is only one. It is land parcel S/Wanga/Ekero/581. Rukiya is of the view that Mwanahawa should get only 2 acres as the land had already been divided and demarcated on the ground. She contends that 4 acres of the 9 acres were held in trust by the deceased for his brother Rajab Oundo Tabiro. However no separate titles were annexed to support the said demarcation.

In this matter, letters of administration were initially granted by the Senior Resident Magistrate Mumias in Succession cause No. 14 of 2010. No evidence has been placed before me the contention of Rukiya that Rajab Oundo Tabiro is entitled to inherit from the estate. In case Rajab wants to come to court he is free to do so”

The proper place for the applicant to demand his alleged four acres is in the Succession Cause aforesaid. The door is always open for him, as the learned judge, advised him. Filing a parallel suit in the Land and Environment Court cannot help. I am aware that the claim is admitted by one of the respondents. But what has that respondent admitted? A claim of adverse possession or trust? I have already explained that the two are antithetical concepts that cannot go together. If I were to grant the orders sought there would be two parallel decisions one by Dulu J in Kakamega Succession Cause No. 680 of 2012 granting land parcel South Wanga/Ekero/581 equally to the five children of the deceased (Hajji Boyi Tabiro) and now my order giving four acres to the applicants herein. In such a case a parallel decision would arise because, I have no jurisdiction to interfere with a Succession Cause and have no jurisdiction to vary the orders of a competent court of equal and parallel jurisdiction. Such a situation would not be in the interests of justice as the court would be open to ridicule and parties would be left confused, a situation that would not be desirable. Such a decision would put the court into disrepute.

Fortunately, as Dulu J said before, the door is still open in the Succession Cause for annulment of the grant if enough cause is shown to do so, under the relevant Sections of Cap 160. The Originating Summons is therefore dismissed as being misconceived. The same is dismissed with no order as to costs.

Dated at Kakamega this 11th day of May 2016

S.MUKUNYA - JUDGE

Judgement read in open court in presence of

C.A Nyongesa,

Olonga for M/s Change for plaintiff

Defendant in person

S.MUKUNYA - JUDGE

11/5/2016