



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. 70 OF 2016

PETER WASWA WAKHISI

SIMON KAYERI ADAMBA

HEZBON OYALO.....PLAINTIFFS

= VERSUS =

FREDRICK ITELA OBWANA.....DEFENDANT

JUDGMENT

1. By an originating summons dated and filed on 13th July 2016 the Applicants claiming to have acquired part of land parcel no. SOUTH TESO/ANGOROM/133 in shares of 3, 4 and 2 acres respectively have approached the court for determination of the following questions:

i. Whether they have been in open, quiet and notorious possession of 3, 4 and 2 acres respectively out of LR No. SOUTH TESO/ANGOROM/133 for a period exceeding 12 years

ii. Whether the Respondent's Title to SOUTH TESO/ANGOROM/133 became extinguished upon expiry of 12 years from the time the Applicants took possession of the land namely from 25th April 1988, 31st March 1986 and 18th March 1989 respectively.

iii. Whether the Applicants have acquired title to the aforesaid land by virtue of adverse possession

iv. Whether registration of the Respondent as the owner of the whole LR No. SOUTH TESO/ANGOROMO/133 should be cancelled and subdivision ordered into four portions for the applicants to be registered as owners of their respective 3, 4 and 2 acre portions.

2. Consequently, the Applicants prayed for orders that:

i. The Respondent's rights over the aforementioned portions of land out of the suit property became extinguished by way of adverse possession

ii. The property be subdivided for their registration as owners of the 3, 4 and 2 acre parcels

iii. The Respondent be ordered to execute ownership documents failure to which the same be done by the Deputy Registrar of the Court.

iv. The Respondent be perpetually barred and enjoined from taking, using or in any way interfering with the Applicants' portions of the suit property

v. Costs be borne by the Respondent.

3. The Respondent filed his Replying Affidavit in opposition to the Originating summons on 31st July 2017. He deposed that the Applicants were in breach of valid sale agreements between themselves and his late father. That they instituted this action to circumvent the same. Moreover, they were mere licensees on the suit property pending completion of the purchase price. He deposed further that the claim was defective and in contravention of express provisions of statutory law.

4. The main suit kicked off on 2nd December 2019 with three witnesses testifying on the side of the Plaintiffs and the Defendant testifying as the sole witness. The 1st Plaintiff giving evidence as PW1 stated that the Defendant was a son to one Peregio Obwana Mase who sold to him the land he was claiming. He adopted his affidavit as evidence. He narrated that he purchased a portion of South Teso/Angoromo/133 and produced a sale agreement and certificate of official search as P. Ex 1 and 2. He also produced the green card of the property as P. Ex 3. PW1 stated that from the time of the agreement in 1988, he has been in occupation of the property.

5. On cross-examination, PW1 answered that he purchased his plot from the suit land which was registered in Peregio Obwana's name with the sale agreement having been signed in Court. He admitted that he was unaware of the exact dimensions of the property he bought. PW1 continued that the said Peregio died in 1990 before they went to the Land Control Board due to lack of funds. That Peregio had 6 children but one died and his sons also resided on the suit land. He stated further that he does not have a survey report identifying his 3 acre portion but insisted that he participated in Peregio's succession case in his capacity as a buyer and brought this suit against the Defendant as an administrator of the deceased's estate.

6. PW1 continued that Peregio's surviving sons, Fredrick, Emase and Chrispinus Okisai each had their homes on the suit land. He admitted that when buying his portion of the property, he did not do a search. He only saw the prohibitory order when the search was conducted later. PW1 gave evidence that the succession cause was filed in 2011 and he filed this case because during confirmation, they were excluded. He narrated that he lives and farms the suit land. That after he bought the land, Peregio put a temporary demarcation on his portion. He had also filed a complaint against Fredrick for cutting trees his trees for which he was charged. He prayed for a title for his portion.

7. The second plaintiff adopted his statement dated 13th July 2016 as evidence and stated that he came to know Peregio when he sold him land measuring 4 acres. That the Defendant was a child to Peregio and the land he was sold was LR 133. PW2 narrated that he bought the land in 1986. His sale agreement was produced as P.Ex 4. He continued that the sale price was Kshs. 16000. He paid Kshs. 15500 after the late Peregio took him to the Land Control Board and paid the outstanding Kshs. 500 during the succession exercise. PW2 filed this suit because they were excluded in the distribution of assets. He averred that he lives on the land and one of his sons has built a permanent house on it.

8. On cross-examination PW2 admitted that he did not have the original sale agreement. That they did not survey their portions to ascertain acreage. Moreover, he did not go to the Land Control Board as Peregio had promised neither did he file objection proceedings in the succession cause. He asserted that he got onto the land pursuant to the sale agreement and instituted a criminal case against the Defendant for cutting his trees. That it was not true that the criminal case was because of a boundary dispute.

9. PW3's evidence was largely in consonance with that of PW1 and PW2. He adopted his statement and affidavit and produced a sale agreement as P.Ex 5. The sale agreement was made between his late father Philemon and the late Peregio whereby his father bought a 2 acre portion. He has been living on the property from 1989 to date having entered thereon pursuant to the aforesaid purchase and has brought this suit in his own right and on behalf of his father's estate. Like PW1 and PW2, PW3 did not have a survey report.

10. DW1 confirmed that the Plaintiffs were known to him and adopted his statement and affidavit as his evidence. He narrated that the 1st Plaintiff lives in Uganda. That he had a small structure on the property where his workman resides; not a home. He denied that the 1st Plaintiff farms on the suit land and that the 1st Plaintiff uses 4 acres thereof. DW1 admitted however that the 2nd and 3rd Plaintiffs live on very small portions of the property where they have homes. Further, the 2nd Plaintiff farms on a neighboring plot owned by one Francis Juma. He also testified that there was a criminal case between the parties concerning cutting of trees.

11. It was DW1's case that his father died in 1990 leaving only the case of Brigita Aoko. That the Plaintiffs were not on the land at the time and only came after the demise of his father. He was not party to the sale agreement and asked the Court to dismiss the case, to order demolition of the Plaintiffs' houses and that he be awarded costs of the suit.

12. On cross-examination, DW1 stated that in 1990 he was 12 years old, in class 6. After his parents' death, he went to live with his Aunt in Uganda. That he was old enough to know the occupants on the suit land. DW1 continued that he was issued with an Identity Card in 2008 when he was 20 years old. That he has previously sued the Plaintiffs but did not succeed as he was not the legal administrator at the time. He denied that the Plaintiffs gave him money for the succession cause that cost him Kshs. 13000. Moreover, he was not given money to enable him transfer their portions to them. DW1 faulted the Plaintiffs for failing to conclude their transactions with his late father.

13. The hearing completed, the Plaintiffs and Defendant filed their submissions on 4th March and 18th February 2020 respectively. I have read and considered the same as well as the parties' pleadings and the applicable law. The only question in dispute is whether the Plaintiffs are entitled to the 3, 4 and 2 acre parcels they claim to be in occupation of by way of adverse possession. It is the Plaintiffs' evidence that they got onto the property by way of purchase for the respective portions of the suitland they are claiming. The Defendant has admitted their occupation but insists that the transactions between the Plaintiffs and his father were never completed hence they are mere licensees.

14. The ingredients to be proved in a claim for adverse possession are settled both in Statute and case law. Section 13 of the Limitation of Actions Act provides that; **a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

15. In the case of *Mbira Vs Gachuhi (2002) 1EALR 137* it was held that;

"... a person who seeks to acquire title to land by method of adverse possession or the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious exclusive and adverse use by him or those under whom he claims for the statutory period without interruption".

16. In line with the above provisions, the Plaintiffs have demonstrated that they got onto the property with permission of the registered proprietor Peregio Obwana by purchase in their own right and in the case of the 3rd Plaintiff through his father vide sale agreements of 31st March 1986, 24th April 1988 and 18th October 1989. The transactions were not completed by the plaintiffs getting titles for the sold portions within the prescribed time. Then, permission is inferred to have lapsed after 6 years which is the time provided for in section 4 of the Limitation of Actions Act. The timelines fell through in 1992, 1994 and 1995 respectively. Time ran against the registered owner and in this case the defendant who succeeded his father as the administrator of his estate.

17. The sale agreements specified the acreage of the portions purchased and according to witness evidence there were ascertainable boundaries that must have been the basis upon which the tree cutting criminal claims were brought against the Defendant. In his testimony, the Defendant admitted that the 2nd and 3rd Plaintiff resided on the property arguing that they lived on smaller portions, not the 3 and 2 acres alleged. He (the defendant) stated that the 1st Plaintiff lived in Uganda but had a temporary a temporary structure occupied by PW1's caretaker.

18. The plaintiffs produced copies of sale agreements to confirm the size of the land they occupied and claimed. The defendant's averment that the plaintiffs were using smaller sizes of the suit parcel than what they were claiming was however uncorroborated and unsubstantiated. It is trite law that he who alleges must prove. Further, the Defendant said that there were attempts made at the eviction of the Plaintiffs. He did not however give details of the cases filed seeking such orders.

19. The Plaintiffs have shown that they have been in open and uninterrupted occupation of the parcels claimed for well over the requisite 12 years. Accordingly, I find that the Plaintiffs have proved their case on a balance of probabilities and find that they are entitled to their respective portions of South Teso/Angorom/133 measuring 3, 4 and 2 acres respectively by way of adverse possession.

20. Judgment be and is hereby entered in their favour in terms of paragraphs (1), (2), (3) and (4) of the plaint that;

a) A declaration is hereby made that the Defendant's rights over the 3, 4 and 2 acre portions of L.R SOUTH TESO/ANGOROM/133 occupied and claimed by the Plaintiffs have been extinguished by the operation of the law.

b) An order that SOUTH TESO/ANGOROM/133 be subdivided into 4 portions of 3, 4, 2 and 3.35 acres with the Plaintiffs' 3, 4 and 2 acre portions to be registered in their names.

c) An order is hereby made that the Defendant or in default the Deputy Registrar of this Court do execute all relevant documents to transfer the 3, 4 and 2 acre portions in the names of the 1st, 2nd and 3rd Plaintiffs respectively.

d) A permanent injunction is hereby issued against the Defendant from interfering with the Plaintiffs' respective 3, 4 and 2 acre portions.

e) Each party to meet their respective costs of the suit.

Dated and signed at BUSIA this 30th day of Sept. 2020.

A. OMOLLO

JUDGE