



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 77/2014 (FORMERLY HCC. 66/2011)

MALALA LUBALE LUVISIA.....

APPLICANT

=VERSUS=

CHRISPINUES EGESA TANGARA).....1ST

RESPONDENT

JAMES OSEME TANGARA.....2ND

RESPONDENT

JONAI NAMUKURU TANGARA.....3RD

RESPONDENT

J U D G M E N T.

1. **MALALA LUBALE LUVISIA** , the Plaintiff, filed the originating summons dated 26th September, 2011 against **CHRISPINUS EGESA TANGARA, JAMES OSEME TANGARA** and **JONAI NAMUKURU TANGARA**, hereinafter referred to as 1st to 3rd Defendant seeking to be registered as the proprietor of Bukhayo/Ebusibwabo/349 under adverse possession doctrine and costs. The Plaintiff stated that the Defendants placed him on the said land following a sale agreement in 1989 and has been in actual possession , peacefully, openly and for uninterrupted period of over 12 years.
2. The Defendants opposed the Plaintiff’s claim through the replying affidavit sworn by the 1st Defendant on 17th October, 2011. The 1st Defendant deponed that the suit land belonged to their late father, Julius Tangara Arwasi who died on 6th February, 1979. That he filed Succession Cause No. 105 of 2007 through which they inherited the suit land. That the Plaintiff has been living on the suit land as a squatter and has declined to vacate even after being asked to do so through the area administrators. The deponent also stated that the Defendants are in the process of apportioning the suit land among themselves.
3. When this case came up for hearing on 21st April, 2015, Mr. Manwari and Okutta advocates for the Plaintiff and Defendants respectively agreed to have witness evidence affidavit sworn by the Plaintiff and Samuel Nyangweso Mapesa on 27th January, 2014 and the Plaintiff’s list of documents dated 30th April, 2013 admitted as the Plaintiff’s evidence. They also agreed to have the witness evidence affidavit sworn by Alfred Arwasi Iseme on 24th February, 2015 and the copy of the certificate of confirmation of grant admitted as the Defendants’ evidence. The counsel then by consent closed the cases of their respective clients and undertook to file written submissions. The Plaintiff’s written submission dated 19th May, 2015 was filed on 20th May, 2015 while that for the Defendants dated 14th May, 2015 was filed on 20th May, 2015. The

- Plaintiffs then filed a reply to the Defendants' submissions on 16th June, 2015.
4. The issues for determination in this case from the pleadings, affidavit evidence and submissions are as follows;
 - a. Whether the Plaintiff took possession of the suit land in 1989, and if so, whether it was with the Defendants consent.
 - b. Whether, if the answer to (a) above is in the affirmative, the consent by Defendants has been withdrawn or determined and if so, when.
 - c. Whether the Plaintiff's occupation and possession of the suit land has been terminated or interrupted between 1989 and the date of filing of the suit.
 - d. Whether the Plaintiff's occupation of the suit land has become adverse to the title of the registered proprietor and if so from when.
 - e. Whether Plaintiff is entitled to be registered with the suit land.
 - f. Who should pay the costs of this suit.

5. ANALYSIS OF THE EVIDENCE AND SUBMISSIONS.

- a. That the affidavit evidence tendered by both parties and the documentary evidence in the nature of certificate of search for Bukhayo/Ebusibwabo/349 dated 5th January, 2007 shows that the said land was first registered on 15th January, 1971 in the names of Tangara Arwasi who was the father to the Defendants.
- b. The affidavit evidence availed by the Defendants through the replying affidavit also shows that their father died on 6th February, 1979 intestate and that the 1st Defendant filed Nairobi H.C. Succession Cause No. 105 of 2006 in which he was appointed the administrator and the grant was confirmed on 5th October, 2009. The copy of the certificate of confirmation of the grant admitted as exhibit by consent of both counsel shows that the only property of the estate was Bukhayo/Ebusibwabo/349 and that it was to be shared equally between the Defendants.
- c. That the affidavit evidence availed by the Plaintiff and Defendants confirms that the Plaintiff was the one in possession of the whole land parcel Bukhayo/Ebusibwabo/349. This was also confirmed by Alfred Arwasi Iseme at paragraph 8 of his affidavit sworn on 24th January, 2015.
- d. That the Plaintiff's evidence that he took possession of the suit land following the sale agreement between the 2nd Defendant and himself in August, 1989 has not been disputed. However the court is unable to verify the Plaintiff's claim that the 2nd Defendant entered the sale agreement on behalf of himself and the 1st and 3rd Defendant as no copy of the sale agreement was availed to the court. On the side of the Defendants they appear to dispute the Plaintiff's claim through the affidavit of Alfred Arwasi Iseme who deponed that the Plaintiff had only bought the portion that the 2nd Defendant was entitled to. From the evidence offered by both parties, it is crystal clear that there is a dispute as to whether the plaintiff bought the whole suit land or only a third portion that the 2nd Defendant was entitled to. However both parties agree, as already shown above, that the Plaintiff took possession and has continued to use the whole suit land and not just a portion of it.
- e. That there is no evidence adduced by any of the parties to confirm whether the sale agreement between the Plaintiff and the 2nd Defendant received the Land Control Board consent. The provision of **sections 6 and 8 of the Land Control Act Chapter 302**, of Laws of Kenya states that agreements for sale of agricultural land be subject to the consent of the Land Control Board being obtained within six months. Where the consent is not obtained the agreement for sale becomes void pursuant to **section 7 of the said Act**. In such a situation the purchaser cannot seek specific performance but only refund of the monies paid under the agreement. In absence of documentary evidence of the consent having been obtained from the relevant Land Control Board, the court concludes that the 1989 land sale agreement between the Plaintiff and 2nd Defendant, whether for the whole or part of the suit land, became void after the expiry of six months from August, 1989.
- f. That flowing from the above, the court finds that the Plaintiff took possession of the suit land in August 1989 with the consent or permission of the 2nd Defendant as a purchaser. The occupation

- of the suit land by the Plaintiff was therefore not adverse to the title of the registered proprietor of the suit land for the duration he occupied the land as a purchaser. The period the Plaintiff occupied the suit land as a purchaser was for six months from August, 1989 to February, 1990 when the sale agreement became void for absence of the consent of the land Control Board.
- g. That the registered proprietor of the suit land and the Defendants who had beneficial interests over the suit land did not interrupt the Plaintiff's occupation and possession of the suit land after the sale agreement became void in February, 1990. The Plaintiff's continued stay on the land from February, 1990 became adverse to the title of the registered proprietor, Tangara Arwasi and by March, 2002 the Plaintiff became an adverse possessor of the suit land in accordance with **section 18 of the Limitation of Actions Act** Chapter 22 of Laws of Kenya.
 - h. That by the time the 1st Defendant filed the Succession Cause of his father's estate and obtained confirmation of grant in 2009 to the effect that the suit land be shared equally between the three Defendants, it was subject to the rights of the Plaintiff as an adverse possessor. [see **PETER Thuo Kairu –vs- Kuria Gacheru (1988) KAR**. That by the time the Defendants were registered as joint owners of the suit land on 9th February, 2010 through transmission, they got so registered subject to the Plaintiff's interests and rights as an adverse possessor.
 - i. That while this suit was pending in court the Defendants had the suit land subdivided into parcels Bukhayo/Ebusibwabo/4216 and 4217 which were registered in their joint names on 26th October, 2011. This prompted the Plaintiff to apply to the court, through the notice of motion dated 1st February, 2012 for inhibition orders to secure the legal status of the two parcels. The court takes this action to have been an attempt by the Defendants to defeat the cause of justice by dealing with the suit property in a manner that was detrimental to the interest of the Plaintiff as an adverse possessor of the suit land. The court expresses its displeasure on the Defendant conduct.

6. CONCLUSION.

- a. That the Plaintiff initial entry on the suit land Bukhayo/Ebusibwabo/349, which has since been subdivided into Bukhayo/Ebusibwabo/4216 and 4217, in August, 1989 was as a purchaser and therefore a licensee of the 2nd Defendant.
- b. That the sale agreement between Plaintiff and 2nd Defendant of August, 1989 became void in February, 1990 pursuant to **section 7 of the Land Control Act** Chapter 302 of Laws of Kenya.
- c. That the Plaintiff's continued stay on the suit land after February, 1990 was adverse to the title of the registered proprietor, Tangara Arwasi.
- d. That under **section 7 of the Limitation of Action Act** Chapter 23 of the Laws of Kenya, the registered proprietor of the suit land, and or those with beneficial interests had a period of 12 years from March, 1990 to reclaim the suit land from the Plaintiff and none did so.
- e. That by March, 2002, the Plaintiff's rights and interests over the suit land, as an adverse possessor under **section 18 of the Limitation of Action Act**, had crystallized and the title of the registered proprietor had been extinguished.
- f. That the Defendants title to the suit land and the two subdivisions thereof have equally been extinguished by the Plaintiff's entitlement as an adverse possessor.
- g. That the Plaintiff has established his claim based on adverse possession against the Defendants on a balance of probabilities and the court orders as follows;
 - i. That the Defendants interests on land parcel Bukhayo/Ebusibwabo/4216 and 4217, which are subdivisions from Bukhayo/Ebusibwabo/349, have been extinguished under **section 18 of the Limitation of Action Act** Chapter 23 of Laws of Kenya.
 - ii. That the Plaintiff is hereby declared the owner of Land parcel Bukhayo/Ebusibwabo/4216 and 4217, which are subdivisions from Bukhayo/Ebusibwabo/349, under adverse possession.
 - iii. That the Defendants are hereby ordered to transfer land parcels Bukhayo/Ebusibwabo/4216 and 4217, which are subdivisions from Bukhayo/Ebusibwabo/349, to the Plaintiff herein and in default the Deputy Registrar of this court do sign all such necessary documents to effect the said transfer.
 - iv. The Defendants to pay the Plaintiff the costs of this suit.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON ...15TH.....DAY OF JULY, 2015.

IN THE PRESENCE OF;

PLAINTIFF.....

1ST DEFENDANT.....

2ND DEFENDANT.....

3^R DEFENDANT.....

COUNSEL.....