



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT AND LAND CASE NO.180 OF 2013

TOM MAKHANU WEKESA.....1ST PLAINTIFF
NYONGESA WEKESA PEPELA.....2ND PLAINTIFF
SAILAS WASWA WEKESA.....3RD PLAINTIFF
MASIKA WEKESA.....4TH PLAINTIFF
MESHACK MULONGO WEKESA.....5TH PLAINTIFF
PRISILA NAMALWA WEKESA.....6TH PLAINTIFF

VERSUS

BEATRICE NANJALA WAMALWA.....DEFENDANT

JUDGEMENT

[1]. The plaintiffs in this case have brought an originating summons for the determination of the question whether the Defendant's title has not been extinguished by operation of law and whether the defendant should now transfer the said land to the plaintiffs who claim to have acquired the same by way of adverse possession. Finally an order that the deputy Registrar should not transfer the same to the applicants herein.

The applicants attached a copy of the certificate of title of East Bukusu/N.Sangaro/840 and a search thereof and a supporting Affidavit.

[2]. The applicants supporting Affidavit was sworn by Mr. Nyongesa Wekesa Pepela the 2nd plaintiff. He avers that his father Wekesa Pepela Nabukanda bought (stayed in) the suit land measuring 4 acres and lived in the said land in the year 1969 and stayed there with the 6th applicant. He states that the 1st applicant was born in 1958, himself in 1971, third defendant 1973, 4th defendant 1979 and 5th defendant was born in 1980. He avers that they have been staying on the land since they were born. The applicants says that the applicants have been in continuous occupation of LR East Bukusu/North Sangalo/860 for a period exceeding 12 years and that the defendant's title has been extinguished by operation of law.

[3]. The defendant/respondent swore a replying affidavit. In her affidavit she states that the applicants sold the suit land to her late husband one James Wamalwa. That the applicants then moved and settled at Kocholia. She annexed an agreement of sale. She averred that the applicants invaded the

land in the year 2000. She avers that after invasion she proceeded to Court vide Bungoma CMCC No.235 of 2000. The Court in that suit ordered the applicants to be evicted therefrom. The Court proceedings and eviction order were annexed to the affidavit.

The respondents after such eviction filed a Succession in Bungoma High Court Succession Cause No.36 of 2006 claiming plot No.910. In that Succession Cause they included the suit land. The respondent avers that she learnt of the Succession Cause and filed objection proceedings for the suit land. The High Court in Bungoma Succession Cause No.36 of 2006 ordered that the applicants do succeed plot No.910 and that the defendant be registered as the owner of the suit land. The defendant was issued with a title on 26/9/2012. The Bungoma High Court Succession Cause No.36 of 2006 was annexed to the affidavit. The defendant avers that there has been no appeal from that order. She states that this originating summons is an abuse of the process of the Court.

The defendant/respondent states in her further replying affidavit that this matter further went to the land disputes tribunal in tribunal case No.18 of 2001. The land was adjudged to belong to the defendant and the award of the land disputes tribunal was adopted as the order of the Court by the Senior Principal Magistrate Bungoma and decree issued to that fact on 13th June 2003.

[4]. During the hearing of this case the applicants only contention was that the land in question belonged to their father. That here was no agreement between the defendant respondent and the applicants' father. The defendant/respondent gave evidence and said the land belonged to her husband. She explained that the land was near her family land. It is next to her house. That both her husband and the applicants' father died before the land could be transferred. She explained how she filed an objection in the Bungoma High Court Succession Cause No.36 of 2006 and how she was awarded the land. Further, she told the Court about the land disputes tribunal case No.18 of 2000. The applicants were parties to that suit too. The land was adjudged to belong to the defendant. The tribunal's order was adopted as the order of the Court by the SPM in Bungoma. There has been no appeal against that order. The respondent also did tell the Court of the eviction order issued against the defendants by CM's Court in Bungoma on 27th October 2007. No appeal has been filed against that order. It is still in force.

[5]. The questions to be decided by this Court is whether there has been occupation in the suit land for a period of 12 years against the defendant, which occupation was a trespass and adverse against the interests of the defendant/respondent. Further whether the occupation was devoid of force and finally whether the occupation was uninterrupted by notice and or any suit filed against the applicants.

[6]. The applicants herein were not trespassers. They say they were born on the suit land. This suit was sold to the defendant's late husband by the applicants' late father. Evidence is on record that the applicants' father moved from the suit land and went to live at Kocholia with his family. The applicants filed Bungoma High Court Succession Cause No.36 of 2006. The respondent filed an objection in that cause. The objection was upheld by the Court. The Court's order was specific that the suit land should be registered in the respondent's name. This was 7th November 2011. This originating summons was filed on 2nd July 2013. The defendant/respondent was registered as the owner of the suit land on 26th September 2012. By the time this originating summons was filed the respondent had been an owner of the suit land for only one year and two months. The order in the Succession Cause has not been vacated set aside or appealed from. The applicants herein were also the applicants in that Succession Cause.

The applicants were the respondents in land disputes tribunal No.18 of 2000. They lost there too. The land was adjudged to belong to the respondent. Judgement was entered in terms of the award on 13th June 2003 by the Bungoma Resident Magistrate. No appeal was preferred against that Court order. An eviction order against the applicants was issued to the defendants on 23rd October 2007. The applicants have not complied with that Court order. They continue to occupy the suit land with impunity.

[7]. I have no doubt in my mind that the originating summons herein is unmerited. The questions raised in paragraph (a), (b), (c) and (d) in the Originating summons are answered in the negative. Land parcel No. East Bukusu/North Sangalo/860 has been adjudged by Courts of competent jurisdiction to

belong to the defendant. There has been no appeal against these orders. This Court has no jurisdiction to interfere with the decision in Bungoma High Court Succession Cause No.36 of 2000. Even if I had (which is not the case) the claim of adverse possession has not been proved at all.

I have been asked by the respondent to order that the applicants do move and vacate from the suit land. This is an unnecessary order since there is already an eviction order by the Chief Magistrate Bungoma which should be executed forthwith.

The respondent /defendant shall have the costs of this suit.

DATED at BUNGOMA this.....15TH day of JULY 2015

S. MUKUNYA

JUDGE