



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 137 OF 2013

GODFREY OUMA NANDIEKI.....PLAINTIFF

= VERSUS =

BATHLOMEW MUSUMBA.....DEFENDANT

J U D G E M E N T

1. The plaintiff commenced this suit by way of an Originating Summon dated 17th January 2006 seeking to be declared the owner of L.R No. Bukhayo/Buyofu/197 by way of adverse possession and or that the defendant as the registered owner is holding the land in trust for the plaintiff. He also prayed that the defendant be directed to execute all the documents to effect a transfer in his favour. The plaintiff also prayed for costs of the suit.

2. The defendant filed a replying affidavit dated 25th April 2006 in opposing the claim. He also filed HCC No. 3 of 2006 on 6/2/2006 against the plaintiff seeking to be granted vacant possession of the suit parcel No. Bukhayo/Buyofu/197. The two suits were consolidated and the defendant's suit No. 3 of 2006 became a defence to the plaintiff's claim.

3. Each of the parties called evidence of a single witness in support of their case/defence. The plaintiff testifying on 16/1/2019 stated that the suit property was registered in his father's name. That his father gave him the land in 1987 and he has lived on it since then to date and cultivating it. That he lives on the land with his family. He decided to visit the lands office on 19/12/2003 to have the suit land transferred to him and he discovered that the title was now registered in the defendant's name. He produced a copy of the search given to him during the visit as **Pex 1** and green card as **Pex 2**.

4. **PW** continued that he consulted to find out who gave the defendant the land. He therefore reported the matter to the District Officer who advised him to file a case before the Tribunal. That it is after filing the case at the Land Dispute Tribunal that he saw the defendant. He produced the proceedings for the Tribunal as **Pex 3**. That the Tribunal found the land belonged to him but the magistrate's court declined to adopt the awarding citing lack of jurisdiction. This necessitated him filing the present case.

5. In cross-examination, the plaintiff said his father died in 2004. That he sued the defendant and his father before the tribunal. That he started living on the suit land on 25/5/1987 and everyone around the land knows it belongs to him. That from 1987 to 19/12/2003 when the defendant became owner of the land he had not sued his father. That he was living on the land with the permission of his father. That this suit was filed 3 years after the defendant got registration. That his father's home is on L.R Bukhayo/Buyofu/176. He denied being aware of his father selling the land. In re-examination, the witness said he has lived on the land peacefully and continuously. This marked the close of the plaintiff's case.

6. The defence opened his case on 17/2/2020. He stated that he lives in Bunganyiro within Matungu sub-county in Kakamega County. **DW** said he knew the plaintiff as the son of Jacob Nandieki who sold him L.R Bukhayo/Buyofu/197. The defendant averred that the suit land was not ancestral land as Jacob Nandieki had purchased the same from Andrew Juma. That when he bought the land, Jacob's family was resident on it and he promised to resettle the family which included the plaintiff to L.R No. Bukhayo/buyofu/176 which was ancestral land and it measured approximately 25.0ha.

7. That the plaintiff sued both of them before the Tribunal. Jacob also agreed to vacate the land by October 2005 which he did. That when he visited the land in November 2005, he learnt that the plaintiff had returned on the suit land. Later in January 2006 the plaintiff filed this claim for adverse possession. He also produced documents he filed as exhibits 1 to 5 in support of the case.

8. In cross-examination, the witness said he can prove the land is not ancestral as the green card shows the original owner of the land. That he bought the land in 2003 while aware the plaintiff was living on the land. That he did not know the plaintiff had buried his wife on the land in 1987 because by then he was not interested in the land. That he filed a case for an order of eviction against the plaintiff. In re-examination, the witness stated that the plaintiff built a semi-permanent house on the land between 2012-2013. That the plaintiff is on his land illegally. This also marked the close of defence case.

9. The plaintiff filed his submissions on 3rd March 2020 while the defence filed his on 16th June 2020. The plaintiff cited several cases which discussed the requirements for proof of adverse possession. These are;

(i) *Mbira Vs Gachuhi (2002) EALR 137* in which the court held that;

“... a person who seeks to acquire title to land by the method of adverse possession for 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 prescribed period without interruption ...”

(ii) *Jandu Vs Kirplal & Another [1975] E.A 225* it was held **“... to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious”.**

(iii) *Mtana Lewa Vs Kahindi Ngala Mwangandi [2005] eKLR* held that **“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years.”**

10. It is submitted that the plaintiff has demonstrated that he was allowed on the suit land by his late father in 1987 and immediately began living on it. He even buried his wife on it in 1987 without interference from his father until in 2003 when the father sold it. He urged the court to find in his favour.

11. The defendant on his part rehashed the evidence adduced and stated that for a claim of adverse possession to suffice, the claimant must show that he entered the land lawfully then went into open, notorious, hostile physical occupation and possession for a period of 12 years. That in this case, the plaintiff's claim fails because;

(i) The plaintiff stayed in the homestead set up by his father on the suit land so he stayed as the son of Jacob Nandieki.

(ii) That the occupation remained permissive until September 2004 when Jacob moved the family to another parcel of land. The defendant cited the holding in the case of *Patrick Magu Mwangi Vs Joreth Ltd (2015) eKLR* that, **“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.”**

12. From the submissions rendered, the parties agree that the proof of adverse possession require a party to demonstrate that his occupation has been notorious and hostile to that of the registered owner for a period of 12 years or more see *Mbira Vs Gachuhi supra*. The plaintiff's evidence states that he was given the permission to occupy the land in 1987 by his late father Jacob Nandieki. As at 1987, Jacob Nandieki was the registered owner who acquired title to the suit land on 20/10/1986.

13. Therefore the question this court is called to determine is whether or not the occupation of the plaintiff was hostile to the interests and or purpose for which his father intended to use the land and if so whether or not the defendant acquired interest in the land when time was already running in favour of the plaintiff. Blacks Law Dictionary 10th Edition defines hostile possession as **“possession asserted against the claims of all others especially the record owner.”** Notorious possession is defined as **“possession or control that is evident to others; possession of property that because it is generally known to people in the area where the property is located gives rise to presumption that the actual owner has notice of it.”**

14. The plaintiff said that his father gave him the suit land. In the proceedings before the Tribunal, he stated that he was given this land when his wife died because his father did not want him to bury his (plaintiff) deceased wife in the father's compound. The plaintiff did not state when the consent/and or permission of his father to allow him (plaintiff) live on the land was withdrawn to enable time begin running for establishing a claim for adverse possession. From the documents presented, the possession can be counted to be hostile when he filed a case against his father and the defendant before the tribunal in the year 2004. Twelve (12) years had indeed not lapsed by the time this suit was filed.

15. During the proceedings at the Land Disputes Tribunal (*Pex 3*), the plaintiff's father asked him if he asked where he was to be relocated to and the plaintiff answered in the negative. Jacob Nandieki – deceased in his statement before the Land Dispute Tribunal said he was giving the plaintiff land he bought from Sebastian Barasa although he did not say the number of that land. Albert Ouma and Pascal Olweyo both of whom gave evidence stated that they were present when Jacob gave Godfrey (plaintiff) the suit land. That Jacob had refused the plaintiff from burying his wife in his father's compound to avoid the plaintiff's children demanding land from Jacob. It is on account of this evidence that the Tribunal awarded the land to the plaintiff.

16. The defendant also testified before the tribunal. He confirmed that while buying the land, he physically visited it and saw the plaintiff entering his house. The defendant produced the sale agreement executed between him and the late Jacob Nandieki on 16th March 2004 (or 6/11/2003). The agreement had two conditions attaching to it i.e.

(1) That the vendor shall execute all the relevant documents to facilitate the transfer of the land purchased.

(2) That any party in breach of this agreement shall be liable to the innocent party in damages.

17. The agreement did not specify that the land was sold in vacant possession. The defendant conceded that the deceased family was living on the land when he bought it. That the deceased undertook to move his family to Bukhayo/Buyofu/176 which measured 25.0Ha. There was a certificate of official search dated 2nd December 2004 for Bukhayo/Buyofu/176 which indeed indicated that the said land was registered in

the name of Nandieki Lukunyi. However, there was no evidence adduced to show that the plaintiff was to be resettled on this land. Mzee Nandieki's evidence in Pex 3 shows he was to resettle the plaintiff on land he bought from Sebastian Barasa but which he did not give its member.

18. In light of the foregoing, I do make a finding that the plaintiff's claim for adverse possession fails as time did not run against his father since he was in occupation with his father's permission. However, I am inclined not to dismiss the plaintiff's claim because the evidence shows there was a constructive trust created between the plaintiff and his father when the father allowed him to bury his wife in 1987 and construct his home in it. His father thus had no interest to pass to the defendant in November 2003 when he attempted to sell the land. Equally the defendant bought the land well aware of the presence of the plaintiff on the suit land. He cannot therefore claim a defence of purchaser for value without notice where the terms of the agreement was silent on the interest of the plaintiff.

19. The plaintiff under paragraph 2 and prayer (c) of the Originating Summons had urged the Court to determine the question that the title deed held by the defendant over Bukhayo/Buyofu/197 is held in trust for him. This Court is therefore permitted to consider the issue of trust. The trust in this scenario arises by the conduct of the plaintiff's father who removed him from his home not allowing him to bury his wife for cultural reasons. The giving of the plaintiff the suit land was done in the presence of parties and the plaintiff acting on his father's word proceeded to bury his wife on the suit land and set himself a home therein. He lived on the land until November 2003 (some 16 years) when the father decided to dispose off the land without informing the plaintiff. The father's actions were unjustified and he was estopped by virtue of his gifting to now disinherit the plaintiff of the suit land.

20. The proviso to section 28 of Cap 300 state;

“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee” and

Section 30(g) Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

21. Further in the case of *Gathiba Vs Gathiba (2001) EA 342* at page 368 the court held thus;

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”. (Underline mine for emphasis).

22. I therefore find in favour of the plaintiff that he is entitled to the suit land when his father gave it to him thus creating a fiduciary relationship. The transfer and registration of the defendant was subject to the trust in favour of the plaintiff. Accordingly, judgement is entered for the plaintiff in terms of **prayer (c)** of the Originating Summons. The counter-claim presented by the defendant is dismissed on account that the defendant did not acquire a good title. The costs of the Originating Summons and the counter-claim is awarded to the plaintiff.

Judgement dated, signed and delivered at BUSIA this 24th day of September, 2020.

A. OMOLLO

JUDGE