



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 60 OF 2005

FREDRICK PHILIP KHAYO PLAINTIFF

VERSUS

EDWARD WANJALA DEFENDANT

JUDGMENT

1. This suit was commenced by an originating summons filed on 4th July 2005 and in it, the Plaintiff seeks prayers that he is entitled to be registered proprietor of six (6) acres comprised in L.R. No. E. Bukusu/N. Nalondo/79 by way of adverse possession. He also sought costs of the suit.
2. The O.S. was supported by the grounds on the face of it and the supporting affidavit sworn by the Plaintiff. The suit is opposed and the Defendant filed a replying affidavit denying the Plaintiffs claim. Thereafter directions were taken and the matter proceeded to full hearing by adducing both affidavit and oral evidence.
3. Before the suit proceeded, the Defendant filed an application seeking temporary injunction under Section 63 (e) of the Civil Procedure Act to issue against the Plaintiff in respect of the suitland. From the record, the application was withdrawn on 14.3.2007.
4. The suit proceeded to hearing with the Plaintiff calling 4 witnesses, while the Defendant was the only witness. The Plaintiff's case was heard by two different Judges. The Plaintiff testified as PW1. His evidence is that he lives on the suit plot E. Bukusu/N. Nalondo/79. He knows the Defendant as he is a neighbor and son of Silvano Wepukhulu Kuranda who sold him this land. The Defendant is also the administrator of the estate of Silvano Wepukhulu Kuranda – deceased.
5. PW1 said he bought the suitland on 29.1.1976 at Kshs. 4800/- and took possession immediately. He produced the sale agreement as Pex. 2 (a) and its transaction as Ex. 2 (b). He has continued to live on this land todate. According to him, he has put up houses on the land, planted trees, coffee, maize etc. His seven (7) wives are all living on this land. He also produced a copy of the application for Land Control Board consent as Pex. 3 and Green Card for the land as Pex. 4. That the Defendant waited for his father to die then began disturbing him. He asked the court to transfer the land to him.
6. In cross examination by Mr. Ocharo, PW1 said the seller's name in Ex.3 is not written as Silvanus but Situko Nabiswa. Silvanus did not also have anyone else witness the agreement. He has never received any letter from the Defendant's advocate or chief asking him not to interfere with the land. He said about 20 of his children live on this land 10 of which are married plus 4 of his wives. He has 500 coffee trees on the land and takes his coffee to Kalaba Society. In re-examination, he said he

bought the suit land from Silvano and has no problem with Situko Nabiswa.

7. PW2 was Alice Mandu. She lives in Turbo. She knows the Defendant having met him in 1976. Previously she lived on plot No. 79 with her husband Dismas Mandu on a portion measuring 1 acre which they had bought from Silvano. She was present to witness Silvano sell 6 acres of the suit land to the Plaintiff on 29.1.1976. She wrote her name in the agreement. Silvano refunded them their money for the 1 acre which the Plaintiff took over.

8. In cross examination by Mr. Ocharo advocate for the Defendant, she said she did not know Situko Nabiswa. Her name was recorded in the agreement by the clerk who prepared it but she did not sign as she was busy packing to leave. She had visited the Plaintiff afterwards and found he had put up some permanent houses on this land.

9. Dismas Mandu Kapkotini testified as PW3. He lives in Mokoyet village within Trans-Nzoia West district. He had bought one (1) acre of land from Silvano's comprised in land E. Bukusu/N. Nalondo/79 between 1971 – 1976 and paid the full price. On 29.1.76, another sale agreement was made between the Plaintiff and Silvano (Defendant's father) for six (6) acres. He was the clerk and a witness and saw the Plaintiff pay Silvano Kshs. 4,800/= part of which Kshs. 800/= was refunded to him for his one (1) acre he had surrendered. He was also aware the Plaintiff moved into the land immediately and has used/developed the land.

10. Under cross-examination, PW3 stated that Silvano put a thumb-print on the sale agreement as he did not know how to read and write. None of Silvano's family was present when the agreement was drawn. He said the Plaintiff also owns L.R. E.Bukusu/N. Nalondo/81 which borders the suit property.

11. He continued that the Plaintiff did not live on land reference No. 81 but lives on L.R. No. 79. The Plaintiff's three (3) sons have also constructed houses on the suit property.

12. PW4 is Bernard Wafumbwa who lives in khalaba village within Bungoma South District. He knows the parties in this suit. In his affidavit evidence filed in court, He said he is an uncle to the Defendant. He witnessed Silvano sell land measuring 6 acres to the Plaintiff. He also remember that PW3 was refunded kshs. 800/=. He confirmed the Plaintiff assumed vacant and peaceful occupation of the sold portion. However his cousin (Silvano) died before transferring the land to the Plaintiff. He further said the Plaintiff has developed the land with several permanent and semi permanent houses, animal shed and erected barbed wire and live fence all around it. The Plaintiff has also planted bananas, stems of coffee, sugarcane etc. At the end of PW4's testimony, the Plaintiff closed his case on 17.10.11.

13. Edward Wanjala (Defendant) gave his evidence before me on 20.6.13. He said that he resides in Khalaba area. Silvano Kuranda – deceased is his father. He died in 1990. He took out grant in respect of his estate on 2004. After the grant, he became the registered owner (pex. 4). He stated the Plaintiff is his neighbour on parcel No. E.Bukusu/N.Nalondo/81. He denied the Plaintiff bought land from his father in 1976 neither did he sue the Defendant's father.

14. DW1 confirmed that the agreement did not contain his father's ID No. nor the plot number and his father did not have any of his family members as his witnesses. He was an adult when the agreement was drawn. He produced a copy of his father's ID card which gave a different number from the one indicated in Pex. 3 (application for consent).

15. According to DW1, the Plaintiff has never used this land and only began using it in 2006. He objected to the prayers sought by the Plaintiff. In cross examination, he said the Plaintiff became their neighbour in 1976. Further that the Plaintiff has carried out developments on parcel No. 81. He denied demanding the Plaintiff to vacate plot 79 as the Plaintiff has never lived on it. He wants to share the land to his brother and sisters. The Defendant then closed his case.

16. The parties advocates' filed their written submissions which I have considered while writing the judgment. I wish to adopt the issues brought out by the Defendant in their submissions as the questions

for this court to determine which are;

- i. Whether the late Silvano Wepukhulu Kuranda sold the Plaintiff 6 acres comprised in title nos. E. Bukusu/N. Nalondo/79.
- ii. Whether the Plaintiff obtained vacant possession of the 6 acres in 1976 or at all.
- iii. Who should bear the costs of this suit.

17. In Pex. 2 (a), the sale agreement drawn on 29th January 1976 was between Silvano Wepukhulu Kuranda (deceased) and the Plaintiff. As per the document, the late Silvano sold six (6) acres out of his 17 acres of land to the Plaintiff for Kshs. 4,800/= paid in full. No mention is made of the land reference number that was being sold. However in an undated application for board consent it is indicated for parcel No. 79 and consent was being sought to subdivide and transfer 2.4 ha to the Plaintiff. The price is also indicated at Kshs. 4,800/=. Silvano is said to have thumb printed on both the form and the agreement.

18. All the Plaintiff's witnesses i.e PW2, 3 & 4 testified that they were present to witness the sale take place. They all confirmed the Plaintiff took possession of this land in January of 1976. The Defendant denied a sale ever took place. That he would have been a witness as he was an adult when the agreement was drawn. Under Sec. 3 (3) of the Law of Contract Act, for any sale to be effective, there should be a note or memorandum in writing giving the names of the parties, the purchase price, parties signatures and that of witnesses. I find that the agreement produced as pex. 2 (a) fulfilled all these requirements set out in Sec. 3 (3) of the Law of Contract Act. It was in writing, bore name of the parties and their signatures. It also indicated the purchase price and had witnesses. The Defendant did not say under what provision of the law a sale of land agreement would be invalid for lack/absence of a family member not being a witness.

20. The Defendant also stated that the thump print on the document does not resemble the one on the ID. This is an issue that would have been resolved by a handwriting expert. No such report was presented to this court. The Defendant averred further that no identity number was included in the agreement. The agreement did not indicate the ID numbers of all the parties and their witnesses. I do find that failure to write the ID numbers in my view did not invalidate the sale.

21. In reference to Pex. 3, the Defendant submitted the document had a different ID number and the thumb print is also obliterated. He relied in the case of **Ndiema Sambuni Soli vs. Elvis Kimutai Chepkeses [2010] e KLR** and under lined the relevant portion of the judgment they relied on. I have read the case cited but I find it distinguishable from the present case. In the cited case, the Appellant admitted the agreement was altered and there was inconsistency on the size of the land bought unlike here.

22. In Ndiema case *supra*, some forms were signed when the proprietor was already deceased. In the instant case, no such event has taken place. The Plaintiff and his witnesses maintained he bought six (6) acres. As to whether the whole parcel of land measured 6.8 ha and not 4.4 ha as indicated in the sale agreement does not in my view vitiate the Plaintiffs' claim for 6 acres.

23. On the question No 2, the evidence adduced show the Plaintiff took vacant possession of the 6 acres immediately the agreement was executed. This is confirmed by the Defendant when he said he knew the Plaintiff in 1976 when he became their neighbor. Although the Defendant alleged the Plaintiff settled on L.R. E.Bukusu/N. Nalondo/81, there was no supporting evidence to verify this averment.

24. Has the Plaintiff established a claim for adverse possession? The Plaintiff said in his evidence in chief that 7 of his wives live on this plot. On cross examination, he said 4 of his wives live on it. Ten (10) of his sons have married and also live on the suit property with their families. The Plaintiff farms the land with crops such as coffee, bananas and maize. PW2, 3 and 4 confirmed this. PW4 who said he is an uncle to the Defendant and a neighbour to Plaintiff said the Plaintiff erected a barbed wire and

live fence round the suit land.. This means the portion the Plaintiff claims is identifiable and is being utilized.

25. It Is clear from the evidence that the Plaintiff settled on the land in 1976 and carried out activities highlighted above. This means he dispossessed the owner Silvano of the land. In **Sisto Wambugu vs. Kamau Njuguna [1983] KLR 172**, it was held that **“dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purposes of which he intended to use it for a period of over 12 years”**. This was restated in the case of **Warije Vs. Saikiwa [1984] KLR 284**. The Defendant submitted no building plans were shown to this court to prove permanent buildings were erected. This court takes judicial notice of the fact that You don't require building plans for buildings outside the Municipality. There was no evidence led that this land was falling under a municipality.

26. In establishing when time began to run, this was 3 months after the period when Land Control Board consent ought to have been obtained. The Defendant submitted that the Plaintiff failed to sue his father (Silvano) between 1976 to 1990. In **Mwinyi H. Ali Vs. A.G. and Philemon Mwaisaka Wanaka Civ. Appeal No. 125 of 1997 (digest on civil case law & procedure par. 1340)**. The court said adverse possession can only be against the owner or legal representative, which can only be done by making them parties to the suit. In the instant suit such claim is brought against the legal representative and there was nothing to bar the Plaintiff from doing so. In any event the Plaintiff said they lived peacefully with Silvano and the Defendant began disturbing him in 1990 after the death of his father. Somehow it is the Defendant who awakened the Plaintiff to commence the suit. The Plaintiff would have been precluded from bringing this claim had the land been transferred into each of the names of the beneficiaries. See **Titus Mutuku Kasuve Vs. Mwaani Investments Ltd. & others, Civ. Appeal No. 35 of 2002**.

28. In conclusion, I make a finding that the Plaintiff has proved his case as required by the law. Consequently I make the following orders;

i. That the Defendant be and is hereby directed to forthwith execute necessary land documents transferring to the Plaintiff land measuring 6 acres comprised in title No. E. Bukusu/N. Nalondo/79

ii. The Plaintiff to bear the incidental costs related to processes of transferring and registering the said documents in his name.

iii. In default of the defendant complying with order i) above, the deputy registrar of this court to execute the necessary documents to transfer 6 acres of the land comprised in E. Bukusu/N. Nalondo/79.

29. Costs is a discretion of the court. In this instant, I order that each party to bear their respective costs of the suit.

DATED, SIGNED and DELIVERED this 13th day of May of 2014

A. OMOLLO

JUDGE.