



IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 77 OF 2011 [O.S]

ROSE CHEROP BOIT PLAINTIFF

VERSUS

PETER WANGILA WAMBULWA DEFENDANT

JUDGMENT

1. The Plaintiff ROSE **CHEROP BOIT** commenced her suit by an originating summons dated 8th August 2011 and filed in court on 9th August 2011. In the originating summons, she has asked the court to determine;

(a). Whether the Applicant has been in open continuous enjoyment and use of land parcel No. **E. Bukusu/E/ Sangalo/1068** for a period of over 12 years.

(b). Whether the Defendant's title has been extinguished by way of operation of law.

(c). Whether the Defendant should now transfer the said parcel of land to the Plaintiff.

(d). In default of the Defendant voluntarily transferring the land to the Applicant whether the court should compel him to so transfer or authorize the Deputy Registrar to sign the documents on his behalf.

(e). Whether the Applicant has acquired title to land parcel **No. E. Bukusu/E. Sangalo/1068** by way of adverse possession.

2. The suit is not opposed as the Defendant though duly served did not enter appearance or file a replying affidavit. From the record, an affidavit of service sworn by Timothy Samburuma filed in court on 6.10.2011 depones that the Defendant was served on 26th September 2011. Interlocutory judgment was endorsed for the Plaintiff by the Deputy Registrar on 30th November 2011.

3. The matter proceeded to formal proof on 8th July 2013. The Plaintiff testified and said that she is the administrator of the estate of her late husband FRANCIS BOIT – deceased. She had obtained a grant which she produced as Pex. 1. She continued that her husband had bought two parcels of land numbers L.R. E. Bukusu/E. Sangalo/985 and 1085. The Plaintiff produced the sale agreement in respect of the two plots as Pex. 2.

4. The Plaintiff told the court that they took possession of the suit parcel immediately. She also utilizes the land and she has sugar cane on it. That she has been on the land for 42 years. She produced an application for consent of the land control board to transfer the suitland to her husband as Pex. 3. She asked the court to enable her get a title deed for the plot. She also produced a search and certified copy

of the register. She closed her case.

5. The Plaintiff's Counsel has not offered any submissions. I will therefore consider the pleadings and the evidence in reaching my decision. In the origination summons, the Plaintiff pleaded whether the Defendant's title had been extinguished by operation of law and therefore the Defendant ought to transfer to her L.R. E. Bukusu/E. Sangalo/1068.

6. The Plaintiff's evidence is that they took possession of the suit parcel immediately on purchase of the land. In the documents produced as exhibit P2, comprises several pieces of agreement drawn on diverse dates. The first agreement was drawn on 22.10.1972 over L.R. E. Sangalo/985. The next piece of agreement that mentions the suit parcel is undated. On the body of it, it is indicated that the Defendant received Kshs. 600/= on 21.5.1983, leaving a balance of Kshs. 4,400/=. The further documents show this balance was paid in installments over a period of time. As at 13th July 1986 Kshs. 1,100/= was paid leaving a balance of Kshs. 200/= that was to be paid at the lands office (ofisi ya mashamba). It is not clear whether that balance was ever paid or not.

7. In the undated document referred to in paragraph 6 above, the total acreage indicated that was being sold was a total of 8.4 acres comprised in L.R. No. 985 – 4.2 acres and L.R. No. 1068 – 4.2 acres. In the official certificate of search and green card provided, the total acreage given for L.R. No. 1068 is 4.2 acres. It can be inferred therefore from the documents produced that the whole parcel of land was sold to Francis Boit – deceased by the defendant.

8. The Plaintiff's statement that she lives with her family on this land is not challenged. Neither is her evidence that she has utilized the land and has sugar cane on it contradicted. In the absence of contrary evidence, I am satisfied that the Plaintiff is in possession of the suitland. Her possession has dispossessed the Defendant of user and occupation of the land for the purpose of which he may have intended to use it. See **Wambugu Vs. Njuguna [1983] KLR 172.**

9. Consequently, I find for the Plaintiff that she has proved her case on a balance of probability and allow her suit by making the following orders;

i). The Defendant's title to L.R. E. Bukusu/E. Sangalo/1068 be and is hereby declared extinguished by operation of the law.

ii). The Defendant is directed to execute all necessary documents transferring the land parcel E. Bukusu/E. Sangalo/1068 to the Plaintiff forthwith and in default, the Deputy Registrar of the court to execute the necessary documents on behalf of the defendant to vest/transfer the suitland E. Bukusu/E. Sangalo/1068 to the Plaintiff.

iii). No costs of the suit is awarded since the suit is undefended.

These are the orders of the court.

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

A. OMOLLO

JUDGE.