



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 254 OF 2009**

GEORGE ARWONGA KOMBO ..... PLAINTIFF

VERSUS

JACKSON ONDARI KOMBO .....DEFENDANT

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 26<sup>th</sup> November 2009 seeking; an order declaring the plaintiff as the absolute proprietor of all that parcel of land known as **LR No. West Mugirango/ Bonyamatuta/115** (hereinafter referred to as “**the suit property**”) on account of adverse possession for over forty (40) years and an order for specific performance of the contract for sale that the plaintiff had entered into with the defendant with respect to the suit property. In his plaint dated 24<sup>th</sup> November 2009, the plaintiff averred that at all material times the defendant was the registered proprietor of the suit property which is an agricultural land within the meaning of the Land Control Act Cap. 302 Laws of Kenya.
2. The plaintiff averred that for over forty (40) years the plaintiff was in full control of the suit property with the consent and permission of the defendant. The plaintiff averred that on 31<sup>st</sup> May 2008 or thereabouts, the plaintiff and the defendant entered into an agreement for sale of the suit property at a consideration of Kshs. 280,000.00 of which amount the plaintiff made a down payment of Kshs.242,000.00 leaving a balance of Kshs. 38,000.00. The plaintiff averred that the defendant had refused to accept the payment of the balance of the purchase price in the sum of Kshs.38,000.00 aforesaid thereby breaching the said agreement for sale. It is on account of the foregoing that the plaintiff sought a declaration that he is entitled to be registered as the proprietor of the suit property on account of adverse possession of the same and I believe in the alternative, an order of specific performance to compel the defendant to transfer the suit property to his name.
3. The defendant entered appearance and filed a defence and counter-claim on 10<sup>th</sup> May 2010. In his defence the defendant admitted that he is the registered proprietor of the suit property. The defendant however denied that the plaintiff had at all material times been in full control and possession of the suit property with the consent of the defendant for over forty (40) years as claimed. The defendant also denied that he had on 31<sup>st</sup> May 2008 or at any other time entered into an agreement for sale with the plaintiff in respect to the suit property at a consideration of Kshs. 280,000.00. The defendant also denied ever receiving a sum of Kshs. 242,000.00 from the plaintiff and that there is a sum of Kshs. 38,000.00 due and payable by the plaintiff to the defendant as claimed in the plaint. The defendant denied further that the plaintiff is entitled to be registered as proprietor of the suit property on account of adverse possession and termed the plaintiff’s suit misconceived and fatally defective.
4. In his counter-claim, the defendant averred that in or about the year 2000 the defendant leased to the plaintiff the suit property at an annual rent of Kshs.3,000.00 until the year 2006 when the defendant advertised the suit property for sale and requested the plaintiff to vacate and handover

the suit property to the defendant. The defendant averred that despite the said demand, the plaintiff has ignored, neglected and/or refused to vacate the suit property and has to date unlawfully and without any justifiable cause remained in occupation thereof cultivating the same and denying the defendant quiet and exclusive possession and enjoyment thereof. The defendant therefore sought an order for the eviction of the plaintiff from the suit property and a permanent injunction to restrain the plaintiff from trespassing onto or in any manner whatsoever interfering with the suit property. On 2<sup>nd</sup> December 2010, the defendant filed an application under Order VI Rule 13 of the old Civil Procedure Rules seeking an order that the plaint filed herein by the plaintiff be struck out and the plaintiff's suit be dismissed for disclosing no or any reasonable cause of action. The defendant's application was opposed by the plaintiff who filed grounds of opposition on 25<sup>th</sup> February 2011.

5. The defendant's application seeking the striking out of the plaintiff's suit was heard by Sitati J. who in a ruling delivered on 26<sup>th</sup> January 2011 allowed the application and dismissed the plaintiff's suit. In the said ruling, the court gave the defendant the liberty to set down his counter-claim for hearing. The court found that the plaintiff's suit was not maintainable in that a suit for a claim to land by adverse possession should have been brought by way of Originating Summons and not by way of a plaint. The defendant's counter-claim was listed for hearing on 20<sup>th</sup> February 2014. Although served, the plaintiff did not appear at the trial. Having satisfied myself that the plaintiff was duly served with a hearing notice, I allowed the defendant to proceed with the hearing of his counter-claim. In his evidence, the defendant testified that the plaintiff is his elder brother and that he (defendant) is the registered proprietor of the suit property. The defendant stated that the suit property was allocated to him by his father who had at the same time allocated a parcel of land known as **LR No. West Mugirango/Bonyamatuta/113 (Plot No. 113)** to the plaintiff. The defendant stated further that Plot No. 113 was subsequently subdivided and the plaintiff remained with the portion thereof known as **LR No. West Mugirango/Bonyamatuta/2406 (Plot No. 2406)**.
6. The defendant produced as an exhibit the certificate of official search in respect of Plot No. 2406 to prove that the said parcel of land is registered in the name of the plaintiff. The defendant stated that he moved from West Mugirango and settled at Manga Settlement Scheme on a parcel of land that was owned by his father. The defendant stated that in view of the fact that he was not utilizing the suit property he leased the same to the plaintiff. Subsequently, he moved from Manga Settlement Scheme and settled at Bonchari where he had purchased his own parcel of land. After moving to Bonchari, he asked the plaintiff to vacate the suit property to enable him sell the same. On being asked to vacate the suit property, the plaintiff decided to file this suit against him. The defendant stated that the plaintiff is not residing on the suit property but only carrying out cultivation thereon. The defendant produced as an exhibit a copy of the title deed for the suit property to prove that the same is registered in his name. The defendant urged the court to enter judgment for the defendant against the plaintiff as prayed in the counter-claim. The defendant did not call any witness.
7. After the close of the defendant's testimony, the defendant's advocate Mrs. Asati informed the court that the defendant wished to rely entirely on the evidence on record and urged the court to enter judgment for the defendant as prayed in the counter-claim. I have considered the pleadings filed herein and the evidence adduced before me by the defendant. Since the plaintiff's suit was dismissed on 26<sup>th</sup> January 2011, what is before me for determination is the defendant's counter-claim. As I have stated at the beginning of this judgment, the defendant's claim against the plaintiff is for an order of vacant possession of the suit property. The defendant stated in his evidence that he had leased the suit property to the plaintiff sometimes in the year 2000 at an annual rent of Kshs.3,000.00 upto the year 2006. The defendant told the court that in the year 2006 he asked the plaintiff to vacate and handover possession of the suit property because he wanted to sell the same. The defendant told the court that the plaintiff refused to move out of the suit property and instead brought this suit against the defendant. The defendant testified that the plaintiff has his own parcel of land which is separate and distinct from the suit property.
8. The defendant placed in evidence a copy of the title deed for the suit property in the name of the defendant. The defendant also produced in evidence certificate of official search for Plot No. 2406 which shows that the same is registered in the name of the plaintiff. There is no dispute therefore that the suit property is registered in the name of the defendant and that the plaintiff

