



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**

**HIGH COURT CIVIL APPEAL NO. 63 OF 2010**

**JACOB WEKESA BOKOKO BALONGO.....APPELLANT**

**VERSUS**

**1. OLOKIO ADEYA**

**2. BENARD ENYONYI ADEYA.....RESPONDENTS.**

*(Being an appeal against the judgment of Hon. E. H. Keago*

*SRM, in Busia SRM. CC. No. 40 of 2010 of 7<sup>th</sup> October, 2010)*

**J U D G M E N T**

**JACOB WEKESA BOKOKO BALONGO**, hereinafter referred to as the Appellant, being dissatisfied with the judgment in Busia, SRM.CC. No. 30 of 2010 by Hon. E.H. Keago, filed this appeal against **OLOKIO ADEYA** and **BENARD ENYONYI ADEYA**, hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The Appellant listed eight grounds in the memorandum of appeal dated 2<sup>nd</sup> December, 2010 which are set out below;

- “ 1. The learned trial Magistrate erred in law and in fact in framing of decision in the issue of adverse possess when the said issue was neither pleaded nor canvassed before him for termination between the parties.
2. The learned trial Magistrate erred in law and in fact in failing to uphold the sanctity of the Plaintiff’s title to the suit parcel and in failing to grant the prayers sought by the Appellant/Plaintiff.
3. The learned trial Magistrate erred in law and in fact in misapplying the law on limitation of actions to the available evidence, to wit that the Respondents had not acquired Title by adverse possession by reason of interrupted occupation.
4. THAT, the resultant finding of learned trial Magistrate that the appellant’s title was obtained irregularly is ambiguous, vague and unenforceable in the absence of further order.
5. THE judgment was delivered against the weight of the evidence.
6. THE learned trial Magistrate erred in law and in fact in allowing the witness who have been

attending the hearing of this case since 19<sup>th</sup> March, 2010 in court No. 3. 29<sup>th</sup> April, 2010 in court No. 2. 3<sup>rd</sup> June, 2010 in court No. 2 chamber.

7. THE learned trial Magistrate erred in law and in fact allowing their evidence on 22<sup>nd</sup> July, 2010 and knowing that the law of this land was not followed.

8. THE learned trial Magistrate erred in law and in fact by refusing my Application requesting Honourable court to order District Land Registrar to come and certify/confirm document tabled before Honourable court as evidence.”

The Appellant then filed the record of appeal and appointed counsel who filed their notice of appointment on 5<sup>th</sup> July, 2011. The counsel also filed a supplementary record of appeal dated 5<sup>th</sup> July, 2011.

When the appeal came up for hearing on 19<sup>th</sup>, June, 2014, the Respondents indicated that they had not been served with the record of appeal. The court directed that service be effected and adjourned the hearing to 28<sup>th</sup> July, 2014, when the parties made their submissions.

In his submission, Mr. Musumba for the Appellant consolidated the eight grounds into three and his submissions are summarized as follows;-

1. That the Appellant had followed the due process in purchasing and being registered as proprietor of Bukhayo/Kisoko/2281. That the Appellant title is indefeasible and cannot be challenged under sections 27 and 28 of Registered Land Act Cap 300 of Laws of Kenya (Repealed) which provisions are in similar terms to sections 25 and 26 of the Land Registration Act. He cited the Court of Appeal decision in **Wamukota –vs- Donati (1987)**KLR 280 to support his submission.

2. That the finding of the trial court that Appellant title was obtained through fraud was not based on available evidence. That Respondents had not proved fraud attributed to the Appellant. The level of proof required is beyond the balance of probabilities.

3. That the suit was not statute barred contrary to the Lower court finding. Counsel submitted that the evidence adduced showed encroachment commenced in 1999 and by 2010 when the suit was filed, only a period of eleven years had passed. The Lower court had got it wrong when it found a period of over twelve years had passed. The appellant’s counsel in response to the Respondents’ filed submissions, pointed out that the Appellant had obtained leave to file the appeal out of time and filed it in five days after obtaining the order. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents adopted the contents of their filed documents dated 28<sup>th</sup> July, 2014 and 3<sup>rd</sup> July, 2014 respectively.

This being a first appeal, the court has the duty to re-evaluate the evidence, assess it afresh and draw its own conclusions. In doing so, this court should bear in mind that it did not have the advantage to see the parties and their witnesses testify and should give an allowance for that. The guiding parameters have been aptly captured in **Peters –vs- Sunday Ports Limited (1958) E.A, 424 at page 429 and Malcom Bell –vs- Daniel Torotich Arap Moi & Another (2012) eKLR** among others.

The Appellant had commenced Busia SRM. CC. No. 40 of 2010, through the plaint dated 29<sup>th</sup> January, 2010 that was consequently replaced by the amended plaint dated 19<sup>th</sup> March, 2010. The Appellant main prayers against Respondents were that they pay him general damages for trespassing into Bukhayo/Kisoko/2281 and be evicted from therefrom. He had averred that he had bought the land in 1980 from the Respondents’ brother named Patrick Kwoba Adeya.

During the hearing in the Lower court, The appellant testified as PW 1. He told the court that he bought land from Patrick Kwoba Adeya in 1980 and that in January, 1981, they appeared before the Land Control Board and obtained the consent. He took the consent to the District Land Registrar and it was found to be defective as it was indicated to be for sub division. The Appellant said he returned the

consent for corrections after which he took it back to the lands office. He made the requisite fee payments for parcel Bukhayo/Kisoko/358 and the property was subdivided into three parcels being numbers 2279, 2280 and 2281. He then had land parcel Bukhayo/Kisoko/2281 registered in his names but the Respondents have declined to vacate from the land. Appellant confirmed that when Patrick Kwoba Adeya sold him the land, the parcel was registered in the joint names of Respondents and the seller. That the seller's (Patrick Kwoba Adeya's) share was four (4) acres and that he had sold to him the entire share now measuring 3 ½ acres. He said he had taken possession of ½ of the land he bought.

The 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent had testified as DW 1 and DW 2 respectively. They also called Jacob Wekesa Balongo and Patrick Kwoba who testified as DW 2 and SW 3 respectively. The Respondents defence was that they never entered into any land sale agreement with Appellant over Bukhayo/Kisoko/2281, or any other parcel and do not know how Appellant got registered with that land. The Respondents stated that the parcels Bukhayo/Kisoko/2279 to 2281 came from Bukhayo/Kisoko/358 which belonged to their father, Adeya Omaita who died in 1977. That Adeya Omaita subdivided the land before he died and left 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent on parcels 2281 and 2279 respectively. That Adeya Omaita had sold parcel 2280 to one Alusara by the time he died. The 2<sup>nd</sup> Respondent conceded knowing that plaintiff had bought ½ acre on 19.11.2980 and paid Kshs.1,900/=

DW 2 evidence was that he resides on Bukhayo/Kisoko/2280 which was bought by one James Alusara from Respondents father. The parcel had been subdivided from Bukhayo/Kisoko/358. He said parcel 2279 was given to 2<sup>nd</sup> Respondent while parcel 2281 was given to 1<sup>st</sup> Respondent and DW 4 (Patrick Kwoba Adeya). He added that the Respondents father had planted a boundary to mark the portion of 1<sup>st</sup> Respondent from that of DW 4.

DW 4 denied selling land to the Plaintiff saying that Plaintiff had given him Kshs.1900/= in 1991 to use when looking for employment. He denied selling plaintiff ½ acre of land.

The Plaintiff had produced 12 documents as exhibits. Among them are the following:-

- a. Copies of certificate of official search for Bukhayo/Kisoko/358 dated 1<sup>st</sup> September, 1999 and 13<sup>th</sup> April, 1999 showing the land was 4.2 hectares and had been registered in the joint names of Enyonyi Adea, Kuoba Adea, Olokio Adea on 21<sup>st</sup> May, 1971 and each owing 1/3 share. The certificate also shows that the title was closed on 23<sup>rd</sup> October, 1991 upon the land being subdivided to parcels 2279 to 2281.
- b. Copies of certificates of official search for Bukhayo/Kisoko/2279 registered on 23<sup>rd</sup> October, 1991 dated 16<sup>th</sup> March, 2010 and 13<sup>th</sup> April, 1999 showing the proprietors as Oloike Adea and Bernard Enyonyi Adea. The copy dated 16<sup>th</sup> March, 2010 shows the acreage as 1.6 hectares while that dated 13<sup>th</sup> April, 1999 indicates the approximate acreage as "nil."
- c. Copy of title deed for Bukhayo/Kisoko/2279 issued on 19<sup>th</sup> November, 1992 in the names of Bernard Enyonyi Adea. The copy does not indicate the size of the land at the space provided at page 1 and 2 of the document.
- d. Copy of letter of consent number 347986 dated 20<sup>th</sup> January, 1981. It indicates it was a consent to transfer land from Patrick Kwoba Adeya to Jacob W. B. Balongo. It describes the land as Bukhayo/Kisoko/1412 at the heading just above the words "LETTER OF CONSENT" and at paragraph 2 (a) the numbers "1412" are cancelled and above them the numbers "2281" added.
- e. The copy of the mutation form for Bukhayo/Kisoko/358 registered on 12<sup>th</sup> March, 1990 creating parcels 2279, 2280 and 2281 measuring 1.6, 1.52 and 1.08 hectares respectively.
- f. Copy of certificate of official search for Bukhayo/Kisoko/2281 dated 10<sup>th</sup> March, 2010 and

showing that it was 1.08 hectares and was registered on 16<sup>th</sup> December, 1993 in the names of Jacob W. Bokoko Balongo.

g. Copy of title deed for Bukhayo/Kisoko/2281 issued on 16<sup>th</sup> December, 1993 carrying similar details as the copy of official search mentioned in paragraph (f) above.

h. Copy of the register for Bukhayo/Kisoko/2281 issued on 13<sup>th</sup> April, 1999 that contains the history of the land from 23<sup>rd</sup> October, 1991 to 16<sup>th</sup> December, 1993.

I have considered the evidence before the lower court and the contents of the documentary evidence presented and find the following:-

1. That though the Appellant case is that he bought the whole share of Patrick Kwoba Adeya's land in 1980, there was no written sale agreement produced before the trial court. It is therefore not possible to confirm the terms of the agreement including the acreage of the portion being sold, the purchase price, the vendor and purchaser and their witnesses if any. The Law of Contract Act, Chapter 23 Laws of Kenya, at section 3 (3) states;

**“ (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-**

**a. the contract upon which the suit is founded-**

**i. is in writing;**

**ii. is signed by all the parties thereto; and**

**b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;**

**Provided that.....”**

The person the Appellant named as the vendor is Patrick Kwoba Adeya who is a brother to the Respondents and who testified as DW 4. He denied having sold any land to the Appellant saying he had only borrowed Kshs.1900/= from him in 1991.

2. The copy of the mutation form for Bukhayo/Kisoko/358 shows parcels Bukhayo/Kisoko/2279 to 2281 were created following the subdivision registered on 12<sup>th</sup> March, 1990. This clearly shows the three parcels, especially Bukhayo/Kisoko/2281 which is the subject matter of the proceedings before the Lower court and this appeal did not exist before the date of the subdivision of parcel 358. The copies of the register and official search for the parcel Bukhayo/Kisoko/2281 shows the register was opened on 23<sup>rd</sup> October, 1991. It was therefore not in existence in 1980 when the Appellant (Plaintiff) alleged that he bought it from DW 4.

3. That having found as in (2) above, the copy of letter of consent to transfer dated 20<sup>th</sup> January, 1981 and produced by Appellant during the hearing in the Lower court cannot be the consent that enabled the Appellant to get registered with the suit land on 16<sup>th</sup> December, 1993. The suit land did not exist when the letter of consent was issued. It is therefore not surprising that the letter of consent bears cancellation at paragraph 2(a) as it cannot be anything else but a forgery.

4. That if indeed there was a land sale agreement between Appellant and Patrick Kwoba Adeya of 1980, then the letter of consent would have been made within six (6) months to the relevant Land Control Board. This is in accordance with section 8 (1) of the Land Control Act Chapter 302 of Laws of Kenya which state;

**“ 8(1)An application for consent in respect of a controlled transactions shall be made.....within six months of the making of agreement.....”**

That even though these proceedings do not involve the alleged vendor, Patrick Kwoba Adeya as a party, the fact that the Respondents called him as a defence witness speaks volumes. The evidence Patrick Kwoba Adeya gave casts doubts as to whether there was any agreement between him and the Appellant. The evidence only goes to suggest that the monies Patrick Kwoba Adeya received from Appellant in 1991, and not 1980, was either a loan or purchase price for a half acre (1/2) of land. The money could not have been the purchase price of Bukhayo/Kisoko/2281.

5. That the Appellant would need to first establish the authenticity of the process and transaction through which he acquired registration as proprietor of Bukhayo/Kisoko/2281 before he can successfully sue for the prayers sought. This is because;

a. DW 4 has disowned having entered into any land sale agreement with Appellant in 1980 or any other time.

b. The Respondents and DW 4 have disputed signing any documents to transfer land parcel Bukhayo/Kisoko/2281 to the Appellant.

6. That the Appellant's claim if any, should be against Patrick Kwoba Adeya with whom he allegedly entered into a land sale agreement. The said vendor would possibly show him the portion he sold in 1980 and assist him get vacant possession.

7. That 1<sup>st</sup> Respondent has been in occupation of that portion of Bukhayo/Kisoko/358 that after subdivision became Bukhayo/Kisoko/2281, even before the sale agreement in 1980. He had therefore been on that land for a period exceeding 12 years from the date Appellant got registered as proprietor to the date of filing the suit.

8. That the 2<sup>nd</sup> Respondent has been occupying that portion of Bukhayo/Kisoko/358 which after subdivision became Bukhayo/Kisoko/2279 and not Bukhayo/Kisoko/2281. The Appellant had no basis of suing him in this case.

After setting out the analysis of the evidence tendered before the Lower court as above, I now turn to the judgment of the learned trial Magistrate to see whether this court would deviate from the findings therein. The learned trial Magistrate, after setting out the five issues for determination, had proceeded to make the following findings:

***“ The Plaintiff in this case sued the Defendants whom he says occupy his land which he bought. From the evidence tendered before court, it is clear that the 2<sup>nd</sup> Defendant has his separate land Bukhayo/Kisoko/2279 which he occupies....there is no clear claim between the Plaintiff and the 2<sup>nd</sup> Defendant. He did not sell (him) 2281 nor does he stay on the (suit) property. I find that he (2<sup>nd</sup> Defendant ) has been improperly sued and the suit against him is hereby dismissed with costs.”***

This court concurs with the finding of the learned trial Magistrate on this finding.

The learned trial Magistrate then addressed whether the suit was filed within the time set by the law. He found that 1<sup>st</sup> Respondent has been in occupation of the suit land even by the time the Plaintiff claimed to have bought it from Patrick Kwoba Adeya. The learned trial Magistrate held:-

***“ ....The Plaintiff acquired title on 16<sup>th</sup> December, 1993. As at that time (to) the present (the) 1<sup>st</sup> Defendant was in occupation. This case was filed in court on 29<sup>th</sup> January, 2010. By (From) that time it was about 18 years to date. A claim over land can only be lodged within a period of 12 years. 12 years would have expired sometimes in 2004. Hence this suit was brought after***

**6 years late. There was no leave obtained before the claim could be lodged (and) hence it cannot stand in law.”**

The learned trial Magistrate went on to cite **section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya**, which provides the period of 12 years limit for claims to recover land from the date the right accrued. The date the Plaintiff right to the land he bought from DW 4 accrued, was taken by the Learned trial Magistrate to be the date he got registered with the suit land, that is 16<sup>th</sup> December, 1993. The date could have been earlier as he had stated the sale agreement was in 1980 and that the Land Control Board consent was obtained in 1981. This court cannot fault the finding of the learned trial Magistrate that indeed the Plaintiff filed the claim outside the 12 years window. He had also not applied for and obtained an extension of time as required under the law.

The learned trial Magistrate also looked at the adequacy of the evidence adduced by the Plaintiff to proof his claim and made the following finding:

**“.....There was no agreement produced to show that indeed Patrick Kwoba sold any land. If he sold land, the plaintiff was supposed to be shown the 1/3 by Patrick Kwoba and none other..... I find that the Plaintiff’s claim against Olokio Adeya not to be based on actual evidence but hinges on fraud by the plaintiff and others. The title in the custody of the Plaintiff is not clear on how it was obtained. The original title deed Kisoko/Bukhayo/358 (Bukhayo/Kisoko/358) was jointly and severally owned by the parties mentioned supra. For the Plaintiff to obtain title deed as alleged, it was only after Patrick Kwoba had (first) obtained his number that he could intentionally transfer to him (Plaintiff) what he had sold to him....”**

The learned trial Magistrate went on to make a finding that the Plaintiff’s “title was obtained irregularly.” He also found that the title was not a first registration and hence not protected under sections 27 and 28 of the Registration of Land Act, Chapter 300 of Laws of Kenya (now repealed) and dismissed the Plaintiff’s suit against the 1<sup>st</sup> Defendant as well.

This court has considered the totality of the evidence adduced before the Lower court and the findings of the learned trial Magistrate contained in the judgment subject matter of this appeal. The court has also considered the grounds of appeal as set out in the memorandum and the submissions by the parties and make the following findings;

1. That the learned trial Magistrate was in order when he made a finding that the Plaintiff’s suit was filed out of time. The Respondents filed statements of defence had clearly indicated that the 1<sup>st</sup> Respondent had been in occupation of the land for over 12 years. This was therefore an issue for determination and the learned trial Magistrate properly pronounced himself on the matter. The Respondents had not lodged a counterclaim over the land based on adverse possession principle and the court did not make a find on that.

2. That the sanctity of a title on first registration has been held to be so sacrosanct that it could not be vitiated even in the face of fraud. See **Chacha –vs- Manini (2002) 2KLR 83, Obiero –vs- Opiyo & others (1972) E.A. 227, Esiroyo –vs- Esivoyo & Another [1973] E.A. 338, Ambant –vs- Masolia [1986] KLR 24**. In this case, the Appellant’s title to Bukhayo/Kisoko/2281 is not a first registration as it was created from the subdivision of Bukhayo/Kisoko/358. The Appellant’s title was also not procedurally and regularly obtained and hence not protected as fraud was established by the following factors:

a. No land sale agreement between Plaintiff and DW 4 who denied existence of such an agreement, was produced.

b. Considering that the suit land Bukhayo/Kisoko/2281 came into being after the subdivision of Bukhayo/Kisoko/358, the letter of consent to transfer produced by Plaintiff and dated 20<sup>th</sup> January, 1981 was nothing but a forgery.

c. That the Respondents and DW 4 disowned the transaction, it was upon the Appellant to proof how he acquired registration of Bukhayo/Kisoko/2281 and as found by the learned trial Magistrate, has failed to do so.

The court having found as above, finds no merit in the appeal and the same is dismissed with costs to the Respondents.

**S. M. KIBUNJA.**

**JUDGE.**

**DATED AND DELIVERED ON 6<sup>TH</sup> DAY OF OCTOBER, 2014.**

**IN THE PRESENCE OF' Appellant, 2<sup>nd</sup> Respondent and Mr. Jumba for Murumba advocate for the Appellant.**

**JUDGE**