



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 13 OF 2015 (O.S)

SEFERIO DANIEL ELALAI APPLICANT

= VERSUS =

LAWRENCE BARASA OKOKI RESPONDENT

J U D G E M E N T

1. The plaintiff commenced this suit by way of an Originating Summons dated 24/2/2015 claiming a portion of land parcel No. South Teso/Asinge/1019 measuring 14.47Ha by way of adverse possession. The plaintiff prays for ORDERS;

- (a) That, the applicant has been in quiet, peaceful, notorious and uninterrupted occupation of a portion measuring 14.47Ha out of L.R South-Teso/Asinge/1019.**
- (b) That, the applicant has since occupied title to 14.47Ha out of L.R No. South-Teso/Asinge/1019.**
- (c) That, the respondent be ordered to transfer a portion measuring 14.47Ha out of L.R. No. South-Teso/Asinge/1019 to the applicant herein.**
- (d) That, the Deputy Registrar of this court be empowered to execute all relevant statutory forms on behalf of the respondents to enable the applicant get registration of 14.47Ha out of L.R No. South-Teso/Asinge/1019.**
- (e) That, costs of this case be paid by the respondent.**
- (f) Any other relief deemed fit and just to grant.**

2. The Originating Summons was opposed by the defendant's replying affidavit filed on 30th September 2015. The defendant pleaded that L.R. No. South Teso/Asinge/1019 has never belonged to him. He added that there was no evidence Josephat Imwana-deceased sold any part of this land to the plaintiff. The defendant averred that it was the son of the plaintiff who has been in occupation since the year 2007. He urged the Court to dismiss the summons for being scandalous and frivolous.

3. The plaintiff summoned a total of four (4) witnesses to prove his case while the defendant called two (2) witnesses. The plaintiff gave evidence as **PW1** and he began by stating that the defendant is the son of Josephat Imwana Okoki-deceased who sold him land in 1978. The plaintiff said he could not state the size of the land sold because it was shown to him physically and markings done. The plaintiff stated that he built his matrimonial home on the suit land and lived on it upto 1996 when he moved to another land he bought in that area.

4. **PW1** continued that all his children were born on this land. That in 1988, Josephat demanded for more money for the land sold and the plaintiff added him as per the agreement of 4/5/1988. That the boundary placed has been intact but there is now a boundary dispute between the plaintiff and the defendant. **PW1** said that Josephat died in 1997 without transferring the sold portion to him. **PW1** added that he had allocated part of the land to two of his sons who are in occupation. That he learnt of the mutation attached to his affidavit through his advocate when a search was conducted at the lands office. **PW1** maintained that he is in occupation of the land together with his children from 1978 to date. He urged the court to grant him the orders sought.

5. **PW1** was cross-examined by Mr. Makokha learned counsel for the defendant. He said that he is illiterate but can write his name and also sign documents via thumb print. He stated that he signed the agreement produced as **Pex 2** although he is not the one who prepared it. That he paid Kshs.1,300 in the first agreement dated 4/5/1978 leaving a balance of Kshs.2,900/=. That the second agreement was written in two pens. **Pex 2** did not indicate the parcel number he was buying or the size sold. The witness stated that his house got burnt in the year 2018 and he reported to the police as shown in the OB. That it is him who gave his children the land. That there is a sisal boundary separating the land sold to him and the remainder land for the seller. **PW1** was later recalled to produce P&A 5 form as **Pex 3** to show that the defendant had taken out succession proceedings in the estate of his father.

6. Erneo Ojuma Elung'ata testifying as **PW2** stated that he knew both parties since they all belong to the same clan. He adopted his witness statement dated 27/3/2017. **PW2** said he is the one who drew the agreement dated 4/5/1988. That the agreement was prepared before the Liguru and the plaintiff paid Josephat Kshs.5,980/=. That because the land sold was big, Josephat had asked to be added more money hence the reason why the 2nd agreement was drawn. That the entire purchase price was paid. It is **PW2**'s evidence that the plaintiff started using the land in 1978 and currently, it is his sons using it. **PW2** added that Josephat had put sisal for the portion sold which divided the land into two equal parts. That the plaintiff occupies the lower part of the land.

7. Cross-examined by Mr. Makokha counsel for the defendant, **PW2** answered that Josephat divided the land into two equal parts in 1978. That the 2nd agreement he drew did not specify the plot number. That on execution of the agreement, Josephat was given Kshs.3,050 and was added Kshs.2,930 within the same month. That these monies were paid in his presence. **PW2** stated that the purchase price was paid in full and the portion sold is the part occupied by the plaintiff and his sons.

8. Timothy Oporu Omuron who gave evidence as **PW3** said he knew both plaintiff and defendant and that he knew the land sold pursuant to the agreement of 6/2/1978 as he was one of the witnesses. That the balance of Kshs.5,280/= was also paid in his presence although he could not remember the date. That Josephat had complained that he be added money thus the 2nd agreement was drawn. **PW3** said he visits the land every day and knows the seller had divided it into two equal parts with the portion sold being the lower side. He states that the plaintiff's two sons live on and cultivate the portion sold.

9. In cross-examination, **PW3** said he was present when the agreement of 1978 was drawn and the land demarcated using sisal plants. That P. Karani was also present and Josephat was paid kshs.1,300/=. He does not remember date of death of Josephat. That he was also present when the 2nd agreement was made. **PW3** stated that the defendant lives on the upper part of the land.

10. Francis Ebu Elelai **PW4** is a son of the plaintiff and is aged 39 years old. He stated that he lives on L.R South Teso/Asinge/1019 with his brother Dismus. **PW4** added that they have a home on this land as well as cultivate it. He said he was born on the suitland. That the land was divided into two equal parts and they are using the lower part and the defendant has never sued them for eviction.

11. In cross-examination, **PW4** said they occupy 35 acres of the suit land. That they have never had a dispute with Lawrence which arose because the sisal on the lower part died. That on this lower side, there is a trench created by water. **PW4** admitted that the defendant included them in the succession cause but the problem is that he is trying to create another portion on the lower side of their land. **PW4** said he is in court to get a title for his land. In re-examination, **PW4** stated that the demarcation put by Josephat is still there. That the boundary dispute is between Maurice and their family not with the defendant. This marked the close of the plaintiff's case.

12. The defendant opened his case with the evidence of Barasa Emongojel Esubule testifying as **DW1**. **DW1** stated that he is a brother to Josephat Imwana Okoki – deceased. He remembers that Josephat sold land to the plaintiff although he was not present during the transaction. That he knows the portion sold because he saw the demarcation. That he knows of a trench dug by Josephat and himself to give room for water to flow and not for a boundary. That the portion sold is where the houses of the plaintiff's sons are.

13. In cross-examination by Mr. Fwaya learned counsel for the plaintiff, **DW1** could not remember the year Josephat sold land to the plaintiff. That the plaintiff started using the land from the year he bought it to date. That it is true it is Josephat who placed a boundary to mark the portion sold. That the plaintiff's family jumped across the boundary placed by the late Josephat. The boundary was placed by planting sisal. That the boundary which divided the land into two still exists. The witness did not know the size occupied by the plaintiff's family but said it is approximately half of the land. **DW1** in re-examination said he was present when the boundary was fixed.

14. The defendant gave his testimony as **DW2**. He is the son of Josephat Imwana Okoki – deceased who owned L.R South Teso/Asinge/1019. That he was appointed the administrator in Busia HC Succession Cause No. 56 of 2013. **DW2** stated that it is true his father sold a portion of this land to the plaintiff in 1978 and he was present. That the plaintiff paid Kshs.1,300 leaving a balance of Kshs.2,900. That the balance of Kshs.2,900 has never been paid to date. **DW2** said he was not aware of another agreement made in 1988 and only saw it in court. **DW2** continued that a boundary was planted during the sale and it is his evidence that the plaintiff's land began from the upper boundary to where the trench was on the lower part. That this trench was existing before the sale.

15. **DW2** stated that the boundary was placed when the first agreement was made. Later on, the plaintiff moved out of the land leaving his children. That it is Francis (**PW4**) who jumped the lower boundary and cultivated upto the river about 6 years ago. According to **DW2**, the plaintiff's share of the land is comprised in approximately 4 acres. That he is not ready to give them the portion beyond the lower boundary.

16. In his witness statement, **DW2** added that the failure by the plaintiff to clear the balance abets the agreement amounting to a breach of the contract thus the plaintiff lacks a basis to claim the land. That he was willing to give the plaintiff land sold as demarcated but on condition that they surrender the portions they are forcefully demanding as well as pay compensation for the time they used it. That the mutation form annexed to the plaintiff's affidavit is a fraud. Further that the plaintiff could have enforced the contract between his late father without necessarily filing a claim for adverse possession.

17. In cross-examination, **DW2** said he was born in 1954. **DW2** stated that the boundary planted ran across the land and it is the lower side sold according to the agreement of 1978. That it is his father who told him that he had sold land to the plaintiff. That his father died leaving them in occupation of the portion sold and the plaintiff's sons are in occupation to date. That the said sons have homes on it and also cultivate thereon. **DW2** confirmed that he is the one who added their names in the P&A 5 form. That the plaintiff's sons are using excess of half of L.R No. 1019. He was ready to give out the portion bought.

18. In re-examination, **DW2** said his understanding of lower side means it ended at the trench. That he was ready to give the share upto the boundary. This marked the close of defence case.

19. The parties' advocates filed closing submissions. The defendant file his on 29/6/2020 while the plaintiff filed theirs on 14/7/2020. I have

read and considered them. From the evidence adduced, it is not disputed that sometime in 1978 the defendant's father sold a portion of his land L.R No. South Teso/Asinge/1019 to the plaintiff. It is also not in dispute that the plaintiff took occupation immediately by building his home on it. Further it is not in dispute that although the plaintiff moved out of the sold portion, his sons with his permission have continued to live and cultivate the sold portion to date. In essence there is evidence to support the plaintiff's claim that he is entitled to the portion he purchased by virtue of adverse possession for using the same openly and continuously for an uninterrupted period of time in excess of twelve years effective from 1978.

20. The only question the court is called to determine is whether or not the plaintiff has shown the size/acreage of the portion he is in occupation of. The plaintiff said he could not ascertain the size but what was sold was demarcated on the ground and that the boundary planted still exists to date. PW2, PW3 and DW3 corroborated his evidence that there was a boundary placed by Josephat-deceased which is intact to date. According to PW2 & 3 the sisal planted divided the land into two equal parts. It is agreed by both sides that it is the lower side which was sold. DW1 and DW2 states that it is true the lower side was sold except according to them, this lower side should end at the trench.

21. The uncontroverted evidence is that the boundary mark placed by Josephat Imwana – deceased to identify the sold part from his land were sisal plants. DW1 stated he was not present when the transaction took place but he was shown the boundary. In fact his evidence was that the trench was not a boundary as it was dug to allow the storm waters to run to the river. The sale agreement dated 6/2/1978 clearly spelt that the portion sold is the lower side. I am therefore satisfied that the plaintiff has proved that what was sold was clearly defined as the lower side which was demarcated by planting of boundary marks to separate it from the vendor's portion which remained on the upper side. Consequently, I make a finding that the plaintiff is entitled to the portion of South Teso/Asinge/1019 on the lower side. There is no land available to the defendant to claim which he described as from the trench to the river.

22. The defendant submitted that the plaintiff has no claim before the court for breaching the agreement. The case before me is a claim for adverse possession and the purpose of introducing the agreement was only to demonstrate how the applicant came into possession of the suit land and what portion he was entitled to nothing more. As to whether the plaintiff disowned his suit by stating in cross-exam that it is the defendant who sued him in my view are semantics since the suit was heard to conclusion.

23. In conclusion, I enter judgement for the plaintiff in terms of prayer

(a) That a declaration be and is hereby made that the applicant has been in quiet, peaceful, notorious and uninterrupted occupation of half portion out of L.R South-Teso/Asinge/1019 and or equivalent portion comprised in the lower portion until the river.

(b) That, the respondent be and is hereby directed to subdivide and transfer the portion described in (a) above to the applicant herein. The costs of such sub divisions and or transfers be met by the plaintiff.

(c) In default of compliance by the defendant as directed above, the Deputy Registrar of this court shall execute all relevant statutory forms on behalf of the respondents to enable the applicant get registration of half of and or the size comprised on the lower L.R No. South-Teso/Asinge/1019.

(d) Each party to meet their respective costs of this case.

Dated, signed and delivered at BUSIA this 13th day of October, 2020.

A. OMOLLO

JUDGE