



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL CASE NO. 31 OF 2011.

JOB WEKESA.....PLAINTIFF

VERSUS.

RICHARD NAFWIKI MAKANDA.....DEFENDANT

JUDGMENT.

[1] By an Originating Summons dated 12th April, 2011 Job Wekesa, the applicant herein posed the following questions;

- (a) *Whether the applicant herein has been in occupation of a portion of land measuring 14 acres comprising in title No. W. BUKUSU/E. SIBOTI/873 openly, continuously and peacefully for a period exceeding 12 years.*
- (b) *Whether the respondent's title over the said portion has been extinguished by operation of the law.*
- (c) *Whether the applicant should be registered as the proprietor of the said portion of land in place of the respondents herein*
- (d) *Whether the court should order the applicant to be registered as the proprietor of a portion of land measuring 14 acres comprised in title No. W. BUKUSU/E. SIBOTI/873 in place of the respondent herein.*
- (e) *Whether the applicant has become entitled to the said portion of land by concept of adverse possession.*
- (f) *Who should pay the costs of the suit.*

[2] The Originating Summons was supported by an affidavit of the said Job Wekesa who stated land Parcel W. Bukusu/E. Saboti/873 is registered in the names of Richard Nafwiki Namaswa now deceased. That his father Jackson Namaswa passed on 2/9/88 and that prior to his death he had purchased a piece of land measuring 14 acres comprised in land parcel W. Bukusu/E. Saboti/873 in the year 1972. That the same was purchased from one Richard Nafwiki Makanda. The various documents regarding that sale were annexed to the affidavit. That the applicants father moved on to the land and put up houses where he occupied with his family. That they never had a dispute with the respondent until 2009. He says that he has personal knowledge that his father was granted a consent to subdivide N. Bukusu/E. Siboti/873 and annexed a letter of consent. That his father died before he could sign the transfer forms of the subdivision. He avers that they have lived peacefully on the land of 14 acres since 1972. That they had lived on that land peacefully continuously and without interruption and have acquired title by adverse possession.

[3] The respondent filed a replying Affidavit and stated that it is not true that he sold the land to Jackson Namaswa Wekesa as alleged and that he did not receive any monies from him. That the alleged Agreements and acknowledgements were fraudulent and intended to mislead. He denied having received 8 heads of cattle and Kshs.4,000/= as alleged from the said Jackson Namaswa Wekesa.

He also denied that the applicant took possession of 14 acres of the suit land or any portion at all. He categorically denied that the applicant has been on the suit land for 12 years and that he ever applied for consent to subdivide his land. He averred that the doctrine of adverse possession does not apply and stated that he has been in occupation of the suit land himself.

[4] When this case came for hearing in court on 6th September 2016 a consent order was recorded that the District Surveyor visits land parcel West Bukusu/East Siboti/873 to ascertain who occupies and/or cultivates the suit land and determine in what proportion and file his report within 45 days. The report was finally filed in court and adopted as the order of the court on 21/3/2017.

According to that report, the applicant was occupying a portion of approximately 3.3. hectares while the respondent was occupying 8.27 hectares.

[5] During the hearing of the case Job Wekesa gave evidence and stated that he had the letters of administration for Jackson Namaswa. He

produced them as P Exh.I. He also produced the agreements for sale for 14 acres and payments paid in five instalments. He produced them as PExh 2,a,b,c,d,e,f. The last acknowledgment of full payment was dated 2/5/75. He said that his father died in 1988. That they were born on the land and that the land was purchased in 1975 and was fully paid by 2.5.1975. He produced the proceedings of the Bumula land disputes tribunal where the respondent admitted having sold the land to the applicants father. He averred that during the *lufu* proceedings of his father, the owner of the land said that he was not owed any money except the cost of the fencing to which the elders contributed and paid. He produced the proceeding of that *lufu* as PExh 5.

[6] Javan Nekesa Munyangali gave evidence. He said that he lives in Chwele and is a farmer. He adopted his statement filed in Court he adopted the same as his evidence. He said that when the land was sold he was there and that the land bought was 14 acres that when the father of the applicant died, in 1988 he was buried therein and that he was the witnesses younger brother.

[7] Richard Nafwiki Makanda relied on his statements made on 2/12/2015. He denied selling the land to the applicants and that the agreements/acknowledgements produced were all fake. He admitted that there was a land disputes tribunal case at Bumula but stated that its orders were set aside. He stated that he refused to sell the land to the applicants father because he did not finish paying the purchase price. The witness said that he was not given 3 cows. Further that the applicant father was using two acres and that the rest is grazing area. He denied that he was there in the *lufu* and that those recording in that ceremony could write whatever they wanted. On cross examination he agreed that there was a caution on the land registered in 1975. He said that when the applicant father died he took him from Kakamega Mortuary and took him to where he was buried. He admitted that when *lufu* happened he was there.

[8] The issue for determination is whether the applicant has established a case for adverse possession.

[9] Having looked at the documents produced by the applicant, the agreement of 18/12/71, 7/1/74, 4/2/73, 8/4/73, 1/7/73, 9/6/74 21/7/74, 12/10/74 and 2/5/75, there is no doubt that the applicant father entered into a sale agreement for the sale of 14 acres at an agreed price of 8 cows and 4000 cash. I am satisfied that entire purchase price was fully paid up on 2/5/75 and that the applicant father took possession of the 14 acres. The land up for sale was agricultural land which was subject to land control. That consent was not granted at all. After the full payment of the purchase price the parties had Six Months to get the said consent by 2/10/75. The consent was not obtained. That sale became void for lack of consent and time began to run against the registered owner. There was no notice issued to the applicant father and his family to move out and vacate out of the suit land. The occupation was peaceful and without any force and so on 2/5/87 a period of 12 years run out. Indeed, when this matter came to court the parties by consent agreed to send a surveyor to see who was on the land and if so, on what proportions. An award was filed and adopted as the order of the court. This surveyors report adopted by the court shows, the applicant and his family occupies 3.3 hectares.

Indeed when the applicant's father died he was buried on the suit land. The respondents concedes to that fact and even says he is the one who got his body from Kakamega Mortuary to the suit land for burial.

[9] I have no doubt that the applicant has established a case for adverse possession against the respondent registered owner of land parcel West Bukusu/East Siboti/873 to the extent of 3.3 hectares. The applicant has completely dispossessed the registered owner of his proprietary rights to the said 3.3 hectares. The suit land will be subdivided and a piece therefrom of 3.3 hectares will be registered in the names of the applicant. The costs of this suit will be to the applicants.

It is so ordered.

Judgment read in open Court before the Counsels for the parties.

Dated at Bungoma this 22nd day of February, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Joy: Court clerk

Mr. Murunga: For the Plaintiff

M/s Isye: For the Defendant