



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 146 OF 2014

ANJELIS OUMA AFWANDE.....PLAINTIFF

= VERSUS =

ARUSI MAKIO DEFENDANT

J U D G M E N T

1. This suit was initially filed in court on 4/9/2012 vide a plaint dated 4/9/2012. That plaint was later amended, re-dated 24/4/2013, and refiled on 30/4/2013. The Plaintiff – **ANGELIS OUMA AFWANDE** – pleaded, *inter alia*, that he is the registered owner of Land Parcel No. BUKHAYO/MATAYOS/1507 (“Suit Land” hereafter) onto which the Defendant – **ARUSI MAKIO** – has illegally entered and occupied. He would wish to have the Defendant evicted and enjoined from possessing, occupying, using or in any way interfering with the suit land. This forms the basis of prayers (aa) and (b) in the amended plaint. The contents of these two prayers are more fully expressed at paragraphs 5A and 5B of the same plaint. The Plaintiff desires also to get costs of the suit (prayer c) and any other remedy the court may deem fit (prayer d).

2. The Defendant filed a defence to the initial plaint on 4/4/2013 and when the amended plaint was filed, he filed another defence on 9/5/2013. It is the latter defence that counts in this matter. In that defence, the Defendant denied the Plaintiff’s allegations and pleaded that there was another case – SRMCC No. 375 of 1995, BUSIA – which the Plaintiff had filed and later withdrew. The Plaintiff is said not to have paid cost amounting to Kshs.11,000 in that suit. It was also pleaded that this suit itself is RES-JUDICATA as it had been litigated upon in the lower court, with a decision issuing in the Defendant’s favour.

3. It is clear that at some point, the Defendant wanted to re-amend the defence to include a counter-claim but he fumbled and tumbled in the manner he approached the issue and his efforts therefore came a cropper. His application for amendment was dismissed by this court on 10/12/2015.

4. The court started hearing the matter on 24/4/2016. Two witnesses testified on the Plaintiff’s side: himself (PW2) and Alfred Nasugo Wambwire (PW2). The Plaintiff said he is the registered owner of the suit land. Two exhibits, a title deed (P1) and a copy of search at the land office (P2) were availed to demonstrate ownership. He said also that the Defendant had tried to buy the land but the deal fell through and he was refunded his money. By then however, the Defendant had entered the land and he refused to move out.

5. In an effort to ensure that the Defendant left the land, the Plaintiff reported the matter to the area elders. The matter was deliberated upon and the Defendant was ordered to vacate the land. Again, he declined to do so. This state of affairs persisted and at some point the Plaintiff decided to sell the land to the Defendant’s family. A deal was struck for a purchase price of 390,000/= to be paid on 23/3/2012. The money was never paid. The deal flopped.

6. PW2 confirmed that the Defendant and the seller of land had gone to him and agreed on a refund to the Defendant. The refund was made but the Defendant declined to leave the land.

7. The Defendant’s side called three witnesses: the Defendant (DW1), **MARY ATIENO MAKIO** (DW2) and **JANE AUMA MAKIO** (DW3). According to the Defendant, land parcel number 1507 arose from sub-division of the original parcel No. 449. The Defendant thought that the subdivision took place sometime in 1995. He was not sure though, but it seems sufficiently clear that parcel No. 1507 was created after sub-division of parcel No. 449 into parcel No. 1507 itself and parcel No. 1508. According to the Defendant, the original parcel belonged to his cousin – **ALBERT WANYAMA** – who allowed his father to settle his mother there. The Defendant further said he has lived on the land since 1980. He was never a purchaser of the land, he said, but only got to know later that he was being regarded as one. To the Defendant, he should be allowed to continue staying on the suit land, having been staying on it for 37 years.

8. The Defendant was cross-examined by Omondi for the Plaintiff and was at one point shown an agreement showing a refund of some purchase money to him. He admitted that he signed the agreement.

9. There was DW2 who called the Defendant her child and a neighbour. It did not come out clearly which point this witness was making. DW3 gave evidence that is in general agreement with that of the Defendant. According to her, the Defendant has been on the land since 1980. There is a difference however. And the difference is that DW3 said the Defendant bought half (½) acre from Albert Wanyama and the Defendant added that half acre to the land that his father already had. That happened in 1994. The Defendant himself had said he was not a purchaser.

10. Hearing over, both sides filed written submissions. The Plaintiff's submissions were filed on 14/2/2018. The crucial or salient aspect of the Plaintiff's submissions is that he is the registered owner of the suit land, having acquired it for valuable consideration from its owner. By then the Defendant had already occupied part of the land on the basis of an unsuccessful purchase. He was refunded his money and was supposed to vacate the land but refused or failed to do so. The Defendant was said to have no proprietary interests in the suit land.

11. The Plaintiff submitted that the evidence availed showed well he is the registered owner. The Defendant was said to have no counter-claim which can possibly justify his claim to continued stay on the suit land. The court was asked to allow the Plaintiff's claim.

12. The Defendant's submissions were filed on 26/2/2018. They contain some history and antecedents surrounding and/or relating to the suit land. According to the Defendant, the original land parcel No. 449 belonged to his late grandfather, one Otiangi. Otiangi allegedly held the land in trust for the entire family composed of six (6) sons. Otiangi later sub-divided the land among the six (6) sons, who included the Defendant's father. That was before the onset of adjudication and/or land registration and the concept of title deed was still unknown in the area. The alleged sub-division clearly showed the entitlement of each son on the ground.

13. At the time of registration however, the Defendant's father was in Nairobi and one Alberito Wanyama, who sold the land to the Plaintiff, got to be registered as owner of the portion meant for the Defendant's father. Sometimes in 1980, Alberito Wanyama and the Defendant's father entered into negotiations which resulted in Wanyama agreeing to surrender two acres to Defendant's father. That was done and the Defendant has resided on the land since then.

14. According to the Defendant, Alberito Wanyama held the land in trust for Defendant's father and/or himself. He therefore lacked capacity to sell it. According to the Defendant too, he is entitled to the land by adverse possession as he has lived on it since 1980. His occupation, he submitted, has been peaceful, continuous, uninterrupted, notorious, exclusive and for the requisite period of 12 years.

15. I have considered the pleadings, evidence, and rival submissions. Though the Defendant invokes the legal concepts of trust and adverse possession, he did not plead them in his defence. True, the Defendant tried to file a counter-claim. But he blundered seriously and his attempt failed. It is still another blunder to try and urge the claim in submissions without laying basis for the same in both pleadings and evidence.

16. In contrast, the Plaintiff articulated his claim well. He showed, for instance, that he is the registered owner. He was also able to show, contrary to Defendant's averments, that the Defendant entered the suit land through attempted purchase. The purchase evidently fell through and the Defendant was refunded the money he had paid. It was shown too that various attempts to have the Defendant vacate the suit land peacefully have been made, with the Defendant each time refusing to vacate. And the document showing refund is signed by the Defendant.

17. It is clear that so far, the defence of the Defendant cannot be said to be a challenge to the Plaintiff's title. And as pointed out by the Defendant's counsel, the Plaintiff is entitled to all the rights and privileges that go with registered ownership. The Defendant's plea that he should be allowed to continue staying on land registered in the name of somebody else is untenable and unacceptable.

18. It would be different if the Defendant had succeeded in proving trust and/or adverse possession. He has not and his continued stay on the suit land is without the backing of the law.

19. The upshot, in light of the foregoing, is that the Plaintiff's claim is found to be successful. The prayers spelt out at paragraph 5A and 5B in the amended plaint and prayed for as (aa) and (b) are hereby granted. Also granted are costs of the suit plus interests at court rates.

20. I need to point out that for the order of eviction, the Defendant should at first be given a 90 days' notice to vacate the suit land voluntarily. If he fails to do so, all reasonable and necessary force should be used to evict him. After eviction, the injunctive order granted should start applying immediately.

Dated, signed and delivered at Busia this 27th day of November, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Present

Counsel for Plaintiff: Present

Counsel of Defendant: No Appearance

