



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC. NO. 123 OF 2013

LIVINGSTONE OMURAYI MWANDIA APPLICANT

(MAKOKHA & CO. ADV)

VERSUS

EVARISTUS ANINDO OPONDO 1ST DEFENDANT

LUARIAN W. OTIENO..... 2ND DEFENDANT

DAVID ONYANGO 3RD DEFENDANT

(KASAMANI & CO. ADV)

JUDGEMENT

1. This suit was filed on 7/10/2011 by the Plaintiff – **LIVINGSTONE OMURAYI MWANDIA** – against three Defendants – **EVARISTUS ANINDO OPONDO** (1st Defendant), **LUARIAN W. OTIENO** (2nd Defendant) and **DAVID ONYANGO** (3rd Defendant). The dispute relates to Land parcel No BUKHAYO/KISUKO/2131 (suit land) owned by the Plaintiff and into which the three Defendants are said to have encroached. The suit is essentially about that encroachment.

2. Sometime after filing the suit, the Plaintiff settled the matter out of court with 2nd and 3rd Defendants. This judgement therefore is between the Plaintiff and the 1st Defendant. The 1st Defendant is said to be the owner of Land parcel No. BUKHAYO/KISUKO/3410, which borders the suit land. The size of the suit land is 0.40 which translates to 1½ acres. As filed, the suit sought the following orders:

i. A restraining order barring the Defendants from occupying portions of land parcel No. BUKHAYO/KISUKO/3410 being ¾ Ha occupied by the Defendant.

ii. An order of re-survey of Land parcel No. BUKHAYO/KISUKO/3410, 4562 and the portion owned by DAVID ONYANGO and that the Plaintiff's Land parcel No. BUKHAYO/KISUKO/2137 be returned to its original measurement of 0.40Ha or 1½ acres shown on the title deed.

iii. Mesne profits.

iv. In the alternative, the Plaintiff be compensated for the land occupied in its market value by the Defendants.

3. The Plaintiff pleaded that he bought the land from one PATRICK MAKOKHA MAKANGA when the land was parcel No. BUKHAYO/KISUKO/708 registered in the name of MAKANGA WAMBIA. It is apparent that the late MAKANGA WAMBIA was the father of the seller – PATRICK MAKOKHA WAMBIA and FRANCIS AMBIA MAKANGA. Francis became the administrator of his late father's estate and he is the one shown as having signed the relevant document surrounding and/or leading to transfer and registration of the suit land in the Plaintiff's names.

4. The transfer and registration referred to were preceded by subdivision of Land parcel No. BUKHAYO/KISUKO/708 into parcel Nos KISUKO/BUKHAYO/1972, 1973 and 1974. Parcel No. 1972, which was 3.45Ha, was later subdivided into Land parcels Nos BUKHAYO/KISUKO/2136, 2137, and 2138. Thereafter, Land parcel No. 2137 was transferred to Plaintiff and registered in his name. All this is clear from the records availed by the Plaintiff.

5. The 1st Defendant filed his defence on 13/3/2013. He denied knowledge of sale of the suit land to the Plaintiff; denied the subsequent transfer of the land to the Plaintiff; asserted that he too was sold No. 3410 by FRANCIS AMBIA MAKANGA; averred that he got title in 1995 and went into possession; denied having encroached into the suit land; and ultimately intimated that if his possession and occupation of the land sold to him happened to be an encroachment or occupation of part of the suit land, then that has been the position for a period of over 17 years. That being so, he has become an adverse possessor with the Plaintiff now holding the occupied position in trust for him pending commencement of appropriate proceedings to acquire title by way of adverse possession.

6. The Plaintiff filed a reply to the 1st Defendant's defence on 21/6/2013. It was pointed out it was the 1st Defendants late mother who was disputing with the Plaintiff before. There was even a dispute at Nambale Land Dispute's Tribunal. The encroachment was said to be in violation of sanctity of title. Adverse possession was said to be untenable in view of the fact that there has been past dispute. The Plaintiff further denied being the 1st Defendant trustee for the occupied land.

7. Both sides separately filed issues for determination. According to the Plaintiff, it is necessary to establish whether he owns the suit land, whether the 1st Defendant's land parcel No. 3410 borders the suit land and, if so, whether it has encroached. And who, between the parties, has rights over the suit land and to what extent is the alleged encroachment?

8. The 1st Defendant on his part wondered whether the Plaintiffs acquisition of title was valid. He wanted it established as to when he became registered owner of parcel No. 3410. And has he encroached and, if yes, when and to what extent? And has the alleged occupation or encroachment been continuous, peaceful, and without interruption from the Plaintiff or any other person and, if so, has the Plaintiff's title been extinguished by adverse possession? Further, does the Plaintiff have an enforceable claim against 1st Defendant? Should his claim be dismissed? Should the relevant land maps be corrected? And who should bear the cost?

9. During hearing, the Plaintiff testified as PW1 and reiterated that the suit land is his own, having bought it as pleaded in the plaint and as stated in his statement. The 1st Defendant's late mother has been the visible face of interference, with the 1st Defendant being in the background though being the registered owner of parcel No. 3410, which he is using to deny and/or justify occupation. The Plaintiff called PW2 – PLASIO ORUKO – who confirmed having witnessed the sale of the suit land to him. He even witnessed the transaction. Finally, there was the Land Registrar – GEORGE THUKU KIMANI – who visited the site and found that the Plaintiff's land had been encroached. The encroached was big, for out of 0.40Ha, only 0.03Ha remained un-encroached.

10. The hearing of the defence case started on 16/6/2015. The 1st Defendant testified as DW1. He said he owns land parcel No. 3410 which his mother bought from FRANCIS AMBIA MAKANDA. He denied

having encroached on the suit land. According to him, he occupied land parcel No.3410 with its boundaries as shown to him. He asked that the Plaintiff's suit be dismissed. The Plaintiff called DW2 – DAVID MAKOKHA – as his witnesses. David is evidently a son of the person who sold the land to the 1st Defendant. He confirmed knowledge of that sale. The Plaintiff was also said to have bought land but he is yet to complete payment of the purchase price.

11. And because of the unpaid money, the land being sold to the Plaintiff was sold to the mother of 1st Defendant. This witness said that the Plaintiff's title deed is fake as the land was never transferred to him.

12. FIDELIS OWIRA was another witness called by the 1st Defendant. He testified as DW3. According to him, the Plaintiff failed to complete the purchase price of the land being sold to him. The same position emerges from LAZARUS ODONGO OPIYO (DW4), who was the last witness called by the 1st Defendant. It was averred that failure by Plaintiff to complete payment of the purchase price led the seller to sell the land to the mother of 1st Defendant.

13. After hearing, both sides filed written submissions. The Plaintiff's submission were filed on 5/4/2017. The Plaintiff pointed out that the survey report filed confirmed encroachment. Other evidence does it too. It was further pointed out that by the time the seller was purporting to sell the encroached portion to the 1st Defendant, ownership had changed hands and the Plaintiff already had the title. There was nothing therefore that could be sold.

14. On the issue of adverse possession, the Plaintiff submitted that the 1st Defendant denied occupation. The Plaintiff position is that adverse possession must be specifically pleaded and proved. It required to be shown that the 1st Defendant has been in continuous, un-interrupted, notorious and unopposed occupation. It was also required that the issue be raised in the defence and asserted in a counter-claim.

15. The Court was urged to appreciate that there has been a dispute at the local Land Dispute's Tribunal. That dispute stopped the running of time and adverse possession therefore cannot be raised.

16. The alleged entry into the land was also said to be as a result of sale, and agreement and the ensuing occupation therefore could not be said to be adverse.

17. The 1st Defendant's submissions were filed on 17/3/2017. According to the 1st Defendant, the alleged occupation or encroachment is not true and if it is, adverse possession should be imputed in his favour. And this is because he has occupied the land for over 12 years. The Plaintiff is therefore barred by the statute of limitation from claiming the portion.

18. The evidence of PW4, which showed encroachment, was faulted because it shows the work of re-establishing the boundaries was not right. The parties were said to be absent and the relevant mutation forms were not used. The evidence was said to be speculative. The Court was asked to dismiss the case.

19. I have considered the pleadings, evidence, and submission. I bear in mind too the issues that each side raised.

20. In my view, what has been availed shows well that the Plaintiff is the registered title holder or owner of the suit land. Equally, the 1st Defendant is shown to be the title holder or owner of land parcel No. BUKHAYO/KISUKO/3140. It is shown too that the two parcels of land border each other and the owners acquired them through purchase. The 1st Defendant tried to question the legality of acquisition of title to the suit land by the Plaintiff. DW2 in particular seemed to suggest that the title is fake. But the 1st Defendant showed the relevant sale agreement and the documents that were duly signed by the transacting parties to facilitate transfer and change of ownership. The witnesses availed by the Plaintiff also vouched for the authenticity and validity of the transaction. The 1st defence allegations ring hollow in view of what was availed by the Plaintiff.

21. The other issues raised by both side do not in my view correctly capture the reality of the situation. The concern, for instance, is not whether there are structures on parcel No. 2137 as the Plaintiff seemed to suggest or when the 1st Defendant became registered owner of parcel No. 3140 as the 1st Defendant seemed to assert. The crucial issue for determination is whether or not there is encroachment by 1st Defendant and, depending on the finding on this issue, whether adverse possession can be said to lie in favour of 1st Defendant.

22. On the issue of encroachment, the 1st Defendant first response was a denial. To him, he is occupying his parcel of land No.3140. He has not encroached. But the evidence given by the 1st Defendant own witnesses belie or even contradict this position. To them, there was a portion sold to 1st Defendant's mother because of Plaintiff's alleged failure to pay part of the purchase price. This portion was apparently in addition to an earlier portion sold to the same person. The 1st Defendant apparent ambivalence is shown, firstly, by the denial and then, secondly, by his assertion that his encroachment would amount to adverse possession.

23. But the issue of encroachment finds authoritative expression in the evidence of PW4 who found it exists as a matter of fact. PW4 is an expert in survey and he took measurements at the site. The defence tried to fault his evidence. The Court however was not convinced. In my view, to fault PW4 convincingly, the 1st Defendant needed to enlist the help of a private surveyor. That way, he would have availed the evidence of an expert to counter that of another expert. As things stand, the attack on PW4's evidence is puny and ineffective, coming from a person whose knowledge of survey work is mundane or pedestrian. That encroachment is referred to by other witnesses called by the Plaintiff while even the 1st Defendant's witnesses themselves seem to acknowledge it, the only difference being that to them, the portion was sold by the seller to the 1st Defendant. I therefore make a finding that there is encroachment.

24. And because there is encroachment, has that encroachment turned into adverse possession. It seemed to be the Plaintiff's position that adverse possession was only raised in submissions by 1st Defendant. But that position is not borne out by the records. The 1st Defendants defence shows him pleading that adverse possession runs in his favour having occupied the land for 15-plus years. He pleads further that he intends to file appropriate proceedings regarding the issue later.

25. But an appreciation of how adverse possession works is necessary. It starts with entry into a person's land knowing that title to that land belongs to that person. The starting point is acceptance and/or recognition of the person's title. The entry can be legal at the start but must at some point turn illegal in order for adverse possession to start running. It can also be illegal right from the start.

26. In this particular case, the 1st Defendant denies the Plaintiff's title, even terming it fake at some point. This is not the right way to assert adverse possession. You cannot deny somebody's title and claim adverse possession at the same time.

27. Adverse possession also requires that the occupation or possession be open, notorious, continuous, hostile, and unpermitted. It should run for a minimum period of 12 years. In this case, it is clear that parties have disputed over the land before the Nambale Land Dispute Tribunal. This fact, coupled with the fact that the matter had earlier been reported to the area local administration, cast doubts as to whether the 1st Defendant can successfully mount a case of adverse possession.

28. It is further noteworthy that the issue is only raised as a defence. Adverse possession consists in unequivocal assertion of claim of title against a title holder and a request that the title be cancelled so that the adverse possessor can become the new title holder. In a suit like this, it was not enough therefore for the 1st Defendant to say he is an adverse possessor, he needed to go further and lay claim to the title to the encroached portion. That way, he would be seen to be serious about his claim to adverse possession. As things stand, the 1st Defendant was content at hinting at the possibility of bringing such claim later. His approach was wrong.

29. I now come to a different consideration namely: The times when each party got his title. The 1st Defendant got his title in 1995 – The Plaintiff got his title in 1991. By the 1st Defendant witness accounts, the encroached portion was sold to the 1st Defendant after 1991. Infact, DW4 put it in 1996 or 1997. DW2 seemed to suggest it was 1993. Either way, the period was after 1991. By this time, the Plaintiff already had title to the land. Due diligence on the part of the buyer by conducting a search at the land’s office would have established the fact. But this was apparently not done and the buyer went ahead to transact with a person whose capacity to sell the land had ceased. Simply put, the buyer, who is said to be 1st Defendant’s mother, bought no land. She was only duped or misled into thinking that she was buying it.

30. The upshot is that when all these concerns are considered, the Plaintiff’s case is found to be well proved on balance. The Plaintiff therefore gets prayer 1 and prayer 2 albeit with the necessary modifications so that they apply only to the portion occupied or encroached by the 1st Defendant only. I mention modification because the prayers were meant to apply to 2nd and 3rd Defendants as well but must now only apply to 1st Defendant. Prayer 3 is not granted as no evidence was led on it. Prayer 4 relates to the alternative of possible compensation. Yes if the parties agree on compensation that one is viable option and the prayer is granted. The plaintiff is granted also costs of suit.

Dated this 13th day of July, 2017

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant: