



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

ELC NO. 113 OF 2014

BENJAMIN EKISA EMUKULE PLAINTIFF

VERSUS

FAUSTINE OKWARA ITANGASA1ST DEFENDANT

EKISA OTWANI ORIDI2ND DEFENDANT

J U D G E M E N T

1. The Plaintiff herein - **BENJAMIN EKISA EMUKULE** - is claiming land parcel No. **L.R. SOUTH TESO/AMUKURA/3226** from the Defendants - **FAUSTINE OKWARA ITANGASA** and **EKISA OTWANI ORIDI** - by way of adverse possession. In that regard, he filed the Originating Summons dated 1/12/2011 seeking determination of various issues between him and the Defendants and seeking for various orders too.

2. The Plaintiff was the applicant in the originating summons while the Defendants were the respondents. Land parcel No. **SOUTH TESO/AMUKURA/3226** resulted from sub-division of the original land parcel No. **L.R. SOUTH TESO/AMUKURA/1003**. The other parcel that resulted from the sub-division was land parcel No. **SOUTH TESO/AMUKURA/3225**. The Plaintiff was also claiming this land parcel but he withdrew his claim on 25/9/2017.

3. The issues raised for determination are as follows:

(a) Whether the applicant purchased a portion of land measuring 3 acres out of L.R. No. **SOUTH TESO/AMUKURA/1003** at an agreed consideration in 1991.

(b) Whether the portion that the applicant purchased was clearly demarcated on the ground and whether he took possession of the said portion and has been using the same to date.

(c) Whether the respondent subsequently subdivided the said L.R. No. **SOUTH TESO/AMUKURA/1003** into two portions: -

(i) L. R. **SOUTH TESO/AMUKURA/3225**

(ii) L. R. **SOUTH TESO/AMUKURA/3226**

(d) Whether the respondent's title to the said portion became extinguished upon expiry of 12 years

from the time the applicant went into possession of the said parcels of land.

(e) Who should pay the costs.

4. If these issues are determined in the Plaintiff's favour, the Plaintiff desires to get the following orders:

(a) That the respondents right over land parcel numbers L.R. SOUTH TESO/AMUKURA/3225 and 3226 got extinguished by adverse possession upon expiry of 12 years from the date the applicant came into possession.

(b) That the respondents be perpetually barred from taking or using the said portions of land.

(c) That the respondents do execute all the relevant documents to facilitate transfer of L.R. No. SOUTH TESO/AMUKURA/3225 and 3226 into the names of the applicants and that in default the deputy registrar do execute them on their behalf in favour of the applicant.

(d) That title to portions of land L.R. No. SOUTH TESO/AMUKURA/3225 and 3226 registered in the applicant's name is valid.

(e) The respondents do pay costs of the case.

It is important to appreciate that where reference is made to parcel No. 3225 in the application, that reference is no longer valid as claim to that land has been withdrawn.

5. From the Plaintiff's supporting affidavit brought together with the application, it is clear that he first bought two acres at 17,000/= and later one acre at 10,000/=. He stated that he fully paid everything. He then took vacant possession immediately upon purchase and has been in such possession from 1991 to date. The sub-division came later and the respondents got registered as title holders. Even then however, the applicant continued in possession and use of the 3 acres he had bought.

6. The Defendants entered appearance through their counsel, Mr. Kraido, but nothing else was done. Eventually, this matter proceeded without the Defendants. It is clear that the Defendants were duly served at every crucial stage of the various court processes. It is indeed after being satisfied that the Defendants were served that the court decided to proceed with the case without them.

7. The court heard this matter on 11/7/2017. The Plaintiff testified as PW1 and called one witness - PASTOR LAWI EMUKULE - who testified as PW2. Much of what the Plaintiff and his witness said in evidence is already what is contained in the application. Additionally however, the following exhibits were availed:

(i) Plaintiff EX No. 1 - Sale agreement for 2 acres of land.

(ii) PEX No. 2 - Sale agreement for one acre of land.

(iii) PEX No. 3 - Land Control Board consent obtained by 1st Defendant.

(iv) PEX No. 4 - Copy of Green Card for parcel No. 1003.

(v) PEX No. 5a & b - Copies of Green Cards for land parcels Nos. 3225 and 3226.

(vi) PEX No. 6 - Agreement for payment of Kshs.3,000 being part of the purchase price of the land.

8. The Plaintiff filed written submissions. It was submitted, *inter alia*, that the Plaintiff bought the land, took actual possession, and started cultivating it. When the Plaintiff purchased it, it was L.R. No. SOUTH TESO/AMUKURA/1003. The 1st Defendant divided it later into parcel Nos. SOUTH

TESO/AMUKURA/3225 and 3226. The Plaintiff is currently in possession of parcel No. 3226 which is 1.23Ha or about 3 acres. That parcel is currently registered in the name of 2nd Defendant. It was pointed out that the Defendant not only failed to respond to the case but also failed to attend court for hearing.

9. The case of **PETER MBIRI MICHUKI vs SAMUEL MUGO MICHUKI: CA No. 23 of 2013, NYERI**, was availed to demonstrate the essentials of adverse possession. And from the case, it is clear that the Plaintiff has to prove that he has possessed and/or used the land he claims as of right; *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion). The possession must be continuous. It should not be broken for any temporary purposes. In this case, the Plaintiff is said to have proved adverse possession.

10. It is easy to agree with the Plaintiff as the matter is not opposed. For a claim of adverse possession to succeed, the possessor must demonstrate that the possession was adequate, continuous and exclusive. It must also be open, hostile and/or notorious.

11. The statutory anchor for the law on adverse possession is to be found largely in Sections 7, 17, and 38 of Limitation of Action Act (cap 22). The relevant parts of these sections provide as follows:

“7. An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to a person through whom he claims, to that person.

17. Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including redemption action), the title of that person to the land is extinguished.

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person registered as proprietor of the land”.

12. It is clearly discernible from Sections 7 and 17 above that after the end of twelve (12) years from the date on which the right of action accrued, no action can be brought to recover land and the title of the registered proprietor will be extinguished. Section 38 enjoins court action by a person claiming title as an adverse possessor.

13. Judicial pronouncement on the issue are wide and varied. One of them is to be found in PETER MBIRI’s case (supra) already cited by the Plaintiff. The other case is **WAMBUGU vs NJUGUNA [1983] KLR 172** where the court held, *inter alia*, that the general principle is that until the contrary is proved, possession in law follows the right to possess. The court held further that in order to acquire by virtue of the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession. Here, we see two concepts: dispossession and discontinuance of possession. The Plaintiff must prove one of them.

14. Crucial also to understand is the holding of the court in **Ngati Farmers Co-operative Society Limited vs Councillor John Ledidi & 15 others: CA No. 94 of 2004, NAKURU**, where the court held, *inter alia*, that mere change of ownership of land which is occupied by another person under adverse possession, does not interrupt such person’s right of adverse possession.

15. I now turn to this case and consider the following:

(i) Whether the Defendants were dispossessed or discontinued their possession of the land claimed by the Plaintiff.

(ii) Whether the Plaintiff’s possession was exclusive, continuous, uninterrupted and peaceful for at least twelve (12) years.

16. From the Plaintiff's uncontroverted evidence, he went into possession in 1991. He started using the land and has been doing so todate. The Defendants do not use Parcel No. 3226 which he is claiming. It is clear therefore that there has been discontinued possession of the land by the Defendants. And it appears clear too that the possession by the Plaintiff has been continuous, open, peaceful and un-interrupted for all the period he has been on the land. It became adverse when payment was completed but the seller refused to transfer it to him.

17. Given the evidence adduced by the Plaintiff and his witness, the issues raised for determination in the originating summons can be answered as follows:

(a) YES, the Plaintiff purchased a portion of land measuring 3 acres out of L.R. No. SOUTH TESO/AMUKURA/1003 at an agreed consideration in 1991.

(b) YES, the portion bought by the Plaintiff was clearly marked on the ground and he took possession and has been using the land todate.

(c) YES, the 1st Defendant later sub-divided land parcel No. 1003 into land parcels No. 3225 and 3226.

(d) YES, the Defendants title to the portion occupied by the Plaintiff became liable for extinguishing after the expiry of 12 years since the Plaintiff went into possession.

(e) YES, the Defendants should pay costs of the suit.

18. Having determined all the issues raised in the Plaintiff's favour, I then proceed to grant the orders prayed for in the application. These are the same prayers set out at paragraph 4 of this judgement. It would be superfluous to set them out here. All these orders however only apply to Land Parcel No. 3226.

Dated, signed and delivered at Busia this 29th day of November, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

Counsel of Plaintiff.....

Counsel of Defendants.....