



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ENVIRONMENT AND LAND CASE NO. 124 OF 2013.

AMOS KILUYI SIMIYU.....PLAINTIFF

VERSUS

AUGUSTINE MASINDE.....1ST DEFENDANT

PRISCILAH ASAMI.....2ND DEFENDANT

JUDGMENT.

[1]. In Bungoma Chief Magistrate's Civil Suit No. 759 of 2008 Amos Kiluyi Simiyu filed a suit against Augustine Masinde and Priscilah Asami. In that Plaint the Plaintiff averred that he is the registered owner of E. Bukusu/N. Kanduyi/1746 comprising of 1.19 Ha. He denied ever selling the said land to the defendants Augustine Masinde and Priscilah Asami. He stated that he entered into an agreement on 10/10/96 with one Joash Murundu died after paying only Kshs.60,000/= for the said land. The Plaintiff alleged that the said agreement was rescinded and that the deposit should be forfeited or refunded to the purchaser.

[2]. The Plaintiff averred that the 1st and 2nd defendant had encroached on the said land and had commenced tilling and fencing the said land claiming purchaser's interest. The Plaintiff therefore filed this suit claiming a permanent injunction to issue against the defendants from possessing and using the said land. The defendants filed a joint defence and denied the allegation of the Plaintiff. They stated that the land was sold to Joash Murundu the husband of the 2nd defendant at an agreed consideration of Kshs.160,000/= and that by the time the said Murundu died in 2003, he had paid to the Plaintiff Kshs.151,000/= in cash and kind and that the Plaintiff had refused to transfer the said one acre to him. The second defendant stated that she had filed Bungoma HCCC No. 76 of 2008 claiming adverse possession after having stayed on the land for over 12 years.

[3]. The Plaintiff filed number ELC 124 of 2013 on 19/12/2008. He sought a permanent injunction restraining the defendants from interfering with the Plaintiff's possession and use of land parcel No. East Bukusu/N. Kanduyi/1746. He also sought a declaration that the sale vide agreement dated 10/10/1996 between himself and Joash Murundu be rescinded.

A consent was recorded on 18/12/2013 and the Court directed that Land file No. 124 of 2014 in the lead file and that file Number 76 of 2008 whose parties should remain as they are and that the Plaint shall be deemed as defence and the defence as counterclaim.

[4]. The Plaintiff gave evidence and said that the land parcel No. E. Bukusu/N. Kanduyi/1746 and Chwele/Bokoli/2026 be produced title deeds in Court. He said that LR. 1746 is 3 acres and that the defendant came to the land on 10th December 2008 and started fencing it. He produced photographs of

the defendant doing so. He said that he removed the door of the bathrooms he had erected and locked the toilets. He denied ever having sold the said to the land to the defendants. He said that they came to the land by force. The Plaintiff said that he had an agreement of sale with one Joash Murundu entered on 10/10/1996 where they were selling one acre of Kshs.160,000/= and that he paid Kshs.60,000/= and never paid the balance. The agreement was produced as Pexh. 3. He said that the agreement was that he said he was to be given possession after he paid the full purchase price. That he died in 2004. He said that he filed the case after he found the defendants fencing his land. He said that the defendants had not built any house on the land. That he filed this case on 23rd December 2008. He stated further that the defendant filed their suit on 8th January 2009 claimed 2/3 of an acre. He said that he does not know the basis of their claim and that they have not been on the land for 12 years. He prayed that the defendants Suit No. 76 of 2008 be dismissed with costs.

The Plaintiff called Joel Kiluyi Wafula who said that he lives in Chwele. That on 10/12/2008 at 8a.m. he saw strange people putting up barbed wire on the Plaintiff's land. That was plot No. East Bukusu/North Kanduyi/1746. He asked them why they were doing that and they said that they were sent. He said that he informed Amos who came. He said that those people do not live on the land and that there was no one staying on the land.

[5]. The defendant Priscillah Asami said that she lives in Webuye. That previously she lived on L.R. 1746 in Kanduyi. She said that she was the wife of Jackton Murundu deceased. She said that she took possession in 196 and lived in peace. She moved out in 2008 because of insecurity. She said that she is the one who put up the fence and the trees. She said that she knew the agreement of sale. That the payment was by instalments. She said the purchase price was Kshs.160,000/=. She said that the purchase price was paid and only Kshs.19,000/= was outstanding when her husband died. She said she planted the big trees in 1996 and the young ones in 2008 and that she had not sold the ½ an acre to anyone. She prayed to the court to give her that land.

She admitted that in the originating summons she was claiming ¾ of an acre while on oath she was claiming ½ an acre. The defendant called Augustine Masinde as Dw2. He gave evidence that he lives in Kanduyi. He said that he knew the Plaintiff and the defendant and that they lived in Kanduyi and were members of the same Church. He said that the land occupied by the defendant was owned by the Plaintiff. He said the land was bought in 1996 from the Plaintiff and the balance outstanding was Kshs.19,000/=. On cross examination he said the land belongs to the 2nd defendant. That she does not live on the land that she left about the year 2009 on account of threats on her life. That no one stays on the land. He said that he does not know whether the balance was cleared these being the pleadings and the evidence adduced in these cases what are the issues. These can be framed out as the flow from the proceedings as follows;

- (a). Was there a sale of a portion of land between Augustine Masinde, Priscillah Asami and Amos Kiluyi Simiyu as alleged in the HCC 76 OF 2008.
- (b). Priscillah Asami acquired Land by adverse possession to the extent of ¾ of an acre of thereabouts from Amos Kiluyi Simiyu in Land Parcel East Bukusu/North Kanduyi/1746?
- (c). Is Amos Kiluyi Simiyu entitled to evict the said Priscillah Asami from the suit land on account of a failed contract of sale?

Was there an agreement of sale?

By an agreement dated 10/10/96 one Amos Kiluyi Simiyu ID. NO.8836607/71 entered into an agreement for sale of one (1) acre for Kshs.160,000/= House for Kshs.70,000/= a kitchen for Kshs.2,000/= and a toilet for Kshs.15,000/= for a total amount of Kshs.247,000/=. He paid a down payment of Kshs.60,000/=. The

agreement signed by the seller and signed by the Joash Murundu. Also produced in court were other acknowledgements showing the balance as Kshs.19,000/= by 30/11/2000. From the evidence adduced by

this parties herein the purchase price was not completed. The Plaintiff says Kshs.100,000/= was outstanding while the defendant in his evidence and documents show that Kshs.19,000/= is still outstanding. The Plaintiff says that the purchaser Joash Murundu died and his widow entered the land by force. The respondent says she was allowed into occupation in the year 2008. However, the Plaintiff and the defendant that the respondent left this land in the year 2008. The respondent cites insecurity as the cause.

[6]. This land is in a land control area and there is no evidence that any Consent to subdivide the land or to transfer the $\frac{3}{4}$ acre and/or $\frac{1}{2}$ acre as alleged by the respondent in his pleadings and evidence respectively was ever obtained. There was no completion date in this date. The purchaser died in 2004 leaving the same incomplete. On the death of the said Joash the same became void for lack of completion and the same equally naturally died. The only issue that then remain outstanding is the part payment of the purchase price.

Has the defendant herein acquired the $\frac{3}{4}$ acre and or $\frac{1}{2}$ acre he claims in his pleadings and evidence by adverse possession?

The agreement for sale was made in 2006. The respondent entered in land in 2008 only two years after the agreement. The parties herein agree that the defendant herein left the suit land in the same year 2008. This case was filed on 23rd December, 2008. The defendant filed his case which deemed as the defence herein on 8th January, 2009. These cases are the ones being determined in this Judgment. For a case of adverse possession to have any basis, one must have stayed in the land of the registered owner, without force and without being given a notice by the registered owner. The entry must be through trespass or sale that became void for one reason or another.

The agreement for sale was open ended and only became void in 2004 when the purchaser died. No adverse possession could ever accrue to the defendant until 2004, aforesaid. In any case these suits had been filed.

Can the defendant be evicted from the suit land?

There being an open ended agreement of sale that became void on the death of the purchaser and there being no occupation by the purchaser and or his family and there being no adverse possession as earlier stated, the Plaintiff is entitled to recover his land. He will however refund Kshs.141,000/= paid by the defendant each party shall bear their own costs.

Judgment read in open court in the presence of the parties.

Dated, Signed and delivered on 29th September, 2016.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistant: Joy

Madam Wakoli for the defendant

Mr. Areba for the Plaintiff.