



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 41 OF 2014**

**BETWEEN**

**EDWARD WANJALA ..... APPELLANT**

**AND**

**FREDRICK PHILIP KHAYO .....RESPONDENT**

**(An Appeal from a Judgment of the High Court of Kenya at Bungoma, (Omollo, J.) dated 13<sup>th</sup> May, 2014**

**in**

**H.C.C. NO. 60 OF 2005)**

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**JUDGMENT OF THE COURT**

1. On 4<sup>th</sup> July 2005 the respondent filed an originating summons (OS) at the High Court at Bungoma and claimed against the appellant title to six acres portion (the suit land) of the piece of land known as **Title No. East Bukusu/North Nalondo/79** (the main title). In his affidavit in support of that OS, the respondent averred that he bought the suit land for Kshs.4,800/= from the appellant's late father, Silvano Wepukhulu Kuranda (the deceased), on 29<sup>th</sup> January 1976, took possession and he has since been living with his family on it.

2. In his replying affidavit, the appellant denied that the respondent bought any piece of land from his late father and prayed for the dismissal of the respondent's Originating Summons.

3. The respondent's case was heard by Wanjiru Karanja, J. (as she then was) and Muchelule, J. When the defence came up for hearing before Omollo, J. on 20<sup>th</sup> June, 2013, the parties agreed to proceed with the hearing of the case from where it had reached. After hearing the defence case and considering the evidence on record as well as the submissions by counsel for the parties, Omollo J. entered judgment for the respondent and directed the appellant to transfer the suit land to the respondent failing which the Deputy Registrar would execute the requisite documents on behalf of the appellant to facilitate the transfer. This appeal is against that decision.

4. In his three grounds of appeal, the appellant faults the learned Judge for believing the evidence of the respondent and his three witnesses and finding that the deceased had sold the suit land to the respondent. Amplifying those grounds at the hearing of the appeal, Mr. Sitima, learned counsel for the appellant, dismissed the agreement dated 29<sup>th</sup> January 1976, as a worthless piece of paper. He contended that although PW2's name is on the agreement, she conceded in cross-examination that she did not sign it. The name of PW3, who is alleged to have been the scribe of the agreement, is not on it and he did not sign it. The other people whose names are on the agreement never testified. In the circumstances, counsel contended that the agreement was not executed as required by law. At any rate, none of the deceased's family members witnessed the sale and the land was not identified.

5. Counsel for the appellant also argued that the application for consent to excise the suit portion from the main title cannot have been signed by the deceased as the Identity Card Number on it is not that of the deceased. On the respondent's occupation of the suit land, counsel dismissed the respondent's case as contradictory. He argued that while the respondent claimed he lived on the land with his family, his witnesses contradicted that testimony. On those submissions, counsel urged us to allow this appeal.

6. In response, Mrs. Chunge, learned counsel for the respondent, submitted that the agreement was witnessed as required by law. Though PW2 did not sign the agreement, she was present when it was made. PW3, the scribe of the agreement signed the agreement although he did not put his name on it. Counsel concluded that the respondent's witnesses were consistent that the respondent took possession and has been living on the suit since 29<sup>th</sup> January, 1976 when the agreement was signed. In the circumstances, she urged us to dismiss this appeal with costs.

7. We have considered the matter. The respondent's claim giving rise to this appeal is not in dispute, it was not on the validity or otherwise of the sale agreement dated 29<sup>th</sup> January 1976, between the deceased and the respondent. The respondent claimed title to the suit land by adverse possession. So what we are called upon to decide in this appeal is whether or not the respondent proved his adverse possession claim to the required standard, that is, whether or not the respondent proved on a balance of probabilities that prior to filing the suit on 4<sup>th</sup> July, 2005, he had openly and without interruption occupied the suit land for a period of not less than 12 years.

8. In both his affidavit in support of the originating summons and the testimony in court, the respondent stated that he took possession of the suit land immediately after he and the deceased executed the sale agreement Ex.2 on 29<sup>th</sup> January 1976. He erected permanent and semi-permanent buildings on it; planted about 500 coffee and other trees; and he has since been living on the land with his seven wives and several children. At the time he testified in court, four of his wives with 20 children, 10 of whom were married sons, were living on the land. Other than disturbing him after the deceased died in 1990, the appellant has never sought the respondent's eviction from the suit land.

9. The respondents' witnesses, PW2, PW3 and PW4, corroborated his testimony. PW2 and PW3 testified that they had themselves purchased from the deceased one acre each of the main title but it decided to move out. They were refunded the purchase price they had paid to the deceased out of the purchase price the respondent paid to the deceased. They were both present when the respondent paid Kshs.4,800/= to the deceased and PW3 executed the agreement dated 29<sup>th</sup> January, 1976. Though PW2 did not sign the agreement because she was busy packing and preparing to vacate the one acre portion she had bought from the deceased, she was categorical that she was present when the respondent paid to the deceased the purchase price of Kshs. 4,800/= out of which she was refunded the purchase price she and her husband had paid to the deceased. As stated PW3 was the scribe of the agreement and he said he signed it. He was also refunded his money out of the purchase price the respondent paid to the deceased.

10. PW4 is appellant's uncle. He also witnessed the sale and knows five of the respondents' wives living on the land.

11. The appellant testified but never called any witness. His case was that his late father could not have entered into the sale agreement without involving any member of his family. He said he and his brother

were adults who would have witnessed the agreement. He dismissed the application for consent as a forgery as the Identity Card Number on it is different from his late father's. He denied the respondent's occupation of the suit land and said he is on his piece of land known as **Title No. East Bukusu/North Nalondo/81**.

12. On this evidence, we are satisfied that the respondent proved his adverse claim on a balance of probabilities as required by law. His testimony and that of his witnesses as summarized above proved that he entered the suit land on or about 29<sup>th</sup> January, 1976, when he entered into the sale agreement with the deceased. There is no reason why the appellant's own uncle could lie against him. Although that entry was with the consent of the deceased, under the Land Control Act, in force then, the agreement became void for all purposes upon failure to obtain the consent of the Land Control Board for the area within three months. The respondent's occupation therefore became adverse from May, 1976. That occupation was open and uninterrupted for over 28 years. The respondent built and lived on the land with his large family. That was inconsistent with the deceased's title to the suit land.

13. In the circumstances, we find that the respondent proved his case to the required standard and was entitled to judgment. Consequently, we find no merit in this appeal and we accordingly dismiss it with costs.

**Dated and delivered at Kisumu this 12<sup>th</sup> day of February, 2016.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**