



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPEAL NO. 278 OF 2012**

**BETWEEN**

**ANISON NYAHIRI MUHINDI.....APPELLANT**

**AND**

**SAMSON G. NKWEGE .....1<sup>ST</sup> RESPONDENT**

**JULIUS R. NKWEGE .....2<sup>ND</sup> RESPONDENT**

**JOSEPH N. NKWEGE .....3<sup>RD</sup> RESPONDENT**

**ALL SUED AS LEGAL REPRESENTATIVES OF NKWEGE MWITA MONGORI, DECEASED.**

**(An Appeal from the judgment of the High Court of Kenya at Kisii (Musinga, J.) dated 8<sup>th</sup> July 2010**

**in KISII HCCC NO. 24 OF 2006 (OS))**

**JUDGMENT OF THE COURT**

1. This appeal arises from the ownership dispute over a 7 acres portion (the suit land) of the piece of land situate in Buikira area of Migori County known as **Title No. Buikira/Bwisaboka/165** (Parcel No. 165). It is registered in the name of the late Nkwenge Mwita Mongori (the deceased) who was the father of the respondents. The appellant claimed that in 1966, he purchased the suit land from the deceased for Kshs.7,000/= and has since been living on it. In 1984, he bought the adjoining piece of land known as Title No. Buikira/Bwisaboka/177 (Parcel No. 177) from Anne Wanyuru Kiambutha.
2. According to the appellant, the deceased died in 1968. In 2005, the respondents destroyed the common sisal boundary between the two parcels of land and invaded the suit land. That provoked him to take out a citation which prompted the respondents to apply for letters of administration in respect of the deceased's estate.
3. In 2010, the appellant filed an originating summons in the High Court at Kisii being Kisii HCCC No. 24 of 2010 (OS), in which he claimed to have acquired title to the suit land by adverse possession. On their part, the respondents denied the appellant's claim and averred in the replying affidavit that the appellant moved to the area in 1984 after purchasing Parcel No. 177 from the

said Anne Wanyuru Kiambutha. He only started laying a claim to the suit land in 2005.

4. After hearing it, Musinga, J. (as he then was) dismissed that originating summons. This appeal is against that decision.
5. In his 9 grounds of appeal, the appellant has faulted the learned Judge for ignoring the “overwhelming oral and documentary evidence” tendered before him that the appellant had acquired title to the suit land by adverse possession. In his submissions before us, Mr. Oguttu, learned counsel for the appellant, argued that although the appellant did not produce any documentary evidence that he had purchased the suit land from the deceased, he called Joseph Marwa Muniko (PW2) the retired Chief of the area who confirmed the purchase and occupation. He faulted the learned Judge for preferring the respondents’ side of the story to that of the appellant.
6. In response, Mr. Okoth, learned counsel for the respondents, submitted that if the appellant had indeed purchased the suit land from the deceased in 1966 as he claimed, like Anne Kiambutha’s husband who bought Parcel No. 177 from the deceased, the appellant would have obtained title to the suit land during adjudication. Counsel dismissed the evidence of PW2 as unhelpful because he did not witness the sale of the suit land to the appellant. Counsel further argued that the appellant had in any case failed to prove his occupation of the suit land contending that the appellant was on Parcel No. 177. He concluded that if the appellant was indeed in occupation of the suit land, then that was not adverse possession but occupation by consent following the purchase.
7. Having considered these rival submissions and carefully read the record of appeal, we find that two main issues arise for our determination in this appeal. They are whether or not the appellant purchased the suit land from the deceased and secondly whether he had, prior to filing the originating summons, acquired title to it by adverse possession.
8. It is not in dispute that the deceased originally owned 29.7 hectares of land. Prior to the commencement of the land adjudication process in the area, he sold about 12.2 hectares thereof to one Kiambutha Muna. During the adjudication process in the area, Kiambutha Muna got the portion sold to him registered in his name as Title No. Buikira/Bwisaboka/177. This is the piece of land his widow later sold to the appellant.
9. The appellant claimed that he bought the suit land from the deceased in 1966. He said the agreement between him and the deceased was oral. We concur with the learned trial Judge that even back then, one would have expected the parties to have people witness any sale. We also agree with counsel for the respondents that PW2’s testimony did not assist the appellant for the simple reason that PW2 conceded in cross-examination that he did not witness the sale and did not say how he knew of it.
10. If the appellant bought the suit land in 1966, that was long before the commencement of the adjudication process in the area in 1973. Why did he not obtain title to the suit land during that process? The record shows that upon purchase of Parcel No. 177 from Anne Kiambutha, he got the same transferred to him on 10<sup>th</sup> April 1984. If the deceased died in 1968 as the appellant claimed or in 1973 as the respondents claimed, why did the appellant wait until 2006 to attempt to force the respondents to transfer the suit land to him? With no answers to these lingering questions and what we had stated earlier, we concur with both the learned trial Judge and counsel for the respondents that the appellant failed to prove his claim that he purchased the suit land from the deceased.
11. On the issue of adverse occupation, we only have the appellant’s word against the respondents’. PW2’s testimony did not assist the appellant even on this issue. His claim that “[t]he the plaintiff [read appellant] has been living on parcel No. 165 from 1966 to date ” cannot be believed. He did not say if the appellant had been occupying the whole of Parcel No. 165 or a portion thereof.

12. In his replying affidavit, Samson Getangita Nkwege, the 1<sup>st</sup> respondent, averred that when the appellant bought Parcel No. 177, he erected buildings on it close to Parcel No. 165. It will be recalled that Parcel No. 165 adjoins Parcel No. 177 with no clear boundary between them. So how did PW2 know the appellant was occupying Parcel No. 165 and not Parcel No. 177? With no independent evidence, we find that the appellant also failed to prove that he was occupying the suit land.

13. For these reasons, we find no merit in this appeal and we accordingly dismiss it with costs to the respondents.

**DATED and delivered this 21<sup>st</sup> day of April, 2016.**

**D.K. MARAGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**