



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO. 140 OF 2004**

SAMUEL JUMA KUTOLOBWA.....PLAINTIFF

VERSUS

FRANCIS SIMIYU WABWILE

MOSES WEKESA

ELIZAPHANIA NASIMIYU WANYONYI

JAME WANJALA WANYONYI .....DEFENDANTS

**JUDGEMENT**

**The Claim**

[1] The plaintiff's claim against the defendant is for a declaration that the defendant continued occupation of the plaintiff's parcel of land number West Bukusu/South Mateka/1397 amounts to trespass and that the defendants should be evicted therefrom. The plaintiff prayed for mesne profits and permanent injunction from entering, occupying, dealing and or in any other way interfering with the suit land.

[2] The defendants filed a defence and counter claim denying the plaintiff's claim. They particularly disputed the plaintiff's Power of Attorney alleging that it was forged, that it was not registered, not sealed and that no stamp duty was paid on the same and that it was a forgery.

The defendants stated that the portions they occupy on the suit land were their own, obtained through proper sale from the registered owner and denied the particulars of fraud alleged by the plaintiff on the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants counterclaimed for a declaration that they own portions of 100' x 100' and 90' x 100' from the suit land respectively and sought for orders of specific performance.

The 3<sup>rd</sup> and 4<sup>th</sup> defendants counterclaimed for a declaration that they have acquired adverse possession by virtue of occupying their respective portions for a period of 12 years and that they should be registered as proprietors of their respective portions.

**The Evidence**

[3] The plaintiff gave evidence that he is the son of Nyongesa Mrefu Kutolobwa the registered owner

of the suit land West Bukusu South Mateka No. 1397. He produced a certified copy of the register of the suit land as P Exhibit 1. He stated that his father gave him a Power of Attorney which was registered in the land's office on 9/9/2004 and produced it as P Ex 2. He said he knows the defendants herein. He denied ever selling any land to them. He said he carried out a search and he gave the defendants notices on 8/11/2004 to quit and vacate the suit land and they never vacated. He produced the notice as P exhibit 3. He gave evidence that by the time his father gave him the Power of Attorney he had asked the defendants to move out and vacate out of the suit land but they refused to do so. He stated that there was no Land Control consent granted to them to stay on the land. He alleged that the defendants had not been on the land for 12 years and that there was no case of adverse possession at all. He stated that his Power of Attorney was genuine and that it had not been revoked by the donor and that he had capacity to bring this suit.

On cross examination by Mr. Otsiula learned counsel for the defendants, he stated that he knows the defendants and that they entered the land around the year 2004. That the 3<sup>rd</sup> and 4<sup>th</sup> defendants came to the land around the 1990's and that previously they were staying in their own lands. He said he went to Nairobi in 1992. He said that his father is still alive and that the defendants had not lived on the land for 12 years and that they did not buy the land from his father at all.

He denied ever attending any Land Control Board for sub division or ever sub dividing the suit land or even taking part in any mutation.

[4] The first defendant Francis Simiyu Wabwire said he knew the plaintiff. He said that the plaintiff's father is his neighbour. That he sold him a piece of land in 1998. He produced a copy of the agreement dated 7/7/2003 for a plot of 100` x 100`. He stated that he purchased the same for Kshs.18,000.00. He further stated that after the purchase he went to the Land Control Board for sub division and produced the consent as defendant exhibit D2. He alleged that after the sale he went to Bungoma and had a mutation drawn and the resultant subdivision produced plots no. 3654, 55 and 56 he produced a copy of the mutation and said it was signed by the father of the plaintiff one Nyongesa Mrefu. He said his plot was 3658 and the lady's was 3655 and Wekesa got 3654. He produced the said mutation as Pexhibit D4. He stated that when he went to the land office he found an inhibition on the said land and the mutation was not registered.

On cross examination by Mr. Makokha learned counsel for the plaintiff, he stated that the application for land control board was made on 30/12/2004 and that this case was filed in court on 24<sup>th</sup> December 2004. He admitted that this case is 6 days older than the consent. He also admitted that the consent does not have a name and that there was no application for transfer. That the plaintiff was given the power of Attorney on 29/9/2004 and that the plaintiff did not accompany the 1<sup>st</sup> defendant to the Land Control Board. The defendant conceded that that he had no agreement for purchasing the land in 1998.

[5] The second defendant Moses Wekesa said he bought a plot of 60` x 90` on 13<sup>th</sup> May 1999 for Kshs.15,000.00 which he paid in full. He produced a copy of a sale agreement with Joseph Mrefu Kutolobwa and a translation of the same as DMF1 1(a) and (b). He stated that he entered the land and built a church in August 1999. He said that he did not attend the Land Control Board and that the seller did not have an identification card.

[6] The 3<sup>rd</sup> defendant Elizaphania Nasimiyu Wanyonyi said that her late husband one Peter Wanyonyi bought the plaintiff's land. She said she does not know the year. That she left all her documents at home. She said that she has lived on the land and she cultivates on the land now. She said she has no agreement for sale and has not gone to the Land Control Board for the Land Control Consent. She said

that her husband bought one acre.

[7] The fourth defendant Jane Nanjala Wanyonyi said that the 3<sup>rd</sup> defendant is her co-wife. She said that she knows the plaintiff and his father who sold her husband two acres. She said that she had no agreement for sale and that she forgot it at home. She said that she lives on the land and that they bought it in 1975.

[8] After the evidence of the plaintiff and the defendants, their respective advocates told the court that they would solely rely on the evidence on record and would not make any submissions.

### The Issues

[9] The issues for determination in this case after perusal of the evidence adduced in court can be stated as follows:-

- (a) Does the plaintiff have a valid authority to bring this suit"
- (b) Are the plaintiffs occupation of the suit land pursuant to a valid sale agreement with the registered owner of the suit land one Joseph Mrefu Kutolobwa"
- (c) Is the occupation of the 3<sup>rd</sup> and 4<sup>th</sup> defendant adverse to the interests of the registered owner Joseph Mrefu Kutolobwa"
- (d) Should the defendants move out and vacate out of the suit land"
- (e) Who should bear the costs of this suit"

### Analysis

[10] The plaintiff in this case said he is the son of Joseph Mrefu Kutolobwa. He produced a copy of the register of land parcel W.Bukusu/S.Mateka/1397. The land was registered in the name of Nyongesa Mrefu on 10/7/73. He also produced a Power of Attorney registered on 29<sup>th</sup> September 2004, at the lands office Bungoma. He alleged that on 8/11/2004 he instructed his lawyers Wetangula and Company to write a letter to Moses Wekesa and others and Peter Wanyoyi Waswa (deceased) to move out and vacate their occupation of West Bukusu/South Mateka/1397 within seven (7) days of that letter. He produced the said letters as evidence in this case. He avers that the defendants never moved out of the land at all. He stated that they are on the land illegally and that they should be ordered to move out and vacate the land.

[11] The plaintiff's power of Attorney was challenged by the defendants. They seemed to allege that it was illegal. However on my perusal of the said document, I find that these allegations are without any foundation. The power of attorney was duly registered in the land office on 28<sup>th</sup> September 2004. The donor of the power of Attorney is still alive. The power cannot be faulted in any way. My finding is that the plaintiff herein had power to bring this suit under the provisions of the now repealed Cap 300 Laws of Kenya.

[12] The defendants allege that they occupied this land through a sale agreement with Mr Joseph Mrefu Kutolobwa the registered owner. The first defendant produced an agreement dated 7/7/2003. This agreement was for sale of a portion measuring 90'x60' from land parcel West Bukusu/S.Mateka/1397 for Ksh.15,000/-. This amount is shown in the said agreement as having been paid in installments of

Ksh.10,000 on 13/5/99 and Ksh.5000 on 20/5/99. Various witnesses have attested their signatures to the same. The 1<sup>st</sup> defendant produced a copy of the Register of the suit land showing a caution in favour of Peter Wanyonyi Waswa of P O Box 108 Bungoma. The caution was later removed by the Land Registrar on 6/9/04. A restriction was imposed by this court on 19/5/2015 prohibiting any dealings with the case pending the final determination of this case. A consent to subdivide this land was granted by the Bumula Land Control Board on 30/12/04 to a Mr Nyongesa Mrefu. The 1<sup>st</sup> defendant also produced a consent to subdivide the suit land into various parcels. The same is thumb printed and signed by Geometric Services. The same was not registered in the land office. The 2<sup>nd</sup> defendant alleged he bought a portion of 60'x90' for Ksh.15000 which he states he paid in full and produced documents as evidence. The 3<sup>rd</sup> and 4<sup>th</sup> defendants are wives of one Peter Wanyonyi who is also alleged to have bought a piece of land on the land. They produced no documents. There was absolutely no dispute that the defendants were in occupation of the suit land. What is in dispute is whether any purchase price was paid to the father of the plaintiff. This issue would have been clarified if the defendants called the said Joseph Mrefu Kutolobwa probably through a witness summons. Sadly, no one found it fit to summon him to court. For now it is safe to say that the defendants were on the suit land through a licence by the registered owner. I do so find.

[13] Having found that all the defendants were on the suit land through some form of licence, I find that the 3<sup>rd</sup> and 4<sup>th</sup> defendants' occupation of the suit land cannot be adverse to the interests of the registered owner. Their licence was terminated by the notice of the plaintiff to them dated 8/11/04. The computation of time for adverse possession could then start to run from that date. This case asking them to move was filed on 23<sup>rd</sup> December 2004. Therefore a claim for adverse possession cannot be maintained. The 3<sup>rd</sup> and 4<sup>th</sup> defendants' occupation of the suit land is not adverse to the interests of the registered owner on the suit land.

[14] The land herein is registered land. It is registered under the now repealed Cap 300 Laws of Kenya. This is agricultural land which is subject to land control consent. The land control consent to purchase the respective portions, the defendants claim herein were not obtained. When land is bought that is subject to land control and no land control consent is obtained, then no interest passes, the transaction is void for all purposes and the purchase price is recoverable as a debt see Sec 6 of Land Control Act Cap 302.

[15] The defendants will have to move and vacate out of the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were able to prove they paid Ksh.15000 each for the portion they occupy. They shall have the same refunded to them with interests at court rates from the date of payment. Once the said sum is paid with interests, they shall move and vacate therefrom within 90 days of payment. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not prove that any consideration passed on between their late husband Peter Wanyonyi and Joseph Mrefu Kutolobwa. They shall also move out and vacate the suit land within 90 days from the date hereof. There was no mesne profits proved before me by the plaintiff. I will award none. Each party shall bear their own costs of this suit.

It is so ordered.

**Dated at Bungoma this 9<sup>th</sup> day of March 2016.**

**S.MUKUNYA**

**JUDGE**



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