



**REPUBLIC OF KENYA.**

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

**CIVIL SUIT NO. 75 OF 2009(OS).**

**DYPHINAH M. KHAONJELI.....PLAINTIFF**

**VERSUS.**

**WAZIRI ABUBAKARI ALI.....1<sup>ST</sup> DEFENDANT**

**BAKARI ORATA AMISI.....2<sup>ND</sup> DEFENDANT**

**ATHUMANI WESONGA WAZIRI.....3<sup>RD</sup> DEFENDANT**

**HANIFA NAFULA WAZIRI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT.**

[1] Three suits were filed by the parties in respect of Land parcels Ndivisi/Muchi/2120 and the resultant parcels.

[2] Bungoma High Court Civil Suit Number 75 of 2009(O.S) filed by Dyphinah M. Khaonjeli Versus. Waziri Abubakari Ali, Bakari Orata Amisi, Athumani Wesonga Waziri in which the applicant sought for the determination by the Court of whether she has been in notorious possession of land measuring 25 yards x 10 yards out of the original Ndivisi/Muchi/2120 and more specifically Ndivisi Muchi 5169 a resultant subdivision which was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. And further whether the 1<sup>st</sup> respondents title to said portion of 25 x 10 yards has been extinguished upon the applicants occupation of over 12 years over the same and finally whether the transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent was lawful or whether it was intended to defeat the interests of the applicant therein.

[3] In Bungoma High Court Civil Suit No. 56 of 2006 the plaintiffs Bakari Orata Amisi and Athumani Wesonga Waziri filed suit against Dyphinah Khaonjeli and claimed that they were the registered owner of Ndivisi/Muchi/5169 measuring approximately 0.02 Hectares and that in the Month of July 2004 the defendant without any reasonable cause and/or justification trespassed and constructed a semi-permanent structure on the said plot and continued to wrongfully occupy the plaintiffs plot since then to date. They claimed for eviction of the plaintiff from plot No. Ndivisi/Muchi/5169.

[4] Bungoma Land and Environment case No. 217 of 2013 was filed by Hanifa Nafula Waziri against Dyphina Khaonjeli. She states that she is the absolute registered owner of land Parcel Ndivisi/Muchi/6036. She stated that she had created a 15 x 62 access road for her tenants on the said plot. That on 20/12/2010 the defendant without any justifiable cause trespassed and entered the plaintiffs parcel of land and uprooted the boundary separating Plot No. Ndivisi/Muchi/4036 and Ndivisi/Muchi 5169 where she stays as a licensee and that Plots No. 5169 and 3056 share a boundary. That it is on that passage that the defendant has constructed two semi-permanent structures for her four animals and a

Kitchen thereof. The plaintiff therefore prays for a permanent injunction restraining the defendant from trespassing into the plaintiffs land parcel number Ndivisi/Muchi/4036 she also prays for an eviction thereof.

[5] When Bungoma High Court Civil Case No. 75(OS) came for hearing on 17/5/2016. The advocate for the Plaintiff applicant in the Originating Summons Mr. Juma and Mr. Ateya for the respondent and Madam Barasa agreed by Consent that Bungoma HCCC 58 of 2006 and ELC 217 of 2013 be consolidated so that Bungoma HCCC No. 75 (O.S) becomes the lead case, the applicants in that case becomes the plaintiff and the plaintiff in Bungoma HCCC 58 of 2005 and the plaintiffs in Bungoma ELC 217 of 2013 becomes the first and second defendants respectively and that the said suits be heard on merit on 17/5/2016. The case could not be reached that day and the same was fixed for hearing on 27/10/2016. The case was not heard on 22/10/2016 since Mr. Ateya Advocate had not filed the witness statements and Mr. Juma Advocate had not bound his documents. The case was adjourned to 2/11/2016 for the parties to comply with order 11.

[6] During the hearing, only Mr. Juma Advocate for the applicant and Mr. Ateya Advocate for the respondent attended. There was no appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and the parties and their advocates in ELC 217 of 2013. All these parties were present when these suits were consolidated on 17/5/2016 and were aware of the subsequent hearing dates. The applicant Dyphinah Mwanga Khaonjeli gave evidence. She relied on her statement dated 4/6/2014 and produced a bunch of documents which were an agreement for sale, land subdivision and a notice of a meeting of Webuye Town Council Green cards, Minutes of Town Council of Webuye, proceedings in Land dispute Tribunal No 16 of 2006 a letter from D.O. Webuye, proceedings and an award from Land Disputes Tribunal an order for transfer of land, letter from Land office Bungoma, a subdivision of Ndivisi/Muchi/2120.

She gave evidence that she has lived on the plot and she applied that she is declared the owner of the plot through adverse possession. On cross examination by Mr. Ateya Advocate she said that she bought the plot from Parcel 2120 from the one Ali Abubakar Waziri and that there was an agreement to that effect. The plaintiff then closed her case.

[7] The defendant Ali Wazir Abubaka, relied on his statement filed in court as his evidence and asked the court to adopt it. On cross examination by the learned counsel for the applicant he admitted that he sold land to applicant, land parcel Ndivisi/Muchi/2129 on 3<sup>rd</sup> January 1984. He said that the applicant has lived on parcel number 2120 from 1984 to 1998. That he discovered that fact in 1997 and did not take the applicant to court and that he had no documents to show that the occupation was not peaceful. This case was given another hearing date since the court ran out of time, it was then 5 p.m. and the case was fixed for hearing on 8/5/2017. On that day only the applicant and her advocate appeared and the applicant asked that the case be closed and she was given a date for submissions. I obliged the prayer for the applicant and ordered that the parties to file and serve their submissions by 30/5/2017 and the case be fixed for submissions on 5/6/2017. As at 21/6/2017 only the applicant plaintiff had filed her submissions and the suit was set down for Judgment on 16/10/2017.

[8] Originally the applicant Dyphinah M. Khaonjeli herein had sued for adverse possession of a portion of 25 x 10 yards comprised in title Number Ndivisi/Muchi/2120. Later on she sued Bakari Orata Amisi and Athumani Wesonga Waziri the 2<sup>nd</sup> and 3<sup>rd</sup> defendant because the portion the applicant occupied is registered in their names as land parcel Ndivisi/Muchi/5169 after Sub-division of Ndivisi/Muchi 2120.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondent had initially sued the applicant for eviction in Bungoma HCCC 58 of 2006. Similarly one Hanifa Nafula Waziri the wife of the 1<sup>st</sup> defendant had sued the applicant claiming for permanent injunction restraining the applicant from entering Hanifa Waziri's land parcel Ndivisi/Muchi/4036 in Bungoma ELC No. 217 of 2013. The plaintiffs in Bungoma HCCC 58 of 2006 and Bungoma ELC 217 of 2013 did not turn up during the hearing of the case and their cases were closed. Consequently no evidence was rendered in Bungoma HCCC No. 58 of 2006 and Bungoma ELC 217 of 2013. I dismiss those cases with costs to the applicant herein.

[9] The applicant herein produced evidence that she purchased a piece of land 25 x 10 yards comprising land parcel Ndivisi/Muchi 2110 registered in the names of Waziri Ali. There was an agreement for sale for the same and the entire purchase price was duly paid as per documents filed in court. The entry into such land was in 1983 where she occupied and put up dwelling structures and she is in occupation till now. This land was subject to land control as the same was agricultural land. None was obtained. The same became void for lack of such control after six months after the payment of full purchase price.

Thereafter the registered owner Wazir Ali secretly subdivided the said Ndivisi/Muchi/2120 into various portions and transferred the resultant Subdivisions to various people who were his relatives and to his wife Hanifa Nafula Waziri who the plaintiff in Bungoma ELC No. 217 of 2013. After those subdivisions the portion the applicant occupies became Ndivisi/Muchi/5169 which was registered in the names of Bakari Orata Amisi and Athumani Wesonga Waziri. The proceedings in the case filed at the Land Disputes tribunal are evident that the applicant was in the land since 1983. Ndivisi/Muchi/2120 was subdivided by Waziri Abubakar Ali in 1998. By this time the applicant had been on the said portion of 25 x 10 yards for in excess of 12 years. The applicant had by then acquired title by adverse possession. The said Waziri Abubakar Ali had been dispossessed of his proprietary rights by the applicant herein. The same was therefore not available to him since his title had been extinguished by such occupation. See Lusenaka & Another Versus. . Omocha KLR[1994].

No legal proceedings had been taken by the 1<sup>st</sup> respondent over the applicants occupation of the suit land. The occupation was therefore uninterrupted see Githu Vs. Ndeete KLR [1980].

All in all I am convinced that the applicant herein has proved her claim in the amended originating Summons dated 28<sup>th</sup> June, 2013 and I allow the orders prayed therein with costs.

It is so ordered.

Judgment read in open Court before the Counsels

**Dated at Bungoma this 22<sup>nd</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Joy: Court Assistant

Mr. Ateya: For the defendant

Mr. Obuyi: For Mr. Juma for the plaintiff