



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 165 OF 2016**

**HUDSON BWIRE ASANGO.....PLAINTIFF**

**= VERSUS =**

**EUNICE OJIAMBO.....DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff – **HUDSON BWIRE ASANGO** – instituted this suit here against the Defendant – **EUNICE OJIAMBO** – on 22/11/2016 vide a plaint dated 21/11/2016. He pleaded, *inter alia*, that his late father – **JACKSON ASANGO JAMES** – owned land parcel No. LR. SAMIA/BUBURI/200 (“suit land” hereafter) and had sold two acres of the suit land to Defendant’s husband, the late **GABRIEL ODHIAMBO**. That happened in the year 2002. Sometimes later, at the initiative of the late Defendant’s husband, the purchase money was refunded and the ownership of the sold portion thereafter reverted to the late Jackson and/or his family. The Defendant however has refused to vacate the land and is obstructing the Plaintiff and other members of the Plaintiff’s family from using the land.

2. This suit was filed with the aim of restraining the Defendant and it has only two prayers as follows:

Prayer (a): A permanent injunction restraining the

Defendant, her servants, agents and/or employees or anyone acting on her instructions from entering, cultivating, or in any other manner whatsoever interfering with the Plaintiff’s peaceful enjoyment of land parcel SAMIA/BUBURI/200.

Prayer (b): Costs of the suit

3. The Defendant denied the Plaintiff’s claim and counter-claimed. Her defence and counter-claim was filed on 23/1/2017. According to the Defendant, the land belonged to her husband though the Plaintiff’s father was the registered owner. She has possessed the land, she pleaded, from the year 2002 when the purchase took place. According to her, she owns the land and has a right to keep off trespassers from it.

4. The Defendant’s counter-claim is one of adverse possession. She pleaded that she has been in quiet and peaceful occupation of the land for over 12 years, starting from year 2002 to date. She asked that she be declared owner by adverse possession. Her prayers were as follows:

Prayer I: That the Plaintiff’s suit be dismissed with costs

Prayer 2: Judgement be entered for her as follows:

(a) That the Plaintiff’s title to two acres out of land parcel No. SAMIA/BUBURI/200 became extinguished upon expiry for 12 years from the time the Defendant went into possession, that is from the year 2002.

(b) That the Defendant has now acquired the said two acres by virtue of adverse possession.

(c) Costs of the counter-claim to the Defendant

5. The Plaintiff filed reply to defence and defence to counter-claim on 31/1/2017. Essentially, the Plaintiff denied the Defendant’s averments in both the defence and counter-claim.

6. The court started hearing the matter on 18/7/2017. The Plaintiff testified as PW1. He was the only witness in his case. He talked of his late father having sold some two acres of the suit land to the Defendant's late husband. That, according to him, happened in the year 2009. Then in the year 2016, the Defendant's late husband called him and his brother – JAMES ATSANGO – and expressed intention to return the land to them. The two brothers said they would wish that to be done in the presence of the family of the Defendant's late husband. The Defendant's late husband promised to contact the two brothers later and on 24/7/2016 he called them to his house where a meeting took place in presence of some members of the family of the Defendant's late husband.
7. While only the Plaintiff and his brother were present on the Plaintiff's side, those present on the side of the Defendant's late husband were Leonard Ojiambo Wandera, Jane Ogolla Nyongesa, Ojiambo Boniface and Lucy Ojiambo. Their relationship with the Defendant's late husband was as follows: Leonard was a son by a different wife, Jane was a sister, while Boniface was the Defendant's own son. And Lucy was a daughter.
8. At the meeting, a written agreement – availed here as PEX NO.1 – was entered into and the purchase money was refunded, with some interests. PW1 said the amount refunded was Ksh.60,000. During cross-examination by Juma, counsel for Defendant, the Plaintiff was asked whether he knew the state of health of the Defendant's late husband. He said he knew the husband was sick but was unaware that he had depression. And on suggestion that the agreement was done in secrecy, the Plaintiff denied it and asserted that even the area assistant chief, one James Ndalo, was present and was even the one who wrote the agreement.
9. The Defendant testified as DW1 and, like the Plaintiff, she was the only witness on her side. She said, *inter alia*, that she is in occupation of the portion of land bought by her late husband. It was bought in the year 2002 and the purchase money was meant for the Plaintiff's brother school fees. She denied knowledge of the return of the land to the Plaintiff and said she only got aware of it when the Plaintiff's mother came abusing her. The Plaintiff's mother, Defendant said, mentioned in the course of abuse that the Defendant's husband had re-sold the land to the Plaintiff's family.
10. The Defendant also said that when she got to learn of it, she tried to refund the money but the Plaintiff refused. And her late husband was sick, she said, and the sickness had affected his mental soundness. The defendant however admitted that the signatories shown in the agreement were those of close relatives, with one being her own son who, according to her, also has a mental problem.
11. The Defendant was cross-examined by Obwatinya for Plaintiff. She insisted that her husband was sick and the sickness had affected his state of mind. To her, this explains why he acted the way he did including giving his bank account number to the Plaintiff to deposit the fund. Shown a written authority (DEX No4) given to her by her late husband to transact on his bank account, she admitted she was given such authority and about one week later, the husband died. And regarding the refund of 60,000/=, she accepted receiving and using it on burial. She however said that she has another 60,000/= which she can refund to the Plaintiff.
12. The matter was finally submitted on in writing after all the evidence was in. The Plaintiff's submissions were filed on 4/10/2017. The Plaintiff made reference to the pleadings; gave an overview of evidence and then stated that the court is called upon to decide whether there was a refund; what state of mind the Defendant's husband was in at the time; whether the Defendant is landless and poor; how reliable the Defendant's testimony is; who is entitled to the land; and finally who is to bear costs.
13. To the Plaintiff, it is well demonstrated there was a refund and on the issue of the state of mind of the Defendant's late husband, it was stated that the "old man was in a good state of mind bearing in mind that it was him who initiated the discussion over the refund and summoned his children and his sister who equally signed the agreement".
14. And the Defendant was said not to be landless or poor as "she had a residential house and rental houses on another piece of land". The Defendant's evidence was said not to be reliable. To the Plaintiff, she gave different figures as the purchase price – 58,000/= and 48,000/= - and also attributed madness to her own son without availing evidence. The Plaintiff's position is that he is entitled to the land and should also get costs of the suit. The Defendant claim of adverse possession was said to have become extinguished when the refund was made.
15. The Defendant's submissions were filed on 10/10/2017. According to the Defendant, the plaintiff's suit is a non-starter. And this is so because the suit land belongs to the Plaintiff's late father and the Plaintiff had no authority to enter into negotiations without the requisite grant enabling him to represent his late father's estate. And the agreement for the alleged refund was faulted, first, for not expressly stating it was for a refund and, second, for showing a different party – the Plaintiff's own brother as the one transacting with the Defendant's husband. The Plaintiff is seen as a person requiring authority to prosecute this case yet he showed no such authority.
16. It was reiterated that the Defendant's husband was ailing and it was the Defendant's further averment that none of the family members said to have been signatories to the agreement for refund was called to testify. This being the case the alleged reversion of the land to the Plaintiff was of no effect in law. The Defendant also submitted that as she was party to the sale transaction between the Plaintiff's late father and her late husband, her consent should have been sought during refund but was not. To her, this makes the transaction null and void.
17. On the issue of adverse possession, the Defendant submitted that she took possession of the land immediately it was bought. She has been cultivating it to date. She is said to have been in quiet and peaceful possession all along. Her counter-claim therefore should succeed. Ultimately the court was urged to enter judgement on the counter-claim and also dismiss the Plaintiff's claim with costs.
18. I have considered the pleadings, evidence, and the rival submissions. I think I do not have to decide whether there was a refund or not. The Plaintiff alleged it. The Defendant admitted it. The only point of departure between the two sides is that while the Plaintiff avers that all the parties involved – including the Defendant's late husband – did it willingly and voluntarily, the Defendant asserts that her husband was mentally impaired and could not therefore act voluntarily and/or rationally. To the Defendant, the Plaintiff and his brother took undue advantage of her late husband. I think what I should inquire into and decide upon is whether the refund was made in the right or proper circumstances.
19. The Defendant is the one who brought up the issue of her husband's state of mind at the time. The duty to prove it therefore fell on her.

Mental instability is almost always a medical condition. To prove it, one needs to avail medical records from which the necessary information can be gleaned. The Defendant brought nothing. The Plaintiff alleged that the issue of refund did not even come from his side. The Defendant's late husband initiated it. The agreement entered into has many members of the family of the Defendant's late husband. They appended their names and signatures as witnesses. Were they also mentally unsound? The Defendant would have us believe that her own son who also signed has a mental problem. But what did she avail to show it? Nothing.

20. The Defendant availed a case – **PETER MUNYUA GATARA Vs MARY WAMBUI MUNYUA: ELC Case No. 369 of 2012, MILIMANI, NAIROBI** – where, like here, mental unsoundness of one party was alleged. The court rejected the allegation for reasons, *inter alia*, that medical evidence had not been availed to demonstrate it. That authority is persuasive and I agree with it.

21. But even aside from the authority, it seems clear to me that the refund was not a one – person affair. The Defendant's side was well represented by people whose sanity has not been faulted. I realise too that the agreement for refund was done on 24/7/2016. This is time the late husband of the Defendant was said to be mentally unstable. On 8/8/2016, the same husband is shown to have written a letter (DEX No.4) authorising the Defendant herself to transact with his bank because, says the letter, "I am very sick hence unable to come to the bank".

22. I think the Defendant acted on the letter and the bank accepted the letter too. I say so because the Defendant herself talked of withdrawing money from her late husband's account. The letter was written two weeks after the agreement for refund was made. Question is: Was the Defendant's late husband of unsound mind owing to sickness on 24/7/2016 but of sound mind two weeks later while still sick (He wrote that he was sick in the letter) on 8/8/2016 to write a good letter giving the Defendant authority to withdraw money from the bank? I think the Defendant is telling a lie here. What appears to be the position is that all was well when a letter beneficial to her was written but it was not well when a transaction she disapproves of was conducted by the same person. I reject the Defendant's allegation. She does not seem to be forthright.

23. The Plaintiff also thought that the court should try to find out whether the Defendant is landless or poor. Again this is not an issue. And it is not an issue because the law is, or should be status-blind. What for instance should the court do if it finds the Defendant is poor, or even landless? Give her land belonging to someone else? What if she is rich and has land? Should we deny her the land she is claiming because she is rich and has other land elsewhere? I leave this issue at that.

24. The reliability of the Defendant testimony is a relevant issue and so also is the reliability of the Plaintiff's testimony. I think I have already pointed out some of the shortcomings in the Defendant's evidence and have rejected such of it that I find not reliable. I think I should now focus on the issue of adverse possession.

25. The Defendant's claim to adverse possession needs to be examined in light of how she and her late husband entered the land. And it is obvious that their entry was by permission of the seller. It was incumbent on the Defendant to state clearly when possession because adverse. When did permissive possession end so that adverse possession can be said to have started. In matters where adverse possession is claimed after a purchase transaction has fallen through, it is usual for the court to look at the written agreement in order to start calculating time in light of the provisions of Land Control Act (cap 302). In this matter, neither the Plaintiff nor the Defendant availed the sale agreement between the deceased parties. It therefore becomes difficult to estimate when time started running.

26. I think the Defendant's approach on the issue of adverse possession was too casual. Apart from the factor of time, there are other ingredients for proof of adverse possession that need to be shown as proved but were not. In simple terms, adverse possession is always said to be demonstrated where the *maxim nec vi, nec clam, nec precario* (no force, no secrecy, no evasion) is well proved. No attempt was made to show this. Besides, adverse possession seems to be very much an afterthought. Even when giving evidence here, the Defendant was still talking of willingness to refund the purchase money refunded by the Plaintiff. Why would she do this if she sees herself as an adverse possessor? Isn't the refund meant obviously to restore her late husband's position as a purchaser?

27. Still on this issue, it is necessary to appreciate that the Defendant did not enter the land apart from her late husband. She entered because of, and not apart from, her husband's entry. She continued to be on the land because of the rights enjoyed by her husband. When the husband accepted the refund of the purchase money, he relinquished or forfeited his rights over the land and while doing so, the rights of every other member of his family including the Defendant, got extinguished. The Defendant cannot turn around to start claiming interests separate from those of her late husband. That is why I find the claim of adverse possession mischievous.

28. The Defendant tried to claim that as she was on the land, with her husband, her consent needed to be sought. I really do not understand what the Defendant means by this. Was she a co-purchaser of the land? If she was, I would agree that her consent was required. If she was not, her consent was obviously unnecessary because any right or interest she thinks she had could only be subsumed under the rights/interests of her late husband. The Defendant availed no evidence that she was a co-purchaser, or a joint owner if you like, and it is therefore not possible to agree that her consent was needed.

29. Besides, even assuming that her consent was required, who should have given that consent? In my view, the issue of consent was purely between her and her husband. Another issue raised concerned lack of probate grant by the Plaintiff when they dealt with the Defendant's husband. Again here, the argument advanced is not persuasive. The Plaintiff was called to transact. He did not initiate the transaction. If he had initiated the transaction, it is possible to argue that he did so regarding the estate of a deceased person yet he had no grant. But now, it is the other way round. The Plaintiff was called. He responded. How can you fault him for responding? The matter was purely in the hands of the Defendant's husband and he dealt with it as he pleased. In my view, the Plaintiff is not to be blamed.

30. When all the foregoing is considered, it is clear that the portion the Defendant claims cannot be regarded as her own. It is not possible to treat her as a purchaser or adverse possessor. It follows therefore that the Plaintiff's claim has to succeed. I therefore allow the Plaintiff's claim in terms of prayer (a). And I think that it is also necessary to make it clear that the Defendant's claim has not succeeded. I hereby dismiss the Defendant's claim. Then there is the issue of costs. One, the Plaintiff, filed a suit. The other, the Defendant, counter-claimed. Both seem to be humble inhabitants of the same village. I do not deem it necessary to order the Defendant, a widow, to pay costs. Each side therefore should bear its own costs.

**Dated, signed and delivered at Busia this 25<sup>th</sup> day of September, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: .....

Defendant: .....

Counsel of Plaintiff: .....

Counsel of Defendant: .....