



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ENVIRONMENT AND LAND CASE NUMBER 26 OF 2021 (O.S)**

**CHRISTINE JAOKO OKECH.....1<sup>ST</sup> PLAINTIFF**

**JACOB JUMA OKECH.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ALOYCE ODHIAMBO OKOTH.....1<sup>ST</sup> DEFENDANT**

**CHRISPINE OTIENO JAMBA.....2<sup>ND</sup> DEFENDANT**

**CLEOPHAS OUMA JUMA.....3<sup>RD</sup> DEFENDANT**

**JUDITH ADHIAMBO AKONGO.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By way of an originating summons dated 6/06/2013, the plaintiffs instituted suit against the defendants. The substratum of the dispute revolves around the subdivision and sale by the 1<sup>st</sup> defendant of parcels of land emanating from land parcel number **SIAYA/KARAPUL RAMBA 459 [‘the suit property’]** which purportedly was ancestral land to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The plaintiffs claim to be adverse possessors to the suit property. In response, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants filed replying affidavits dated 18/07/2013. A notice of withdrawal of suit dated 5/03/2019 was filed against the 3<sup>rd</sup> respondent. This withdrawal was adopted as an order of the court on 12/3/2019. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants denied the existence of illegalities in the process of subdivision, sale and purchase of the suit property and stated that the suit property was not ancestral land because the plaintiffs had their own distinct parcel of land. By the court’s directions dated 3/4/2014, the originating summons was converted into an ordinary suit.

**The plaintiffs’ case and evidence**

2. The plaintiffs’ case is contained in their originating summons dated 6/6/2013, supporting affidavit dated 6/06/2013, 2<sup>nd</sup> plaintiff’s witness statement dated 24/06/2014 and a witness statement of one Gorreti Margaret Awuor Ochieng, documents produced as “**Pexh 1 to 4**” which respectively were a “greencard” of the suit, a national identity card, death certificate of Wamaya Hawala, a mutation form and a letter from an area chief and oral evidence tendered in court during the hearing. In summary, it was the plaintiffs’ case that the suit property was ancestral land and was originally owned by the family’s patriarch one Hawala Oduma who had two sons namely; Wamaya Hawala who was the 1<sup>st</sup> defendant’s grandfather and Okech Hawala who was the 1<sup>st</sup> plaintiff’s husband and father to the 2<sup>nd</sup> plaintiff. It was their case that during the land demarcation process in the locality, Wamaya Hawala who was the eldest son in the family was registered as the proprietor of the suit property and he was to hold it in trust for himself and his brother Okech Hawala. They contended that the family patriarch, his two sons Wamaya Hawala and Okech Hawala and their respective families lived in the suit property but at one time or the other, Wamaya Hawala parted ways with his wife and eventually relocated to another place. However, he returned to the suit property in the year 1999 and died shortly thereafter. According to them, Wamaya Hawala’s only son one Vitalis Okelo Wamaya died in the year 1993 and he was survived by the 1<sup>st</sup> defendant and three of his brothers. Upon the death of Wamaya Hawala, the 1<sup>st</sup> defendant, secretly and fraudulently subdivided and sold the suit property to 3<sup>rd</sup> parties who are the 2<sup>nd</sup> to 4<sup>th</sup> defendants.

3. The 1<sup>st</sup> plaintiff claimed to have lived on the suit property from the onset of her marriage in 1950’s while the 2<sup>nd</sup> plaintiff claimed to have lived on the suit property peacefully for several years and his father was buried on the suit property.

4. In his testimony, the 2<sup>nd</sup> plaintiff stated that the 1<sup>st</sup> plaintiff had always resided on the suit property to the exclusion of the defendants. Apart from his testimony, the plaintiffs led evidence by Margaret Awuor Ochieng (**PW2**) who is a daughter of the 1<sup>st</sup> plaintiff and who

stated that the suit property is ancestral land and Wamaya Hawala held it in trust for the family and he was supposed to distribute it between himself and his younger brother. She asserted that during Wamaya Hawala's lifetime, he never disclosed where he kept title documents for the suit property. She stated the 1<sup>st</sup> defendant cannot claim sole ownership of the suit property because he had other brothers who were entitled to the land. She prayed for the court to give the title documents to the suit property to the plaintiffs for purposes of distribution.

5. The plaintiffs sought the following reliefs in the originating summons; (i) a declaration that the plaintiffs have acquired an interest by way of adverse possession and are entitled to the suit property and/or subsequent subdivisions namely **SIAYA/KARAPUL RAMBA land parcels numbers 4998,4999,5000 and 5001** (ii) the court declare that Wamaya Hawala held the suit property in trust for Okech Hawala and therefore the plaintiffs are entitled to inherit a portion of the suit land (iii) an order be made directing the plaintiffs to be registered as proprietors of the suit land and, (iv) the costs of the suit be awarded to the plaintiffs.

#### **The defendants' case and evidence**

6. The 1<sup>st</sup> defendant's case is contained in his replying affidavit dated 18/07/2013, witness statement dated 29/10/2020 and oral evidence tendered in court during the hearing. In summary, when he was about 10 years old, his grandfather Wamaya Hawala handed him over to one Rifunga Odembo and in the process, he bequeathed the suit property to him. The title deed to the suit property was left in the custody of Rifunga Odembo by his grandfather in 1986 and Rifunga Odembo handed it over to him between the years of 2017 to 2018. His grandfather, father and mother lived on the suit property until their demise in the respective years of 1996, 1993 and 1997. He contended that Okech Hawala had his own distinct parcel of land and the plaintiffs merely wanted to disinherit him. He stated he sold portions of the suit property to the 2<sup>nd</sup> and 4<sup>th</sup> respondent and that the transactions were above board. He stated that the 1<sup>st</sup> plaintiff had always lived in the suit property.

7. The 2<sup>nd</sup> and 4<sup>th</sup> defendants' respective cases are contained in their replying affidavits dated 9/09/2013 and 27/09/2013, witness statements both dated 18/07/2012, "**Dexh 1**" which is a sale agreement dated 27/5/2011 and "**Dexh 2**" which is a title deed for **Siaya/Karapul Ramba/5000** and oral evidence tendered in court during the hearing. In summary, they stated that they legally purchased the various subdivided plots emanating from the suit property for due consideration and they had valid sale agreements to prove this. They stated that the subdivided portions of the suit property were legally transferred to them and they were not privy to the disputes between the plaintiffs and 1<sup>st</sup> defendant and they have been in peaceful occupation.

8. They urged the court to dismiss the plaintiffs suit with costs.

#### **The Plaintiffs' submissions**

9. The plaintiffs filed written submissions dated 5/11/2021. They contended that the suit property was ancestral land because Wamaya Hawala held the suit property in trust for his younger brother Okech Hawala. They contended that the plaintiffs' rights to the suit property emanated from their possession and occupation. To buttress their claim for adverse possession, the plaintiffs' averred that their possession of the land was actual, open, exclusive and adverse to the title holder for a period of over 12 years preceding the sale to third parties and that the title holder merely held title as a trustee of the adverse possessor and on this contention, they placed reliance on **Section 7 of the Limitation of actions Act** and on the case of **Wambugu vs Njuguna [1983] KLR 173** which held that in a claim of adverse possession, what is most pertinent is whether or not the title holder had been dispossessed or had discontinued his possession for the statutory period.

10. They submitted the 1<sup>st</sup> defendant contravened **Section 45(1) of the Succession Act** by intermeddling with the estate of Wamaya Hawala and consequently, the actions of the 1<sup>st</sup> defendant of unilaterally transferring the suit property to himself without following the laid down probate procedures and subdividing, selling and transferring it to third parties was illegal and unlawful and therefore invalid, null and void.

11. They framed the following issues for determination; (i) whether the plaintiffs are entitled to the orders as sought, (ii) whether the transfers to the defendants were valid, regular and lawful and should be cancelled and, (iii) who should bear the costs of the suit.

#### **The Defendants' submissions**

12. The defendants filed written submissions dated 29/11/2021. Their submissions were based on three main issues; (i) whether an order of adverse possession can issue in the circumstances (ii) whether Wamaya Hawala held the suit property in trust for Okech Hawala and whether *mutatis mutandis* the defendants are beneficiaries and, (iii) what reliefs are available to the defendants.

13. On the 1<sup>st</sup> issue, the defendants contended the suit property ceased to be in adverse possession when the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants took possession upon purchase and on this, they placed reliance on **Section 13 of the Limitations of Actions Act** and the case of **Joseph Gahumi Kiritu vs Lawrence Munyambu Kabura CA Number 20 of 1993** which held that time stops running when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.

14. On the 2<sup>nd</sup> issue, the defendants contended that the alleged trust was not expressed in writing and further, the court could not presume resulting trust for the simple reason that Okech Hawala had not purchased the suit property. They contended that from the onset, Hawala Wamaya was neither a trustee nor a settler of the suit property.

15. On the 3<sup>rd</sup> issue, they contended the 2<sup>nd</sup> and 4<sup>th</sup> defendants bought the suit property from the 1<sup>st</sup> defendant without any notice of occupation or notice of encumbrances and consequently, they were *bonafide* purchasers. To buttress this submission, they placed reliance on **Section 24(a) of the Land Registration Act** and the case of **Katende vs Haridar & Company Limited [2008] 2EA 173** which held that for one to rely on the bona fide doctrine, they must prove that; (i) they hold a certificate of title (ii) they have purchased the property in good faith (iii) they had no knowledge of the fraud (iv) they were not a part of the fraud (v) they purchased for valuable consideration and, (vi) the vendors had apparent valid title.

## **Analysis and determination**

16. I have considered the pleadings together with the parties' respective submissions and evidence tendered together with the relevant legal frameworks and jurisprudence. The following are the key issues falling for determination: (i) whether the plaintiffs have established that a customary trust exists over the suit property and, (ii) whether the plaintiffs have established a claim of adverse possession. I will sequentially make pronouncements on these issues.

17. The 1<sup>st</sup> issue is whether the plaintiffs have established that a customary trust exists over the suit property.

18. A Customary trust flows from **Sections 25 and 28** of the **Land Registration Act (Sections 27, 28 and 30** of the retired **Registered Lands Act**). Under **Section 28 (b)**, customary trust is recognised as an overriding right over a registered parcel of land.

19. The party who alleges customary trust must prove that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members and once this onus is discharged, then the court would render its decision on the intent. It is never the duty of the court to infer trust. A determination on the existence of trust is on a case by case basis and the Supreme Court settled the guiding principles of customary trust in the case of **Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015** which held thus;

*“Each case had to be determined on its own merits and quality of evidence...Some of the elements that would qualify a claimant as a trustee were:(a) The land in question was before registration, family, clan or group land. The claimant belonged to such family, clan, or group.*

*(c)The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous. (d)The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. (e)The claim was directed against the registered proprietor who was a member of the family, clan or group”*

20. The defendants in their bundle of documents annexed a copy of an official search for land parcel numbers **SIAYA/KARAPUL RAMBA/458** which was registered in the names of the 1<sup>st</sup> plaintiff on 14/5/1987 which was the same time the suit property was registered in the name of Wamaya Hawala and that of **SIAYA/KARAPUL RAMBA/1709** which was registered in the name of the 2<sup>nd</sup> plaintiff. However, for reasons best known to the defendants, these documents were never produced as evidence in support of their case and this court will not belabour on these two documents. Has the plaintiff proved that it was the intent of the family patriarch for Wamaya Hawala to hold the suit property in trust for the entire family? It is common ground amongst the plaintiffs and 1<sup>st</sup> defendant that Wamaya Hawala kept the title deed of the suit property away from the plaintiffs. The plaintiffs stated that the suit property was registered in the name of Wamaya Hawala to hold in trust for his younger brother Okech Hawala. This evidence was controverted by the 1<sup>st</sup> defendant who stated that the plaintiffs were issued with their own distinct parcels of land. This challenge by the 1<sup>st</sup> defendant was never rebutted by the plaintiffs and his testimony remained unchallenged. The plaintiffs' never led evidence in court on which clan the family came from, how land adjudication process in the locality was undertaken, the intervening circumstances during the land adjudication process that led to Wamaya Hawala being registered as a trustee for Okech Hawala and whether the issue of Wamaya Hawala failing to subdivide the suit property between himself and his younger brother was ever raised with the clan elders or family members. All these grey issues are only left to the courts speculation. Consequently, it is the finding of this court that the plaintiffs have failed to discharge the burden of proof on a balance of probabilities that Wamaya Hawala held the suit property in customary trust for Okech Hawala and by extend his beneficiaries.

21. The 2<sup>nd</sup> issue is whether the plaintiffs have established a claim of adverse possession. In the case of **Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2021] eKLR**, the Supreme Court of Kenya held that the principles of adverse possession are well settled. In a long list of court decisions including **J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom** which quotes **Halsbury's Laws of England (Fourth Edition, Reissue 1998)**, **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR**, **Wambugu vs Njuguna (1983) KLR** and **Gabriel Mbui vs Mukindia Maranya (1993)eKLR** the principles of adverse possession have been settled as thus; (i) One must have been in continuous and uninterrupted possession of the land for at least 12 years(ii) such possession has been open and notorious to the knowledge of the owner(iii) such possession is without the permission of the owner; and (iv)That the plaintiff has asserted a hostile title to the owner of the property. These principles shall be juxtaposed against the facts and evidence before this court.

22. The plaintiffs have contended that they have been in continuous and uninterrupted possession of the suit land for at least 12 years. They contended that Wamaya Hawala left the suit property at an undisclosed date and returned to the suit property in 1999 before dying shortly thereafter. The date and year he departed from the suit property has not been disclosed by the plaintiffs and without these specifications, this court is unable to determine when time started running from the years prior to 1999. In any case, when Wamaya Hawala returned to the suit property in the year 1999, the land ceased to be in adverse possession and he was in the same position as if he had never been deprived of possession by the plaintiffs. Upon his demise on 3/06/1999, time started running against his heirs in title who in this case were the 1<sup>st</sup> defendant and his siblings because their parents had predeceased their grandfather. The 1<sup>st</sup> defendant contended that in 1995 he was approximately 15 to 16 years of age meaning that by the time his grandfather died in 1999 as evidenced by the death certificate he was an adult. Therefore, the plaintiffs claim for adverse possession became ripe as from 3/06/2011. Looking at the evidence on record the 1<sup>st</sup> plaintiff has proved that she has been in occupation and possession of the suit property for a period of over 12 years from 3/06/2011. The 1<sup>st</sup> plaintiff has proved her case on this 1<sup>st</sup> principle.

23. The 2<sup>nd</sup> principle is whether such possession has been open and notorious to the knowledge of the owner. It was a common thread in the plaintiffs and 4<sup>th</sup> defendant's testimony that there was an old house in the suit property. The point of departure is that it was the plaintiffs' contention that the house belonged to the 1<sup>st</sup> plaintiff while it was the 4<sup>th</sup> defendant's contention that this house belonged to the 1<sup>st</sup> defendant's grandparents. The 4<sup>th</sup> defendant averred that the 1<sup>st</sup> plaintiff had promised to vacate the suit property and move to her own

property known as **SIAYA/KARAPUL RAMBA/458**. The 1<sup>st</sup> defendant in his cross examination stated that the 1<sup>st</sup> plaintiff used to live in his grandmother's kitchen which was in the suit property. It is my finding that the 1<sup>st</sup> plaintiff was in open and notorious possession of the suit property.

24. The 3<sup>rd</sup> principle is whether possession was without the permission of the owner. It is trite law that an adverse possessor must prove that her act of possession was not as result of permission or license given to her by the owner. The 1<sup>st</sup> plaintiff has asserted that she moved into the suit property upon her marriage to Okech Hawala which connotes that there was permission by the owner of the land. This permission occurred long before demarcation and continued long after the demarcation process. This court is persuaded by the high court decision of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR** which held thus;

***“It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute”.***

The 1<sup>st</sup> plaintiff fails on this 3<sup>rd</sup> principle.

25. The 4<sup>th</sup> principle is whether the plaintiffs have asserted a hostile title to the owner of the property which in other words means that the plaintiffs must prove that their act of possession involved rights irreconcilable with those claimed by the owner of the land such as to give the owner occasion to dispute that possession. The plaintiffs' testimony was somewhat contradictory. On the one hand they asserted they were adverse possessors while on the other hand, they claimed that the 1<sup>st</sup> defendant cannot claim the suit property to the exclusion of his (1<sup>st</sup> defendant's) siblings because the suit property was family land. One cannot claim a hostile title to land yet claim the owner has some residual rights over the land. The Plaintiffs fail on this 4<sup>th</sup> limb.

The principles of adverse possession are not mutually exclusive and consequently, the plaintiffs' claim for adverse possession fails.

26. It is my finding that the plaintiffs have not proved their case on a balance of probabilities.

27. In view of my findings, I ultimately make the following disposal orders;

**a) The plaintiffs' suit is hereby dismissed.**

**b) Costs to the defendants.**

**JUDGMENT DELIVERED VIRTUALLY. DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2022.**

**In the Presence of:**

Mr. Achilla for applicant

Mr. Mirember for 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents.

Court assistant: Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**20/1.2022**