



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT HOMA BAY**

**ELC OS CASE NO. 65 OF 2021**

**(FORMERLY MIGORI ELC OS CASE NO. 654 OF 2017)**

**PETER SABAI CHACHA.....PLAINTIFF**

**VERSUS**

**NYAICHOHA MWITA NYANGOKO.....1<sup>ST</sup> DEFENDANT**

**THE CHAIRMAN BOARD OF MANAGEMENT,**

**NYAMAHARAGA MIXED SECONDARY SCHOOL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The instant dispute pertains to a portion of land measuring approximately zero decimal three hectares (0.3 Ha) in area being part of land reference number Bukira/Buhirimonono/2887 measuring approximately zero decimal nine two hectares (0.92 Ha) in area (The suit land herein). The original land is LR number Bukira/Buhirimonono/448 measuring approximately thirteen decimal sixty six hectares (13.66 Ha) in area. It is contained in Registry Map Sheet number 29 and located in Isebania within Migori County.
2. The plaintiff, Peter Sabai Chacha is represented by learned counsel, Quinter Adoyo.
3. The defendants are represented by learned counsel, Omonde Kisera.
4. As envisaged under **Order 37 Rule 19 of the Civil Procedure Rules, 2010 (The Rules herein)**, on 10<sup>th</sup> July, 2019, the court gave directions, inter alia;

*“.....the Originating Summons dated 2<sup>nd</sup> June 2017 be treated as a plaint. The replying affidavit sworn on 27<sup>th</sup> June 2017 be treated as a statement of defence. Hearing by way of viva voce evidence.....”*

5. It is noteworthy that I heard this suit at Migori Environment and Land Court to the extent that the parties closed their respective cases as well as filed submissions herein as at 16<sup>th</sup> November 2021. So, on the said date, my brother, Kullow J, ordered and directed that the suit be transferred to this court for determination.
6. On 6<sup>th</sup> December 2021, this court directed the Deputy Registrar of this court to issue notice to the parties with regard to delivery of judgment in this suit. Accordingly, the parties were duly notified of the same via email on 6<sup>th</sup> December 2021 at 05:09 PM GMT+3.

**B. THE PLAINTIFF’S CASE IN BRIEF**

7. The plaintiff commenced the suit by way of an Originating Summons dated 2<sup>nd</sup> June 2017 and duly filed in court on even date claiming to have acquired the suit land by way of adverse possession for determination of the following six (6) issues;

a) A declaration that the defendants’ rights to recover the whole LR NO BUKIKA/BUHIRIMONONO /2887 is barred under limitations of actions Act, Chapter 22 of the Laws of Kenya and its title thereto is extinguished on the grounds that the plaintiff herein has openly peacefully and continuously been in occupation and possession of the suit land for a period exceeding forty –

seven (47) years .

b) There be an order the the plaintiff be registered as the proprietor of part of LR No. BUKIRA /BUHIRIMONONO /2887 measuring 0.3 ha

c) The second defendant herein be ordered and / or directed to execute and/or sign all the necessary transfer instruments to facilitate transfer and all registration of the suit land in the name of the plaintiff in default , the Deputy Registrar of this humble court be at liberty to execute the transfer instruments in favour of the plaintiff.

d) There be an order restrain the Defendants , either by themselves , agent , servants and /or employees from interfering with the plaintiffs peaceful possession and occupation of the said parcel LR No. BUKIRA /BUHIRIMONONO /2887 MEASURING 0.3 ha in any manner whatsoever and or howsoever.

e) The costs of this originating summons to be borne by the Defendant.

f) Such other or further orders in the court may deem fit and fit and just to grant in the circumstances.

8. The plaintiff's complaint is that on 14<sup>th</sup> February 1978, he bought the portion of suit land being part of the original land as stated at paragraph 1 hereinabove from Chamberi Mwita Irecho (Deceased) who was a younger brother to the 1<sup>st</sup> defendant. That he has been in open and exclusive possession and occupation of it since 1979. That in the year 2010, the 1<sup>st</sup> defendant sold a portion of the suit land to the 2<sup>nd</sup> defendant. That in the year 2015, the 2<sup>nd</sup> defendant asked the plaintiff to vacate the suit land thus, it provoked the present suit.

9. On 29<sup>th</sup> July 2020, the Plaintiff (PW1) relied on his affidavit in support of the Originating summons as part of his testimony. He further relied on a sale of land agreement, copy of the suit land register and photographs of the of the portion of the suit land (PExhibits 1, 2 and 3 respectively) which are all annexed to the affidavit as well as his further list of documents dated 2<sup>nd</sup> June 2020 namely photographs of the plaintiff's home on the portion of the suit land and minutes of the meeting held at the Assistant Chief's office, Nyamaharaga Sub Location on 15<sup>th</sup> November 2019 (PExhibits 4 and 5 respectively).

10. PW2, FREDRICK MOIGETE SABAI told the court that he is a son of PW1 and relied on his statement dated 2<sup>nd</sup> June 2020 as part of his testimony. He stated, inter alia, that PW1 bought the portion of the suit land from the Deceased. That he (PW2) was born on the portion of the suit land in 1984 and that he has lived thereon from that time. That the suit land is next to the land of the 2<sup>nd</sup> defendant.

11. PW3, ELIAS NYAMOHANGA MIROMBE, a retired teacher, relied on his statement dated 2<sup>nd</sup> June 2020 as part of his evidence. He stated that he bought a piece of land from the Deceased who was an elder brother to the 1<sup>st</sup> defendant. That the home of PW1 borders the 2<sup>nd</sup> defendant's land.

12. PW4, FREDRICK WAISIKO CHAMBERI, also a retired teacher and a son of the Deceased stated that the 1<sup>st</sup> defendant is his uncle. That in the year 1978, the Deceased sold a piece of land to PW1 who lives with his family thereon. As part of his testimony, he relied on his statement dated 2<sup>nd</sup> June 2020.

13. By an 8-paged submissions dated 29<sup>th</sup> September 2021 and duly filed in court on 1<sup>st</sup> October 2021, learned counsel for the plaintiff summarized the parties' respective cases and framed three (3) issues for determination including whether PW1 has acquired the portion of the suit land by adverse possession. In analyzing the issues in favour of PW1, counsel cited section 17 of the Limitation of Actions Act Chapter 22 Laws of Kenya and authorities, inter alia, **Wambugu-vs-Njuguna (1983) KLR 172 and James Maina Kinya-vs-Gerald Kwendaka (2018) eKLR** on adverse possession, to fortify the submissions.

### **C. THE DEFENDANTS' CASE IN BRIEF**

14. The defendants opposed the plaintiff's claim by a replying affidavit sworn on 27<sup>th</sup> June 2017. I consider the said affidavit in its entirety and it would be superfluous to reproduce the same in this suit.

15. The Principal of the 2<sup>nd</sup> defendant, HELLEN ADHIAMBO OMWAYI (DW1) relied on the replying affidavit referred to in paragraph 14 hereinabove alongside her further statement dated 21<sup>st</sup> December 2020 as part of her testimony for and on behalf of the 2<sup>nd</sup> defendant. She stated in part that the 2<sup>nd</sup> defendant bought the entire suit land from the 1<sup>st</sup> defendant.

16. She also relied on a sale agreement (DExhibit 1), a further sale agreement (DExhibit 2), title deed of the suit land in the name of the 2<sup>nd</sup> defendant (DExhibit 3), letter dated 18<sup>th</sup> May 2010 in respect of stamp duty payment (DExhibit 4), photographs (DExhibit 5a to h) , sketch map (DExhibit 6), a certificate of official search dated 24<sup>th</sup> March 2010 (DExhibit 7) and a transfer (DExhibit 8).

17. DW1 further made reference to and relied on a letter of consent of the area Land Control Board (DExhibit 9), a mutation form (DExhibit 10), minutes of 6<sup>th</sup> July 2010 and 26<sup>th</sup> January 2010 (DExhibits 11 and 12 respectively). She also referred to and relied upon two (2) cheques in favour of 1<sup>st</sup> defendant (DExhibits 13a and b) and other minutes of 24<sup>th</sup> April 2010, 25<sup>th</sup> September 2009 and 17<sup>th</sup> November 2009 (DExhibits 14, 15 and 16 respectively).

18. The 1<sup>st</sup> Defendant namely NYAICHOHA MWITA NYANGOKO (DW2), testified that he sold the whole suit land to the 2<sup>nd</sup> defendant

and transferred the same accordingly as disclosed in DExhibits 1, 2, 8 and 9. That the 2<sup>nd</sup> defendant is in possession and occupation of the suit land while PW1 occupies part of the suit land, among others

19. On 16<sup>th</sup> November 2021, learned counsel for the defendants filed a 4-paged submissions of even date making reference to the parties' respective pleadings together with the evidence on record herein and framed three issues for determination namely the dictates of adverse possession as set out in the case of **Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another (2015) eKLR** alongside the case of **Gabriel Mbui-vs-Mukindia Maranya (1993) eKLR**. In the discussion of the issues, counsel invited the court to consider the public interest in the suit and that the plaintiff has failed to prove this case on a balance of probabilities thus, urged the court to dismiss the same with costs.

#### **D. ISSUES FOR DETERMINATION**

20. It is established law that the issues for determination in a suit generally flow from either the parties' pleadings or as framed by them for the court's determination; see the Court of Appeal decision in the case of **Galaxy Paints Co. Ltd-vs-Falcon Grounds Ltd (2000) 2 EA 385**.

21. I have carefully and anxiously considered the parties' respective pleadings, evidence and the submissions including the issues framed therein. **Order 15 Rules 1 and 2 of the Civil Procedure Rules, 2010** (The Rules herein) provide for framing of issues and materials from which issues may be framed in a suit respectively.

22. In the foregone, I am of the considered view that the issues for determination in this suit boil down to-

- a) Is the 2<sup>nd</sup> defendant legally and correctly joined and or sued herein?
- b) Has the plaintiff proved the ingredients of the concept of adverse possession in respect of the portion of the suit land against the defendants?
- c) Is the plaintiff entitled to the orders set out on the face of the originating summons?

#### **E. DISCUSSION AND DISPOSITION**

23. As regards joinder of the 2<sup>nd</sup> defendant to this suit, learned counsel for the defendants' submitted that Nyamaharaga Mixed Secondary School (the school) can sue or be sued through the Board of Management (the BOM) duly constituted under the Basic Education Act, 2019 (2013). That PW1 elected to sue the Chairman of the BOM of the school yet the BOM of such a public school is a corporate body with perpetual succession and seal.

24. Counsel further submitted thus;

*“.....the Chairman of the said Board of management cannot be same as suing the said Board in its corporate image.*

*.....the pleadings especially the O.S, herein creates the architecture of the suit herein hence one parties are not legally and correctly joined and /or sued then there should be no Decree against them.”*

25. I note all the provisions of the Basic Education Act (supra). The **Black's Law Dictionary 10<sup>th</sup> Edition at pages 208/209, 414, 1031 and 1540** defines the terms “Board of Managers/Board of Directors”, “Corporation”, “legal entity” and “school board” respectively which are taken into account herein. DW1 is the secretary to the BOM of the school as discerned in her evidence inclusive of her statement and DExhibits 4, 11, 13 to 17. She stated in examination in chief that;

*“....I am the secretary to the BOM, the 2<sup>nd</sup> defendant and I have the mandate to give evidence herein on behalf of the 2<sup>nd</sup> defendant....”*

26. Under **Article 159 (2) (d) of the Constitution of Kenya, 2010 and section 19 (1) of the Environment and Land Court Act, 2015 (2011)**, justice shall be administered without undue regard to procedural technicalities. Furthermore, in the case of **Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal held-

*“.....This is a court of law and a court of equity. Equity shall suffer no wrong without a remedy.....The court is bound to deliver substantive justice rather than technical and procedural justice.....”*

27. **Order 1 Rules 3, 4, 5, 7, 8 and 9 of the Rules** relates to parties to suits and the effect of mis-joinder and non-joinder thereof. Apparently, the plaintiff had erroneously included the word “Chairman” in reference to the 2<sup>nd</sup> defendant in this suit. In the exercise of this court's discretion and further to the observation at paragraphs 23 and 24 hereinabove, the word “Chairman” be and is hereby excluded from reference to the 2<sup>nd</sup> defendant because I am satisfied that no harm would result to the defendants thereby.

28. On the issue of adverse possession, this court is duly guided by a long line of authorities including the Court of Appeal decision in **Wambugu and Wilson Kazungu Katana cases** (supra). In the latter case, the ingredients of adverse possession were aptly stated thus-

- a) The parcel of land must be registered in the name of a person other than the applicant, and

b) The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, and

c) The applicant must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

29. Regarding the 1<sup>st</sup> ingredient, PW1 stated on grounds (d) and (e) of the Originating Summons that upon sub division of the original land, the suit land was registered in name of DW2 who then transferred it to the 2<sup>nd</sup> defendant. PW1 deposed at paragraph 4 of his affidavit in support of the Originating Summons that the Deceased obtained title deed over the original in his name on 15<sup>th</sup> June 1992 as per entry numbers 2,3 and 4 in PExhibit 2. He then sub divided the original land to give rise to the suit land which was registered in the name of DW2 with effect from 14<sup>th</sup> April 2010 as revealed in PExhibits 3.

30. Indeed, entry number 1 in PExhibit 3 shows that the registration of the suit land was in the name of DW2 as at 14<sup>th</sup> April 2010. The same was registered in the name of the 2<sup>nd</sup> defendant on 29<sup>th</sup> June 2010 as disclosed in entry number 2 in PExhibit 3.

31. The defendants admitted in their submissions that the suit land got registered in the name of the 2<sup>nd</sup> defendant as at 29<sup>th</sup> June 2010. In her further statement at paragraph 6, DW1 stated that the suit land is registered in the name of the 2<sup>nd</sup> defendant. Moreover, she stated in examination in chief as-

*“ We proceeded to process title to the land in the name of 2<sup>nd</sup> defendant (DExhibit 3).....”*

32. It is essential that adverse possession should be of the whole or a defined portion of land as held in **Muthuita-vs-Wanoe and 2-others (2008) 1 KLR (G F) 1024 and Godfrey Shimonya Peter and 2 others-vs-Mary Anyango Ameka and another (2018) eKLR**, among other authorities. Clearly, the size of the suit land is shown in PExhibit 3, DEXhibit 3, DEXhibit 6 and as stated in paragraph 1 hereinabove. The same is registered in the 2<sup>nd</sup> defendant's name pursuant to **sections 27 and 28 of the Registered Land Act Chapter 300 Laws of Kenya (Repealed Act)**.

33. In that regard, I endorse the decision in **Wainaina-vs-Murai and others (1976-80) 1 KLR 283 at 289/290** where Simpson J (as he then was) observed-

*“The land in question is registered under the Registered Land Act.....”*

34. As pertains the 2<sup>nd</sup> ingredient, I take into consideration grounds (f), (h), (i) and (j) of the Originating Summons and it's supporting affidavit. PW1 asserted that he bought the portion of the suit land from the Deceased on 14<sup>th</sup> February 1978 as per PExhibit 1. The suit land was registered in the name of the Deceased at that time as disclosed in PExhibit 2. Being a purchaser of immovable property, PW1 is entitled to initiate the instant claim in respect of acquisition of the portion of the suit land as provided for under **Order 37 Rules 3, 7 and 8 of the Rules**.

35. Further, the testimony of PW1 that he bought the portion of the suit land was affirmed by PExhibit 5 alongside PW2 who stated during cross examination that;

*“PW1 bought the suit land from the father of the 1<sup>st</sup> defendant. The seller is now deceased.....”*

36. The testimonies of PW1 and PW2 were further affirmed by PW3 and PW4. The former told the court that PW1 bought the portion of the suit land from the deceased and the latter stated that PW1 stays thereon since the year 1978.

37. The fact of occupation of the portion of the suit land was not disputed by DW1 and DW2 who stated that PW1 was in occupation of it when the 2<sup>nd</sup> defendant bought the same from DW2 and that PW1 lives thereon respectively. During cross examination, DW1 stated in part:

*.” PW1 claims a bigger portion of the land than he occupies.....He was in occupation of the disputed portion when the school bought the land.”*

38. On that score, the open and exclusive occupation of the portion of the suit land by PW1 is inconsistent with the title of the owner, 2<sup>nd</sup> defendant as duly noted in the **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 28**. The 2<sup>nd</sup> ingredient of the concept of adverse possession is satisfied accordingly.

39. As regards the 3<sup>rd</sup> ingredient, PW1 asserted that he resides with his family on part of the portion of the suit land and cultivates the remainder thereof. PExhibits 4, 5 and 6 speak to the said possession and occupation of the same. The conclusion in PExhibit 6 reads;

· *“That Peter Sabai Chacha bought the land BUKIRA /BUHIRIMONONO /448(0.3 HA )hectares as shown in the land sales agreement form attached behind the letter / report.*

· *That Peter Sabai Chacha has been staying there since 1978 and there has been no complain.*

· *When the school .....*

· *When Samwel ....*

· *Since 1978, Peter Sabai Chacha has been staying in the same plot that he bought from Chamberi Mwita Nyangoko (deceased) .....*”

40. It is trite law that possession can take different forms such as cultivation of the land in dispute; see **Titus Ong’ang’a Nyachio-vs-Martin Okioma Nyauma and 3-others (2017) eKLR**.

41. DW2 confirmed the court that PW1 lives on part of the suit land. Whereas DW1 testified that PW1 does not live thereon, her testimony was brought into question when she stated during cross examination thus;

*“PW1 is a squatter on the suit land as he occupies the school land measuring approximately 0.92 hectares.....We thought of compensation for his structure on the disputed land. He claimed that the value of the disputed portion of land was Ksh.1,800,000/=.....The school is claiming part of the homestead of PW1 who built two (2) permanent houses thereon. We found the houses having been built on the land in dispute.....”* (Emphasis added)

42. Plainly, PW1 has been in open and notorious occupation of the portion of the suit land in excess of twelve years occasioning the ouster of the 2<sup>nd</sup> defendant therefrom. He has therefore, acquired ownership of the portion as envisaged under **section 28(h) of the Land Registration Act, 2016 (2012)**. I proceed to echo the decision in the case of **Gatimu Kinguru-vs-Muya Gathangi (1976-80) 1 KLR 317** where Madan J (as he then was) observed;

*“ The defendant’s possession was open and notorious.....There has been no discontinuation of possession by the plaintiff since 1959.....There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant.....”*

43. Concerning costs, I am guided by **the proviso to section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 37 Rule 20 of the Rules**. The Halsbury’s Laws of England, 4<sup>th</sup> Edition Reissue (2010) Volume 10 states;

*“The court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially.”*

44. Additionally, I have to consider the issue of any other relief as sought in the Originating Summons. I subscribe to the decision of Duffus, P in **Odd Jobs-vs-Mubia 1970 EA 476** and cited in **Transworld Safaris (K) Ltd –vs-Ratemo 2008 KLR 339 at 346**, among other authoritative pronouncements and note section 28 (b) of the Land Registration Act, 2016 (2012). I further note the evidence of PW1 and PW2 including PExhibits 1, 2, 3, 4, 5 and 6 as reinforced, to a considerable extent, by the evidence of DW1 and DW2 and in line with **Macharia Mwangi Maina case (supra), William Kipsoi Sigei-vs-Kipkoech Arusei and another Civil Appeal No. 54 of 2016 (2019) eKLR**. On that strength, PW1 has also proved the elements of constructive trust and proprietary estoppel which are applicable and enforceable against the 1<sup>st</sup> and 2<sup>nd</sup> defendants over the portion of the suit land.

45. To that end, I find that the Plaintiff’s claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants amounts to adverse possession. He has proved the claim on a balance of probabilities as held in, inter alia, **Gabriel Mbui case (supra) and Murunga Kabangi and 2 others-vs-Hannah Wairimu Gitau and another Civil Appeal No. 287 of 2010 (2019) eKLR**. So, he is entitled to orders 1, 2, 3, 4 and 6 sought in the originating summons

46. Thus, I enter Judgment for the Plaintiff against the defendants in terms of orders 1, 2 and 3 as sought in the Originating Summons dated 2<sup>nd</sup> June 2017 and filed herein on even date as set out in paragraph 7 hereinabove. For clarity, the orders are infra;

a) A declaration that the defendants’ rights to recover the whole LR NO BUKIKA/BUHIRIMONONO /2887 is barred under limitations of actions Act, Chapter 22 of the Laws of Kenya and its title thereto is extinguished on the grounds that the plaintiff herein has openly peacefully and continuously been in occupation and possession of the suit land for a period exceeding forty – seven (47) years .

b) There be an order the plaintiff be registered as the proprietor of part of LR No. BUKIRA /BUHIRIMONONO /2887 measuring 0.3 hectares.

c) The second defendant herein be ordered and / or directed to execute and/or sign all the necessary transfer instruments to facilitate transfer and all registration of the suit land in the name of the plaintiff in default, the Deputy Registrar of this humble court be at liberty to execute the transfer instruments in favour of the plaintiff.

d) There be a permanent injunctive order to restrain the Defendants, either by themselves, agents, servants and /or employees from interfering with the plaintiffs peaceful possession and occupation of the said parcel LR No. BUKIRA /BUHIRIMONONO /2887 MEASURING 0.3 hectares in any manner whatsoever and or howsoever.

e) Each party to bear his or her own costs of this suit.

f) In any event, constructive trust and equitable estoppel as stated in paragraph 44 hereinabove as well as costs of the suit, be and are hereby further and or any other remedies for the plaintiff in this suit

47. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 19TH DAY OF JANUARY 2022.**

**G M A ONGONDO**

**JUDGE**

In the presence of;

- i. Ms Kichana holding brief for Q. Adoyo learned counsel for the plaintiff
- ii. Okello, Court Assistant