



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA.**

**AT BUSIA**

**ELC. NO. 30 OF 2014.**

**PASCHALIS WILLIAMS MAKOKHA.....PLAINTIFF**

**VERSUS**

**1. GREGORY MAKOKHA KUNDU**

**2. JOHN ODUOR OGUTU.....DEFENDANTS.**

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

**PASCALIS WILLIAM MAKOKHA**, hereinafter referred to as the Plaintiff, commenced his claim against **GREGORY MAKOKHA KUNDU** and **JOHN ODUOR OGUTU**, hereinafter referred to through the amended originating summons dated 8<sup>th</sup> August, 2013. The Plaintiff's claim is based on adverse possession and seeks to be registered as proprietor of land Bukhayo/KISOKO/7467 for having been in open and notorious possession of the suit land for a period exceeding 12 years.

The claim is denied by the Defendants through their replying affidavits sworn on 21<sup>st</sup> September, 2012 and 19<sup>th</sup> November, 2013 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.

The Plaintiff testified as PW 1 and called James Noah Mambeli, Reuben Wesonga Oduma and Enos Oruko Ongangi who testified as PW 2, PW 3 and PW 4 respectively.

The 1<sup>st</sup> Defendant testified as DW 1 and called Wycliffe OKOTH Kafwa, Servas Bruno and Mary Adhiambo Walumbe who testified as DW 2, DW 3 and DW 4 respectively. The 2<sup>nd</sup> Defendant testified as DW 5.

**PLAINTIFFS CASE.**

1. That the Plaintiff entered onto the suit land on 1<sup>st</sup> March, 2000 when one Christopher Walumbe Kafwa sold him a portion of 3 acres from Bukhayo/Kisoko/3301 at Kshs.120,000/=. The sale agreement indicated the purchaser as Mourice Obilo who is the Plaintiff's son. That the portion the Plaintiff bought was demarcated on the ground and he took immediate possession and planted sugarcane either in his own names or the names of his other son James Noah Mambeli (PW 2).
2. That the Plaintiff has been using the suit land openly, peacefully continuously and without any interruption from anybody else for a period exceeding 12 years. That at the time of the sale agreement, the vendor had not obtained the title to the land and therefore the parcel reference was not indicated in the agreement. That the land was later ascertained as Bukhayo/Kisoko/7467 which Plaintiff discovered had been registered in the names of 1<sup>st</sup> Defendant on 5<sup>th</sup> May, 2011

- and title issued on 6<sup>th</sup> May, 2011.
3. That Plaintiff took possession of the suit land in March, 2000 and planted sugarcane which he was processing privately until 2004. That in 2004, the Plaintiff planted food crops on the land and in 2007 he allowed his son, PW 2, to plant sugarcane and that he (PW 2) used the land until 2012 when they learnt somebody else had bought the land through Mumias SOM.CC.NO. 387 of 2011. That the said Mumias Court case had been filed by 1<sup>st</sup> Defendant and DW 4 against PW 2 and Mumias sugar company Limited. The Plaintiff added that by the time the final orders were issued in Mumias SPM CC.No. 387 of 2011 on the 15<sup>th</sup> June, 2012, he had been in possession of the suit land for over 12 years and had filed this suit.
  4. That the Plaintiff came on the suit land was not under any contract and when PW 2 planted his sugarcane in 2007 he entered into a new contract with Mumias sugar company limited. That PW 2 had by 2011 harvested sugarcane from the suit land three times and did not use it after that as the 1<sup>st</sup> Defendant took over the cane thereafter. PW 2 also conceded that he paid the 1<sup>st</sup> Defendant Kshs.32,000/= as ordered in Mumias SPM.CC. No. 387 of 2011.
  5. That Plaintiff had given PW 3 casual work on his sugarcane land from 2000 to 2003 on the suit land. According to PW 3, the Plaintiff did not use the suit land after 2003 as the land had been bought by somebody else. PW 4 also testified that he had worked for the Plaintiff on the suit land between 2000 and 2003.

### **DEFENDANTS' CASE.**

6. That on 11<sup>th</sup> June, 2010, 1<sup>st</sup> Defendant purchased 3.5 acres of Bukhayo/Kisoko/3301 from Mary Adhiambo Walumbe at Kshs.402,000/= which he paid fully. That the said Mary Adhiambo Walumbe who testified as DW 4, filed Busia H.C. No. Succession Cause No. 161 of 2010 and was appointed the administratrix of the estate of Christopher Walumbe Kafwa, who was the registered proprietor of Bukhayo/Kisoko/3301. That the Succession court confirmed the grant and 1<sup>st</sup> Defendant was given 3.5 acres from Bukhayo/Kisoko/3301 which portion after subdivision was registered as Bukhayo/Kisoko/7467 and title issued on 6<sup>th</sup> May, 2011.
7. That the 1<sup>st</sup> Defendant took possession of the land he found PW 2 had planted sugarcane there and filed Mumias SPM.CC.No. 367 of 2011. That PW 2 and himself had an out of court settlement in which the sugarcane contract was transferred to the 1<sup>st</sup> Defendant in addition to being paid Kshs.32,000/= by PW 2. A consent to that effect was adopted by the court and an order dated 15<sup>th</sup> June, 2012 issued. That the 1<sup>st</sup> Defendant later sold the suit land to the 2<sup>nd</sup> Defendant.
8. That according to DW 2, the Plaintiff had given Kshs.19,000/= to Christopher in 2000 when the later was unwell. However, after the death of Christopher, the family met and agreed to give Plaintiff and acre of land with the third sugarcane crop which he harvested only ones. The land remained farrow until 2006 when Plaintiff planted sugarcane and used it until 2011, when DW 4 took it over. Both DW 2 and DW 3 denied having been witnesses in the sale agreement between Plaintiff and Christopher and said the only purchaser they know of in 2000 was one John Muhambe and the purchase price he had paid was refunded by Christopher family.
9. That DW 4 was a daughter to Christopher Walumbe Kafwa who died in 2000 when she was only 10 years old. That DW 4 did not know of any land sale agreement between her deceased father and the Plaintiff. She confirmed selling 3.5 acres of the land to DW 1.
10. The 2<sup>nd</sup> Defendant confirming buying the suit land from DW 1 and said he took possession in 2013. He said as the sugarcane on the land had been harvested three times, he ploughed the whole land and built a farm house.

### **ISSUES FOR DETERMINATION.**

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- a. When the Plaintiff started using the suit land, and if so when his occupation became adverse for

- purposes of time starting to run.
- b. Whether the Plaintiff has been in adverse occupation for more than 12 years.
- c. Whether the Plaintiff's occupation of the suit land was ever interrupted.
- d. Whether the Plaintiff is entitled to the orders sought.

**ANALYSIS OF THE EVIDENCE.**

12.. That though the Plaintiff claim is that he took possession of the suit land in March, 2000, the land was then part of Bukhayo/Kisoko/3301.The suit land got registered as Bukhayo/Kisoko/7467 following the subdivision based on the distribution of the estate following the issuance of the certificate of confirmation of a grant dated 16<sup>th</sup> March, 2011 in Busia H.C Succession Cause No. 161 of 2010. It is however clear that the portion the Plaintiff claims is the same portion PW 2 `was farming sugarcane on. It is also the same portion 1<sup>st</sup> Defendant and DW 4 subsequently sued PW 2 over and which 1<sup>st</sup> Defendant sold to the 2<sup>nd</sup> Defendant.

13. That though the Plaintiff claims that he continued to be in possession of the suit land either directly or through his son, PW 2, and was still in possession when he commenced these proceedings, the evidence adduced shows otherwise. The Plaintiff's two witnesses who testified as PW 3 and PW 4 said that the Plaintiff used the land only between the year 2000 and 2003. The evidence adduced by DW 2 shows that the Plaintiff only used the one acre of land in 2000 for the period it took him to harvest the third harvest. Thereafter the land remained fallow until 2006 when Plaintiff planted the sugarcane again. The two witnesses called by Plaintiff seem to confirm the testimony of DW 2 that there was a break after the time he harvested the third cane up to 2006. This clearly shows that a period of 12 years could not have passed between 2000 when Plaintiff took possession to the time he harvested the third cane. The Plaintiff's second entry onto the suit land was in 2006 and again by the time he filed this suit on 5<sup>th</sup> June, 2012, only a period of 6 (six) years had passed.

14. That even though the Plaintiff claim is not based on contract, it is clear from the evidence adduced by PW 1, PW 2 , PW 4 and DW2 and DW 4 that the first time the Plaintiff took possession of the suit land was with permission of the then registered owner of the suit land and his family. That period cannot be counted for purposes of counting the time that had passed in favour to the Plaintiff for adverse possession (*See Kiptanui –A- Vhumba –vs- Kibor A. Kolil* [2014]eKLR.

15. That the Plaintiff's possession of the suit land ended in 2011as confirmed by PW 2 who was in actual physical possession. PW 2 stated that after harvesting the third sugarcane harvest in 2011, he did not got back to the land again. He was consequently sued in Mumias SPM.CC. No. 367 of 2011 whose order of 15<sup>th</sup> June, 2012 formalized his exit. This clearly means that had the Plaintiff's possession of the suit land from 2007 had been through, PW 2, then that possession ended in 2011 and it is erroneous of the Plaintiff to claim he had been in adverse possession of the suit land. (*see Virginia Wanjiku Mwangi –vs- David Mwangi* [2013]eKLR.

16. That having found as above, the court further finds that the Plaintiff claim against both Defendants fails and his suit is dismissed with costs.

It is so ordered.

**S. M. KIBUNJA.**

**JUDGE.**

**DATED AND DELIVERED AT BUSIA ON 19<sup>TH</sup> DAY OF MARCH, 2015.**

**IN THE PRESENCE OF...PRESENT.....PLAINTIFF**

**... PRESENT .....1<sup>ST</sup> DEFENDANT**

... PRESENT .....2<sup>ND</sup> DEFENDANT

JUDGE.