



**REPUBLIC OF KENYA.**

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

**ELC. NO. 111 OF 2014.**

**(CONSOLIDATED WITH BUSIA CMCC. NO. 160 OF 2014 VIDE CONSENT DATED 18<sup>TH</sup> JUNE, 2014)**

**AGNETA ATHIENO ONYANGO .....PLAINTIFF/APPLICANT**

**VERSUS**

**GEOFFREY KUDONDO.....1<sup>ST</sup> DEFENDANT**

**MILTON KUDONDO.....2<sup>ND</sup> DEFENDANT**

**RICHARD KUDONDO.....3<sup>RD</sup> DEFENDANT**

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

**BACKGROUND.**

1. **AGNETA ATHIENO ONYANGO**, hereinafter referred to as the Plaintiff, on her own behalf and as administratrix of the estate of **PATRICK OCHIENG OBONGITA**, through the further re-amended originating summons dated 19<sup>th</sup> January, 2015, against Geoffrey Kudondo, Milton Kudondo and Richard Kudondo, hereinafter referred to as 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively, claims for the following;

- a. To be declared the adverse possessor of two plots each of 50 by 100 feet of Marachi/Bukhalalire/810.
- b. That permanent injunction do issue against the Defendants over the said two plots and costs.

The Plaintiff’s re-amended originating summons contains alternative prayers as follows;

- c. Refund of Kshs.76,000/= paid as purchase price.
- d. Payment of Kshs.494,728/= being the value of the main house, kitchen, toilet, bathroom, borehole and cost of landscaping.
- e. Kshs.532,726/= being the value of the trees and fruits trees planted thereon.
- f. Kshs.75,000/= being the value of the food crops on the land.
- g. Kshs.60,000/= being the mortuary charges and funeral expenses in respect of her late husband, and
- h. General damages for being stopped from burying her late husband’s body on the suit land.

2. The Plaintiff’s claim is disputed by the Defendants through the replying affidavits sworn on 27<sup>th</sup>

- January, 2015 by 1<sup>st</sup> Defendant on his own behalf and that of his co-defendants.
3. The 1<sup>st</sup> Defendant had commenced Busia CMCC. NO. 160 of 2014 against Agneta Athieno, who is the Plaintiff, through the plaint dated 4<sup>th</sup> April, 2014 praying for a permanent order of injunction to stop the plaintiff from burying the remains of her late husband on the suit land and costs. The 1<sup>st</sup> Defendant contemporaneously filed the Notice of Motion under certificate of urgency dated 4<sup>th</sup> June, 2014 seeking temporary injunction pending the hearing and determination of the suit.
  4. The Plaintiff filed her statement of defence dated the 7<sup>th</sup> April, 2014 to the lower court suit.
  5. Mr. Ashioya and M/S. Maloba Advocates for the Plaintiff and Defendants respectively filed a written consent dated 18<sup>th</sup> June, 2014 among others consolidating Busia CMCC. No. 160 of 2014 with this case for hearing and determination. The 1<sup>st</sup> Defendant's claim for permanent injunction in Busia CMCC. No. 160 of 2014 was under the said consent taken as a Counter claim while the originating summons and replying affidavit filed herein are taken as the plaint and defence respectively.
  6. The Plaintiff testified as PW 1 and called Dixion Asiro Odwori, Dixion Obuya, Joseph Owuor Ongulu, Winchester George Nasiye, Chrisantus Odhiambo, Vincent Wamalwa Komeri, John Bosco Oduori and Moris Owino as witnesses and they testified as PW 2 to PW 9.
  7. The Defendants testified as DW 1, DW 2 and DW 3 respectively.
  8. The Plaintiff's counsel then filed their written submission dated 11<sup>th</sup> March, 2015 while that by the Defendants counsel which is undated was filed on 18<sup>th</sup> March, 2015.

## **9. ISSUES FOR DETERMINATION.**

- i. Whether the first Plaintiff has been in occupation of the suit land and if so whether her occupation has been adverse to the title of the registered proprietor.
- ii. Whether the Plaintiff has been in occupation of the suit land continuously and uninterrupted for over 12 years and if so, whether she has acquired rights of an adverse possessor over the suit land.
- iii. Whether the period the Plaintiff's husband had been in possession of the suit land before marrying the Plaintiff should be considered when computing the period for adverse possession.
- iv. Whether the Plaintiff has done any developments on the suit land and if so whether she is entitled to compensation.
- v. Whether the 1<sup>st</sup> Defendant is entitled to an order of permanent injunction against Plaintiff over the suit land.
- vi. Who should pay costs.

## **10. ANALYSIS OF THE EVIDENCE.**

- a. The Plaintiff had first initiated these proceedings through the originating summons dated 13<sup>th</sup> May, 2014. The Defendants had each filed a replying affidavit sworn on 21<sup>st</sup> May, 2014. Thereafter the hearing commenced on 9<sup>th</sup> July, 2014 and Plaintiff testified as PW 1. She told the court that she got married to her late husband Patrick Ochieng Obongita in 2003 after his first wife left. She joined her husband on the land he had bought from Paul Kudondo and has lived on that land since 2003. The Plaintiff said her late husband had bought the two plots in 2000 and settled on that land in 2001. It is obvious that the Plaintiff had not come to the suit land until the year 2003 when she got married and her evidence about the time her late husband bought the land and settled on it must have been what she was told after marriage. She did not disclose her source of the information. There are other witnesses like PW 2 and PW 8 who stated that the Plaintiff's husband bought the plots in 2000. These two witnesses indicated that they were present and witnessed the sale transaction. The law requires agreements of sale of land to be in writing [*see section 3 of the Law of Contracts Act Chapter 23 of the Laws of Kenya*]. The Plaintiff's case is that a written sale agreement over the two plot was made and duly witnessed and that it later got burnt in a fire while with her late husband's first wife. A copy of a police abstract of 10<sup>th</sup> May, 2011 confirms that her late husband's report had been recorded as O.B. 19. The Defendants have disputed that there was any land sale agreement or that the agreement was burnt in a fire. The

- Defendants' counsel has further submitted that, had it been true that the sale agreement was destroyed in a fire, then there was no explanation offered why another agreement was not done as by that time both the purchaser and the vendor were alive. The court has no way of confirming what the terms of the agreement was without a copy being availed before the court. This is especially so as the witnesses gave different figures of the purchase price, amount paid and the number of plots bought or sold under the said agreement.
- b. The evidence adduced by both parties confirm that the Plaintiff is still residing and using a portion of the suit land. What is in dispute is when, and on what basis the Plaintiff started living on the suit land. It was the contention of the 2<sup>nd</sup> Defendant that the late Patrick Ochieng Obongita settled on the land first with his first wife in 2000. That the late Patrick Ochieng Obongita was later asked to vacate and in 2006 he came back with the Plaintiff as his wife. The Plaintiff and her witnesses had also said that the late Patrick Ochieng Obongita started living on the land in 2000. The court therefore finds that both parties are in agreement that the late Patrick settled on the land on or about 2000 with the consent of the registered proprietor, the late Paul Kudondo.
  - c. The late Patrick had been invited to the suit land by Paul Kudondo to settle there as he treated his ailing family members. It is probable as some of the witnesses stated that the late Paul Kudondo offered to sell a portion of the suit land to the late Patrick Ochieng Obongita and that the costs of treating the ailing family members was to be taken as part of the purchase price. The absence of a written sale agreement however makes it difficult for the court to confirm the terms of the agreement.
  - d. The occupation of the suit land by Patrick Ochieng Obongita and his family, including the Plaintiff, did not dispossess the registered owner so long as they remained on the land with his permission. The claim by the Plaintiff that she and her late husband had been in adverse possession of the suit land since 2000 cannot therefore be true as their occupation was with permission of the registered owner. They were therefore licensees on the basis of the sale agreement.
  - e. That the evidence availed shows that the relationship between Patrick Ochieng Obongita and Paul Kudondo over the suit land was discussed before the Chief and District Officer in the year 2011. Even though no record of the proceedings was availed to this court as evidence, a copy of a letter dated 2<sup>nd</sup> June, 2011 was done by Paul Kudondo to Patrick Ochieng Obongita asking him to vacate from the suit land. The copy of the letter is annexed to the replying affidavit of the 2<sup>nd</sup> Defendant sworn on 21<sup>st</sup> May, 2014. This letter and the hearing of the dispute before the Chief and District Officer is the only evidence that could be taken to show that Paul Kudondo had by the year 2011 withdrawn the permission he had given Patrick Ochieng Obongita to settle on the land. It could also be taken to be a manifestation of Paul Kudondo's decision to backtrack from the sale agreement he may have had with Patrick Ochieng Obongita over the suit land. Patrick Ochieng Obongita could have sued Paul Kudondo for breach of contract but he did not. It therefore follows that the period from the year 2000 to 2011 cannot be included when calculating the period the Plaintiff and her late husband may have been in adverse possession of the suit land.
  - f. The evidence available shows that Patrick Ochieng Obongita and his family did not vacate the suit land as required of them in 2011. They continued in occupation and Paul Kudondo died on 13<sup>th</sup> November, 2012 (*see limited grant ad Litem issued to 1<sup>st</sup> Defendant and the burial permit*). Then Patrick Ochieng Obongita died on 31<sup>st</sup> March, 2014 (*see Limited grant and ad litem issued to plaintiff dated 31<sup>st</sup> July, 2014*). For the Plaintiff to succeed in her claim based on adverse possession, she must show that she has used the two plots of the suit land as of right continuously, without force, secrecy or persuasion for over 12 years [see *Titus Kigoro Munyi vs Peter Mburu Kimani* [2015] eKLR and *Gicharu Kariri vs Peter Njoroge Mairu*. Nairobi Civil Appeal No. 293 of 2002] By the time the originating summons dated 13<sup>th</sup> May, 2014 was filed, only about three years had passed since 2011. This therefore means that Patrick Ochieng Obongita died before he could become an adverse possessor of the suit land. The Plaintiff also filed this suit before the 12 year period had lapsed and had therefore not attained the rights of an adverse possessor to the suit land.
  - g. That the law requires consent of the Land Control Board be obtained within six months from the date of the agreement for sale of agricultural land. [*see Section 6 and 8 of the Land Control Act*

- Chapter 302 of Laws of Kenya].** Though the Plaintiff annexed to her supporting affidavit sworn on 1<sup>st</sup> July, 2014 copies of applications for consent to subdivide Marachi/Bukhalalire/810 and transfer undisclosed parcel of land measuring 0.1 hectares, the consents were not annexed. The court can only conclude that the applications for consents were never paid for and filled with the relevant Land Control Board and no consents were therefore issued. The Plaintiff also annexed a copy of transfer form which is blank except some marks scribbled where the transferor and transferee affixes their signatures. This transfer form is of no value to those proceedings as it is incapable of being acted upon even if presented to the Land Registrar.
- h. The evidence availed shows that Patrick Ochieng Obongita died before he could have the land he was buying from Paul Kudondo registered in his names. This being the case, the Plaintiff cannot claim overriding interests of a spouse in terms of section 28(3) of the Land Registration Act 2012 as the land was never been registered in her late spouse's names.
  - i. Though counsel for the Plaintiff submitted that the court should rule in favour of the Plaintiff on the basis of the doctrine of promissory estoppel, the pleadings filed herein do set out such a claim. Parties in a suit are bound by their pleadings and this suit was commenced through originating summons in accordance with order 37 of the Civil Procedure Rules and does not contain a prayer based on the said doctrine.
  - j. That it is however obvious that when Paul Kudondo allowed Patrick Ochieng Obongita to settle on the suit land, he did not stop him and his family from carrying out developments thereon including constructing houses and planting trees. The 1<sup>st</sup> Defendant counterclaim does not seek to stop the Plaintiff from carrying out the development or to evict her from the suit land. The 1<sup>st</sup> Defendant was within his rights, as the personal representative of the late Paul Kudondo to commence Busia CC. No. 160 of 2014 to stop the Plaintiff from burying her late husband on the suit land. He has applied for permanent injunction and as already found above, the Plaintiff has not availed a valid sale agreement that could be enforced. Her late husband died without seeking specific performance orders against Paul Kudondo. The Plaintiff is therefore not entitled to any general damages for being stopped from interring the body of her late husband on the suit land. She cannot also claim for refund of mortuary expenses for her late husband body's preservation.
  - k. The value of the food crops cannot also be awarded to the Plaintiff as there is no evidence to suggest that it was taken from her. The food crops must already have been harvested by the Plaintiff who is still in possession of the portion she was occupying when this suit was filed.
  - l. The value of the main house, kitchen, toilet and bathroom must have been the values of newly built structures. The court was not told when the structures were constructed and their value as they stand at the time of valuation. It would however be premature to determine the current value of the said structures and the costs of the landscaping as the Defendants have not indicted that they want to evict the Plaintiff. The counterclaim is limited to an injunction stopping Plaintiff from burying the body of her late husband on the suit land.
  - m. That the report by the forester, (PW 7), on the value of the trees on the land was Kshs.532,726/=. However the report did not give the acreage of the land or the parcel number where the trees the forester valued were growing. The valuation exercise was done after the filing of this suit and the Defendants were not involved. The court is therefore unable to confirm that the trees valued were all on the two plots subject matter of this suit and as there is no prayer in these proceedings to evict the Plaintiff from the suit land, no order will be issued on that prayer.
  - n. That having found that the Plaintiff obtained the Limited grant and Litem on 31<sup>st</sup> July, 2014, while the originating summons were filed on 13<sup>th</sup> May, 2014, it follows that by the time Plaintiffs filed this suit, she had no capacity to sue on behalf of her late husband's estate. The Plaintiffs effort through their amended originating summons to indicate in the heading that she was also suing on behalf of the estate of Patrick Ochieng Obongita did not cloth her with capacity. This court concurs with the decision of Makhandia J, (as he then was) in ***Patrick Kiseki Mutisya (Suing as the personal representative to the estate of Nzomo Mutisya (deceased) -vs- K.B. Shaghani & sons Limited & another [2012] eKLR***, where the honourable judge agreed with the position taken by one of the parties that a suit instituted by a party who has not obtained a grant before hand is a nullity. The honourable judge then referred to a passage of Lord Denning's judgment in ***Macfoy -vs- United Africa Ltd [1961] All E.R. 1169*** at page 1172 and made the following finding;

***“The subsequent amendment of the plaint cannot reverse the initial harm done to the suit. The Plaintiff when he initiated the suit, had no capacity to sue. It is settled law that a person cannot sue on behalf of the estate of the deceased unless he has first obtained a grant of letters of administration either limited or full. A similar position had been taken by the Court of Appeal in Virginia Edith Wambui Otieno –vs- Joash Ochieng Ougo [1982-88] I KAR 1049 where the court observed;***

***“ But an administrator is not entitled to bring an action as an administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception.”***

The best the Plaintiff could have done if she desired to sue on behalf of the estate of the late Patrick Ochieng Obongita would have been to withdraw the suit and file a fresh one after obtaining the Limited or full grant.

## **11. FINDINGS.**

- i. That the Plaintiff had no capacity to sue on behalf of the estate of Patrick Ochieng Obongita at the time this suit was filed as she had not obtained a limited or full grant under the ***Law of Succession Act, Chapter 160 of the Law of Kenya.***
- ii. That the Plaintiff settled on the suit land in 2003 upon marrying the late Patrick Ochieng Obongita who had purchaser’s interests on the land.
- iii. That the late Patrick Ochieng Obongita had settled on the suit land as a purchaser with permission of Paul Kudondo, the registered owner in 2000.
- iv. That the sale agreement between Paul Kudondo and Patrick Ochieng Obongita of 2000 was breached by Paul Kudondo in 2011 and became void for failure to obtain the consent required under ***section 7 of the Land Control Act Chapter 302 of the Laws of Kenya.***
- v. That Paul Kudondo withdrew his permission to allow Patrick Ochieng Obongita to stay on the suit land in 2011 and the continued occupation of the suit land by the Plaintiff from that date was without permission and therefore adverse to the title of the registered owner, Paul Kudondo.
- vi. That by the time the Plaintiff filed this suit, only about three years had passed from 2011 and this falls short of the twelve years required to confer her with prescriptive rights over the suit land.
- vii. That the 1<sup>st</sup> Defendant, as the personal representative of the estate of Paul Kudondo, has a right to seek to stop the Plaintiff from interring the body of Patrick Ochieng Obongita and permanent injunction is hereby issued in terms of prayer (a) of the plaint dated 4<sup>th</sup> April, 2014 filed in Busia CMCC. No. 160 of 2014.
- viii. That in view of the circumstances under which the Plaintiff settled on the suit land and the fact that she is still residing on the said land, the court directs that each party bear his/her own costs in both suits.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 18<sup>th</sup> DAY OF JUNE, 2015.**

**IN THE PRESENCE OF;**

**PLAINTIFF/APPLICANT.....PRESENT.....**

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

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

**3<sup>RD</sup> DEFENDANT/RESPONDENT.....PRESENT.....**

**COUNSEL.MR. ASHIOYA FOR PLAINTIFF AND MR. WAWERU FOR MALOBA FOR DEFENDANT.**