



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT VIHIGA

ELC CASE NO. 26 OF 2021

(FORMERLY KAKAMEGA ELC CASE NO. 79 OF 2018)

FREDRICK NDONGA MAUNGU.....PLAINTIFF

VERSUS

MARGARET OMOLLO WERE (sued as the administratrix of the estate of

SAMWEL WERE ODERA- Deceased).....DEFENDANT

JUDGEMENT

Introduction

1. The claim herein is based on the doctrine of adverse possession. What is in dispute is a portion of that larger parcel of land known as WEST BUNYORE/EBUTANYI/1788 measuring approximately 1.14 Ha.(the suit land).

2. Directions on the Originating Summons under Order 37 Rules 18 and 19 Civil Procedure Rules, 2010 were taken on 15.5. 2019 that matter to proceed by way of oral evidence, the Applicant to be Plaintiff and the Respondent to be the Defendant. Parties were given liberty to file any further documents.

The Plaintiff's case

3. The Plaintiff's case is contained in the Amended Originating Summons dated 25th April 2019, his Supporting Affidavit sworn on the same date, the Further Affidavit sworn on 29th July 2019, his witness statement and the testimony in court.

4. His case is that in or about the month of February 1982 he entered into a written agreement with the husband of the defendant one SAMWEL WERE ODERA, deceased, vide which he bought a piece of land measuring one (1) acre out of land parcel known as WEST BUNYORE/EBUTANYI/1164 (the original parcel) at an agreed purchase price of Kshs 9000. That the said parcel of land was later subdivided to result into L. R WEST BUNYORE/EBUTANYI/1437 and the suit land herein. That although he took possession of the sold piece of land in the year 1982, the seller did not give him title immediately and later the seller passed on before he could transfer the land in his favour. That the Defendant, who is the widow of the seller, later did succession to the deceased's estate and caused the entire of the suit land to be transmitted into her name without transferring the sold portion to the plaintiff. That in the year 2018, the Defendant chased him out of the sold portion of land.

5. He contends that having purchased, occupied, developed and used the sold portion of the suit land for a period of over 12 years that is; from the year 1982 to 2018 he has acquired title thereto by virtue of adverse possession and the Defendant's interests have been extinguished by operation of law and that the Defendant holds the title in trust for him.

6. He adds that he sued the Defendant in her capacity as the widow and administrator of the Estate of the deceased. He refutes the Defendant's claims that he had leased the disputed portion of the suit land. He contends that he could not have built a permanent house on the disputed portion of land if it was only leased.

7. He added that he had developed the sold portion of land by planting trees, maize and potatoes and had built a permanent house which is still on the land.

8. He produced exhibits namely; land sale agreement as exhibit 1, certified copy of register in respect of WEST

BUNYORE/EBUTANYI/1164 as exhibit 2, certified copies of register in respect of WEST BUNYORE/EBUTANYI/1437 and 1788 (the suit land) as exhibits 3 (a) and 3 (b) respectively and photos of a house allegedly built by the plaintiff on the sold portion as exhibit 4.

9. He called a witness, PW2, who adopted his witness statement filed in court on 29th July 2019 as his evidence and testified that he is the clan elder of the village where the suit is situate. That when he became clan elder in the year 1997, the plaintiff was exclusively and peacefully occupying one (1) acre of land out of land parcel known as W.BUNYORE /EBUTANYI/1164 now comprised in W.BUNYORE/EBUTANYI/1788 which was bought from the deceased Samwel Were Odera. That the plaintiff continued to occupy and utilize the said 1 acre peacefully, continuously, openly and uninterrupted from the first time he (PW2) learnt of his occupation in the year 1997 by farming thereon maize, beans, sweet potatoes and cassava. PW2 testified further that the Defendant has never interfered with the plaintiff's occupation of the suit land. That the plaintiff and his son Remington Maungu started construction of a permanent house which is almost complete with the help and knowledge of the Defendant who has been supplying the plaintiff with building materials.

That it was the Defendant's refusal to transfer the disputed portion in favour of the Plaintiff that triggered the filing of the present case. That after the suit was filed the Defendant and her children became hostile to the Plaintiff. That the Plaintiff has possession of the suit land to date.

10. The Plaintiff seeks the following relief:

a) That the Applicant (Plaintiff) be declared the owner of one acre of land parcel No. WEST BUNNYORE/EBUTANYI/1788, which was created from L.R NO.WEST BUNYORE/EBUTANYI/1437, a Sub-Division Of LR NO.WEST BUNYORE/EBUTANYI/1164 having purchased the same in 1982 where after he has lived on, occupied and used the said parcel of land from then to date when the Respondent threatened to chase him out of the said parcel of land, and the Applicant is hence entitled to the said parcel of land by virtue of Adverse possession and the Respondents be ordered to transfer title to the said parcel of land to the applicant.

b) That the court issues a declaration that the Respondent is holding ownership to one acre of land parcel NO. WEST BUNYORE/EBUTANYI/1788 in trust for the Applicant and the Respondent be ordered to transfer title to the said parcel of land to the applicant and in default of the Respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the ELC of Kenya at Kakamega to execute all documents necessary to effect the sub-division of the said parcel of land and the transfer of title to the aforesaid portion of land into the name of the Applicant.

c) The Respondent pays the costs of this Originating Summons to the Applicant.

d) That the honourable court does make further orders or grant any other relief deemed fit and just.

Defence case

11. The Defendant's case is contained in her Replying Affidavit sworn on 13th May 2019. She denied the Plaintiff's claim and averred that she is the bona fide registered owner of the suit land which she inherited from her husband Samuel Were Odera, deceased.

12. She states that the Plaintiff visited her home in the year 1994 and leased land for his mother, one Agnes, to plant maize and cassava and that the lease period was yearly. She stated that the plaintiff has never lived on the suit land.

13. That after the death of her husband in 1996 and after expiry of the lease period, she took over possession of the leased portion and continued farming it to date. That later, the plaintiff approached her through the area Chief with a request to purchase the land which request she declined.

14. She denied that the plaintiff bought land from her husband. She claims that the land sale agreement adduced in evidence by the plaintiff is a forgery. She denied ever signing the agreement as a witness. She denies that the plaintiff paid her husband kshs.9,000/= for purchase of the land and avers that the transaction between the plaintiff and her late husband was a lease that ran from the year 1994 to 1996.

15. She avers that the plaintiff only wants to take advantage of her because she is a widow and she is old. She further avers that the plaintiff has not been able to explain the delay in obtaining the title deed in the life time of her husband and why he did not sue the deceased for the title. She denies that the plaintiff has acquired any registrable interest over the suit land.

She prays that the suit be dismissed.

Submissions

16. Written submissions dated 10th March 2022 were filed on behalf of the plaintiff by the firm of D. Akwala & Co. Advocates. Counsel submitted on behalf of the Plaintiff that the doctrine of Adverse Possession is embodied in sections 7 and 13 of the Limitation of Actions Act. Relying on the case of *Maweu –vs- Liu Ranching and Farming Co-operative Society (1985) KLR 430*, Counsel submitted that the possession claimed must be adequate in continuity, in publicity and in extent and be adverse to the registered owner. That a plaintiff has to prove that the possession was actual, open, exclusive and hostile for a claim of adverse possession to succeed. Counsel submitted that the plaintiff in the instant case has demonstrated adverse possession of the one acre of the suit land because after purchase, he took possession and started utilizing it by cultivating food crops such as maize, beans, cassava, planting trees and constructing a permanent house. That the Defendant has never occupied nor lived on the portion of land in issue. That mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt the adverse possession.

Counsel submitted that time begun to run in favour of the Plaintiff in the year 1982 when he occupied and started to use the land. Counsel relied on the case of *Public Trustee –vs- Wanduru* cited in the case of *James Maina Kinga –vs- Gerald Kwendaka [2018] e KLR* to demonstrate the point that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve (12) years if the purchaser takes possession of the property because, from this date, the true owner is dispossessed of possession. That a purchaser in possession of the land purchased after having paid the purchase price is a person in whose favour the period of limitation can run.

It is further submitted that the Defendant never took any step throughout the time that the plaintiff was in possession of the suit land that would interrupt time from running. Relying on the case of *Githu –vs- Ndeete (1984) KLR 776* where it was held that time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by the adverse possessor. Counsel submitted that, as held in the case, assertion occurs when the owner takes legal proceedings or makes effective entry onto the land.

Counsel further relied on the case of *Nicholas Ireri Kamwende –vs- Victor Ndiragu & 2 others [2020] eKLR*. He prays that the suit be allowed and costs be awarded to the plaintiff.

17. Written submissions dated 11th march 2022 were filed on behalf of the Defendant by the firm of Bruce Odeny & Company Advocates acting for her. Counsel proposed three (3) issues that the court should determine in the matter.

18. The first issue is whether or not the plaintiff purchased one acre of the Original land parcel No. WEST BUNYORE/EBUTANYI/1164 from the Defendants husband. On this, Counsel submitted that the agreement produced as exhibit does not on the face of it specify the portion of land being purchased and there is nothing on the agreement to show that the Defendant witnessed it, that none of the witnesses named in the agreement was called to testify and that consent of the Land Control Board was not obtained as required under the Land Control Act.

He concluded that the plaintiff did not purchase an acre of land as alleged and if at all the said agreement took place, the same became void for want of consent of the Land Control Board.

19. The second issue proposed by Counsel is whether the Plaintiff is the lawful owner of one acre of land parcel No. WEST BUNYORE/EBUTANYI/1788. On this Counsel submitted that the substantive law governing adverse possession is section 38 (1) of the Limitation of Actions Act while the procedural law is Order 37 Rule 7 Civil Procedure Rules, 2010. He relies on *Halsbury's Laws of England, 4th Edition, Vol.28, paragraph 768* to submit that no right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. That time starts to run when the true owner ceases to be in possession of his land.

Reliance was placed on the case of *Kweyu –vs- Omutut [1990] KLR, 709* where Gicheru JA stated that:

“ By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers infeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality.) Adverse possession is made out by the co-existence of two distinct ingredients, first, such a title as will afford colour, and, second such possession under it as will be adverse to the right of a true owner---.”

He also relied on the case of *Peter Mhuri Muchuki –vs- Samuel Mugo Muchuki [2014] e KLR* to demonstrate as to when time begins to run in favour of a purchaser who is in occupation of the purchased land.

Counsel submitted further that there is no evidence produced to demonstrate that the suit land originated from the original parcel NO. WEST BUNYORE/EBUTANYI/1164 the subject of the land sale agreement. That the plaintiff has not demonstrated actual, open, uninterrupted, notorious, exclusive and continuous possession so as to qualify him as an adverse possessor.

Counsel submitted further that the original parcel NO.WEST BUNYORE/EBUTANYI/1164 was sub-divided in the year 1991 in the life time of the Defendant's husband to create WEST BUNYORE/EBUTANYI/1229, 1230 and 1231 and that the Defendant's husband was still in occupation and control of the said land even after the purported sale.

That no surveyors report was produced to demonstrate that the portion of land claimed is actually one (1) acre of the original land parcel NO.WEST BUNYORE/EBUTANYI/1164.

Counsel concluded on this issue that the plaintiff is a trespasser with no legal rights on the suit land and that is why neither him nor his family reside thereon.

20. The third issue proposed on behalf of the Defendant is whether the Deputy Registrar of the Land and Environment Court of Kenya at Kakamega should be ordered to execute transfer documents.

Counsel submitted on this that given the matters raised in the submissions already made on behalf of the Defendant, issuing an order to the Deputy registrar of the Land and Environment Court of Kenya at Kakamega to transfer title to the plaintiff will lead to a miscarriage of justice.

The Defendant prays that the suit be dismissed with costs and interest to the Defendant.

Issues for determination

21. The court has considered all the pleadings, evidence and submissions herein and found the following to be the issues for determination:

- a) **Whether there is a valid land sale agreement between the Deceased and the plaintiff for the purchase of a portion of land measuring one (1) acre of the suit land.**
- b) **Whether or not the plaintiff has acquired proprietary rights to the one (1) acre portion of the suit land by operation of the doctrine of adverse possession.**
- c) **What order to make on costs.**

Analysis and determination.

22. This court is enjoined by the provisions of Order 21 Rule 4 Civil Procedure Rules, 2010 to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. With this in mind this court proceeds to analyze the evidence and decide the issues framed.

23. The first issue is whether there is a valid land sale agreement between the Deceased and the plaintiff for the purchase of a portion of land measuring one (1) acre of the suit land.

The plaintiff produced a document titled land agreement as exhibit 1. I have read the said document and noted the following:

a. The parties to the agreement were Samuel Were Odera ID No. 4072499/67(the deceased) and Fredrick Ndonga Maungu ID No.6964710/69. Whereas there is a mark (signature) against the deceased's name there is no such mark against the Plaintiff's name.

b. the land parcel is indicated as No.1164/W/B/EBUTANYI SUBLOCATION. However, the parcel number written first was erased and replaced with No. 1164. This was not countersigned to show authenticity.

c. The purchase price was indicated to be kshs.9000/= which was already paid in full. The agreement states in part

“Agreement was to pay Nine thousand Kenya shillings only (KSHS 9000/=) and this was paid by instalments and today the payment is over there is nothing remaining to be paid.”

In essence no money, in the form of purchase price, exchanged hands on the date of signing the agreement. The document appears to have been an acknowledgement of transactions which had already taken place prior to the date or dates of signing the document.

d. Regarding the date of the agreement, although at the bottom of the front page the date of the agreement is indicated as February 1982, one of the witnesses namely; the Chief South Bunyore one Mr. J. Omuyoma, signed his part and affixed the official rubber stamp on 31-1-1983. This leaves unanswered the question as to what was the actual date of the agreement; was it February 1982 or 31st January 1983?

e. The Assistant Chief South Bunyore, one H. Makutsa, named in the agreement as a witness did not sign the document. No explanation was tendered for this.

f. It is not clear whether there is a signature against the name of the Defendant in the document.

With all these gaps in the land agreement, it was necessary for the Plaintiff to call the witnesses named in the agreement to testify and authenticate the document. PW2 had no evidence on the agreement. His evidence was on occupation of the disputed portion of land.

24. The Defendant denies the existence of such agreement and avers that what existed between her husband and the plaintiff was a lease agreement which was entered into in the year 1994 for a short period and expired by the year 1996 when the Deceased died. The Defendant did not produce a copy of the lease agreement.

Given the totality of the evidence on record, the court is persuaded that there was no valid sale agreement between the Deceased and the Plaintiff.

25. The second issue is whether or not the plaintiff has acquired proprietary rights to the one (1) acre portion of the suit land by operation of the doctrine of adverse possession.

The year of entry onto the suit land by the Plaintiff is disputed. While the Plaintiff claims that he entered onto the disputed portion of the suit land in the year 1982 after purchasing it, the Defendant insists that it was in the year 1994 that the plaintiff entered the land after leasing it for his mother to cultivate. Whatever the year of entry it is clear that the Plaintiff did enter onto the suit land for some years and did some activities thereon, the climax of which was the construction of the permanent house. Time starts to run in favour of the purchaser from the date of last acknowledgement of payment of the purchase price. This date is not clear from the land agreement. counting from any of the

dates mentioned namely: 1982, 31. 1. 1983 or 1994, up to the date of filing the Originating Summons the requisite twelve (12) years had elapsed. What the Plaintiff needed to prove was that he had had adverse possession of the portion.

Clearly, the Plaintiff was not in occupation of the suit land as at the time of filing the Originating Summons. There are two versions of how and when the Plaintiff vacated the suit land. The plaintiff's version is that after purchasing the portion of the in the year 1982 and started cultivating, planting trees and food crops and later constructed a house which was to be used by his son. That he enjoyed peaceful occupation of the sold portion of land till the year 2018 when the Defendant chased him from using the land. That the Defendant removed all his trees and crops from the suit land.

The Defendant's version is that she took over possession, occupation and use of the suit land in the year 1996 when the lease agreement expired and after her husband had died. Either or none of the versions may be the true account of the facts. Nonetheless one thing is not contested: that the plaintiff is no longer in occupation of the suit land. That the Defendant who is the personal representative of the deceased and the current registered owner of the suit land is in occupation and use of the same. Time stops to run in favour of the adverse possessor when the registered owner asserts his right over the land by *inter alia* entry thereon and taking possession or by the Adverse possessor acknowledging the registered owner's right and vacating the land.

In the case of *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura; civil Appeal no.20 of 1993* quoted in *Presbyterian Church of East Africa (Uthiru Church) & another vs Kihoro & 3 Others (Civil Appeal 303 of 2018[2022]KECA 49 (KLR) (Civ) (4 February 2022)* Judgement the court of appeal held that

“time which has begun to run under the Act is stopped either 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...”

The same position was stated in the case of *Githu –vs- Ndeete [1984] e KLR 776* cited by the plaintiff, where it was held that

“ time ceases to run under the Limitation of Actions Act when the owner takes of asserts his right or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into the land--.”

In present case, time stopped to run in favour of the Plaintiff when the defendant asserted her right by entering the land and taking possession and utilization thereof.

26. In a claim based on adverse possession, the parcel number of the suit land is a material fact that ought to be pleaded and proved. The law requires that a copy of the register in respect of the suit land be annexed to the Originating Summons. Order 37 Rule 7 states

“(1) An application under section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(2) The Summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...”

The claim has to be in respect of specific land that is identifiable and which is registered in the name of the Defendant against whom time runs. Secondly, in my view, where only a portion of the suit land is claimed, the size of the claimed portion must be proved.

27. In this case the Defendant submitted that the plaintiff has not demonstrated any nexus between the original parcel No. W. BUNYORE/EBUTANYI/1164 and the suit land. Exhibits 2, 3(a) and 3(b) are copies of register in respect of W. BUNYORE/EBUTANYI/1164, W. BUNYORE/EBUTANYI/1437 and 1788 respectively.

In the amended Originating Summons, the plaintiff claims that the suit land is W. BUNYORE/EBUTANYI/1788 which was created from LR NO. WEST BUNYORE/EBUTANYI/1164 from which the plaintiff bought a portion measuring 1 acre in the year 1982.

However, a reading of exhibit 2, which is the green card (copy of register) in respect of land parcel No EST BUNYORE/EBUTANYI/1164, shows that on 6th of June 1991, the title in respect of the original title NO. WEST BUNYORE/EBUTANYI/1164 was closed on sub-division and new numbers issued namely No. WEST BUNYORE/EBUTANYI/ 1229, 1230 and 1231. It cannot therefore be true that the plaintiff occupied parcel no.1164 in the year 1997 as stated by PW2.

According to Plaintiff's exhibit 3(a) the suit land namely WEST BUNYORE/EBUTANYI/1788 is a product of sub-division of land parcel NO. WEST BUNYORE/EBUTANYI/1437. It shows that title for land parcel NO. WEST BUNYORE/EBUTANYI/1437 was closed on 20.12.2016 on sub-division and new titles issued namely the suit NO.W. BUNYORE/ EBUTANYI/ 1788 (the suit land) and 1789. No evidence was tendered to show how parcel NO. WEST BUNYORE/EBUTANYI/1788 (the suit land herein) relates to the original parcel No.1164 which was the subject of the land agreement. It was incumbent upon the plaintiff to seal the gap and demonstrate that what he bought from the original parcel NO.1164 is what changed over the years through the process of sub-division to finally become part of parcel NO.1788. and that it is the same piece of land that he had occupation of. Under sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya, the burden of proof is on the person who would desire the court to believe his/her claims. In this case the burden of proof was on the plaintiff. He did not discharge this burden on a balance of probabilities.

28. The size of the sold portion of land is not mentioned in the land agreement. The Plaintiff claimed in his pleadings and evidence that it was one (1) acre. The Defendant disputed this. In a case of this nature, it was important to get a land surveyor to ascertain the actual size/dimensions of the claimed portion. This is because the claim is on only part of the suit land and as such the same ought to be identified

with certainty. No such surveyor's report was produced. What is on record is only the Plaintiff's word in his pleadings and his testimony. In the case of *Gatimu Kinguru vs Muya Gathangi [1976]KLR 253* the court observed that:

“the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”

While PW 2 testified that the Plaintiff was occupying land Parcel no WEST BUNYORE/EBUTANYI/1164 in the year 1997 when he became the clan elder, the green card shows that land parcel no WEST BUNYORE /EBUTANYI/1164 was not in existence in 1997 as the same had been sub divided in the year 1991. He also testified that the Plaintiff was in occupation of the suit land to date (date of his statement filed on 29/7/2019) yet according to the plaintiff, he (Plaintiff) had been chased away from the land in the year 2018. The Defendant denied that PW2 was her clan elder.

The court finds that the evidence placed before it is not sufficient to prove the claim based on adverse possession. It has not been proved that the Plaintiff had actual, open, exclusive, occupation of the disputed portion of land for a continuous period in excess of the requisite 12 years.

29. Though under the provisions of section 27 of the Civil Procedure Act costs of any action, cause or other matter, or issue shall follow the event the circumstances of this case it is just that each party bear own costs.

30. In conclusion therefore, the court finds that the Plaintiff's claim has not been proved on a balance of probabilities. The suit is dismissed. Each party to bear its own costs.

Orders accordingly.

JUDGEMENT DELIVERED VIRTUALLY AT VIHIGA THIS 28th DAY OF MARCH 2022.

E. ASATI,

JUDGE, ELC.

In the presence of:

Aligula Advocate for the Plaintiff

Imbaya Advocate for the Defendant

Patricia- Court Assistant.

E. ASATI,

JUDGE, ELC.