



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 34 OF 2015**

**CLETUS JESSE WANJALA..... APPLICANT**

**= VERSUS =**

**JOHN MUSUMBA OMIA .....RESPONDENT**

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

1. The Applicant commenced these proceedings vide the Originating Summons dated 20<sup>th</sup> April, 2015 and filed on the same date, against the Respondent. The Applicant's case is that he has acquired by way of purchase, 3 acres out of L.R No. Bunyala/Bulemia/4126 and raised for the determination the following questions:

- a) **Whether the Applicant has been in open and quiet possession of 3 acres out of L.R No. Bunyala/Bulemia/4126 since the year 1992;**
- b) **Whether the Respondent's title to L.R No. Bunyala/Bulemia/4126 upon the expiry of 12 years from the time the Applicant went into possession of the land from the year, 1992;**
- c) **Whether the Applicant has now acquired title by virtue of adverse possession;**
- d) **Whether the registration of the Respondent as owner of the L.R No. Bunyala/Bulemia/4126 should be cancelled and subdivision ordered into two portion with a view of the Applicant getting registered as owner of a portion measuring 3 acres;**
- e) **Who should pay costs of the suit.**

2. The Applicant sought to be granted the following ORDERS:

- a) **That the Respondent's right over L.R No. Bunyala/Bulemia/4126 got extinguished by adverse possession upon expiry of 12 years from the time the Applicant came into possession from the year 1992;**
- b) **That L.R No. Bunyala/Bulemia/4126 be ordered to be subdivided into two portions of 3 acres and 0.5 acres and the Applicant be ordered to get registration of the portion measuring 3 acres;**
- c) **That the Respondent be ordered to execute all the relevant statutory documents required of him to facilitate transfer of the portion measuring 3 acres from L.R No. Bunyala/Bulemia/4126 into the names of the Applicant and in default, the Deputy Registrar of the Court do execute the same in place of the Respondent;**
- d) **That the Respondent be perpetually barred and or enjoined from taking, using and from in any way interfering with the Applicant's portion of the suit land measuring 3 acres;**
- e) **That costs of this case be borne by the Respondent.**

3. The Originating Summons was supported by the Applicant's supporting affidavit dated 20<sup>th</sup> April, 2015 and attached to it were several pages of the sale agreement for the purchase of the suit land, a letter of consent dated 11<sup>th</sup> December, 1992 and a certificate of official search dated 16<sup>th</sup> March, 2015.

4. The Respondent filed his replying affidavit dated 24<sup>th</sup> of November, 2020 and filed on the same date admitting selling 2 acres of land comprised on L.R No. Bunyala/Bulemia/4126 to the Applicant. He deposed that the Applicant upon such sale, invited surveyors to the ground who demarcated the two acres. The Respondent stated that he realised later on that the Applicant had interfered with the boundaries

previously placed on his land and extended it to 3 acres. He is however ready and willing to transfer to the Applicant the 2 acres he bought from him and that the County Surveyor Busia be directed to move to the ground and give off the 2 acres from L.R No. Bunyala/Bulemia/4126 in favour of the Applicant with the costs for the survey, the consent for subdivision and transfer being met by the Applicant owing to the fact that the dispute herein was necessitated by him insisting to acquire an extra one acre that was against their agreement for sale.

5. During the hearing which took place on the 7<sup>th</sup> of October, 2021, the Applicant stated that he has known the Defendant since 1991 having sold him a parcel of land. That the defendant first sold him 2 acres of land in 1991 at a consideration of KShs.17,000/- and an extra one acre in 1992 at KShs.9,000/-. The Applicant averred that he took possession in the year 1991 by putting up his residential house and farming thereon. That they have had no dispute between them. He adopted his affidavit sworn on the 20<sup>th</sup> of April, 2015 as part of his evidence and produced his list of documents filed on the 5<sup>th</sup> of March, 2018.

6. In his affidavit the Applicant deposed that he has been in physical possession of the land for more than twenty-six years after paying the purchase money in instalments and the Respondent acknowledging receipt of the money. That the Respondent later subdivided the land original number 2136 into parcel numbers 4124, 4125 and 4126 and he resides on the portion number 4126. That his possession has been peaceful, quiet and to the exclusion of anyone else including the Respondent.

7. In cross-examination the Applicant stated that he initially bought two acres of land which he fenced in 1991 and which fence is still there to date planted with sisal boundaries around the parcel. He stated that they had an issue over the one acre when the Respondent refused to sign the transfer forms. He stated that he did not have a survey report to confirm the size of the parcel that he is currently occupying. He concluded by stating that he is entitled to costs of this suit because the Respondent is the cause of the delay.

8. On re-examination, the Applicant referred to the Respondent's replying affidavit dated 13<sup>th</sup> July, 2015 where he admitted to selling the Applicant land and that the agreement for the one acre was entered into on the 8<sup>th</sup> of February, 1992 and there were witnesses present. This marked the close of the Applicant's case.

9. The Respondent also relied on his sole evidence and he opened his defence by stating that he hailed from Bunyala North location and he knew the Plaintiff because they had an agreement for the sale of two acres of land. The witness continued in evidence stating that he planted sisal on the upper and lower part of the land sold to the Applicant. That the Applicant however extended into his portion by building a toilet which action forced him to report the matter to the Police that resulted in the arrest of the Applicant's son but later pardoned him.

10. That the Applicant had filed a case before the Land Dispute Tribunal where the D.O told him to receive his 2 acres and leave out the disputed one acre. The defendant insists that he only sold two acres to the Applicant and not 3 acres. That he was willing to sign documents of transfer for the two acres but the disputed one acre should be left for his children and grandchildren. He concluded by stating that the Applicant should meet the costs of the survey.

11. During cross-examination, the Respondent stated that his original land parcel number 2136 was 8 acres while the suit parcel number 4126 is 3 ½ acres in size. That the Applicant's share is comprised in parcel number 4126. With respect to the agreement dated 8<sup>th</sup> February, 1992, the witness denied that the signature thereon was his asserting it was forged. He stated that he knew the witnesses named in the impugned agreement except he did not know one named Henry Oyieri.

12. In re-examination, the Respondent stated that the Liguru was present during the agreement for the two acres and that John Wandera was the go-between. He stated further that the witnesses named in the agreement dated 8<sup>th</sup> September, 1991 were present but the signature on the agreement is not his. He stated that there have been several disputes between the parties herein with regard to the disputed one acre.

13. The parties agreed to exchange written submissions with the Applicant filing his submissions on the 26<sup>th</sup> of October, 2021. He submitted that when they entered into the agreements in 1991 and 1992, the defendant was not an old man. That although the Respondent alleged that the signature on the 2<sup>nd</sup> agreement was forged, he did not produce any evidence to prove the forgery. That the Respondent has never taken any action to evict the Applicant from the disputed land if he was living thereon illegally and he has been residing on the land for 30 years now. He concluded by stating that he has proved his case on the required standard. The Applicant relied on the case of Samuel Miki Waweru vs. Jane Njeri Richu (2007) eKLR where the trial court stated thus;

***In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.***

14. The Respondent filed his submissions on the 3<sup>rd</sup> of November, 2021 and submitted inter alia that he entered into an agreement with the Applicant for the sale of 2 acres of land in 1991 and which land is now designated as L.R Number Bunyala/Bulemia/4126. That the claim for the sale of the three acres is time barred as it relates to a contract of purchase that was extinguished 6 years from March, 1992. That the fact that there was no consent from the Land Control Board within the 6 months from the date of purchase invalidates the agreement.

15. The Respondent submitted further that the Applicant in his evidence admitted that they have had disputes over the one acre of land since 1992 which is evidence that the occupation of the disputed portion has not been peaceful yet peaceful possession is the cornerstone of adverse possession. The Respondent narrated that he never signed the transfer forms in favour of the Plaintiff because of the disputed one acre. That the boundary for the two acres exists but there was no boundary for the third acre because there was no third acre. He urged this Court to find that the suit was wholly unnecessary and the same should be dismissed with costs to the Defendant.

16. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are

as follows:

- a) **Whether the Applicant is entitled to 3 acres comprised in Bulemia/4126 by virtue of adverse possession, and**
- b) **Who bears the costs of this suit?**

17. From the evidence presented, the Respondent does not deny that the Applicant is entitled to 2 acres to be curved out of L.R. Bunyala/Bulemia/4126. The Respondent expressed his willingness to execute relevant documents of transfer for the 2 acres in favour of the Applicant. Therefore, what remained for the court to determine is whether or not the Applicant is entitled to the additional one acre which he claimed to have bought in February 1992.

18. To establish his claim for the additional one acre, the Applicant produced a sale agreement dated 8.2.1992 signed between the parties and a further document dated 10.5.1992 acknowledging payment of the balance of purchase price for the one acre. The Respondent on his part denied such a transaction ever took place, stating that his signature appearing on both documents were forged. He however did not provide evidence to support his allegation of forgery.

19. All queries whether on the balance the purchase price for the one acre was paid, or failure to sign or any other activity that would invalidate the contract ought to have been sorted out six years from the date the illegality was discovered. This is provided under section 4(1) (a) of the Limitations of Actions Act which provided that:

**‘The following actions may not be brought after the end of six years from the date on which the cause of action accrued:**

**(c) actions founded on contract;’**

20. The occupation and or possession of the disputed one acre is not denied by the Respondent. He stated thus in his evidence “*the sisal was removed and he extended on to my portion by building a toilet. I reported him to the police and the plaintiff’s son was arrested but I later pardoned him*” Although the Respondent does not tell us when this interference took place, it confirms the Applicant’s averment that he is in use of the one-acre portion. The Respondent submitted that the occupation has been contested from the time the Applicant started using it adding that the Applicant even sued him before the Land Disputes Tribunal. These proceedings were not produced however on the averment that it is the Applicant who had taken the Respondent to the Tribunal, time did not stop running in favour of the Respondent.

21. The Respondent has not shown the Court of any steps to remove the Applicant. Contesting the sale and or possession by the Applicant justifies his claim to the one-acre portion by way of adverse possession where one of the principles for proving such a claim is that the occupation should be hostile to that of the registered owner. Further, the registered owner must have been dispossessed of the land which in this case appears to be the possession obtaining. The Respondent stated that the one acre should be left to his children and grandchildren meaning he has been dispossessed from putting the land to the use he intended it for.

22. Save for the number of years, a claimant for adverse possession has to elaborately demonstrate that the possession was adverse and or hostile to that of the owner. The Applicant’s duty was to prove that his occupation completely interfered with the Respondent’s ability to use the suit land. The parties agree on only 2 acres of the suit land and are in agreement that the occupation of one acre is in dispute. The Court of Appeal in the case of **Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamataka Board of Wakf -vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus: -

**“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”**

23. The possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years for the right to accrue. The Applicant produced two agreements for sale one dated 8<sup>th</sup> September 1991 for 2 acres of land and at and the other dated 8<sup>th</sup> February, 1992 for one acre of land. The Applicant has demonstrated that he took possession of the three acres of land immediately. The Respondent acknowledges and confirms that they planted a sisal boundary around the two-acre portion. Although the Respondent denied sale of the one acre, there was no sufficient evidence to contradict the document of sale produced by the Applicant. Secondly, there was no evidence that contradicted the Applicant that he is in possession of the additional one-acre portion and that such possession was from 1992 or thereabouts. By the time of filing this summons, the Applicant had been in possession of the three acres for 24 years.

24. In the upshot of the foregoing evidence and analysis I am convinced that the Applicants have proved their case beyond the balance of probabilities as required by law. Therefore I enter judgement for the Applicant and hold that:

- a) **The Applicant has acquired by way of adverse possession three (3) acres portion of the suit title number BUNYALA/BULEMIA/4126;**
- b) **The County Land Surveyor, Busia County be and is hereby directed to survey the suit property to mark out the Applicant’s three acres out of Land Reference Number BUNYALA/BULEMIA/4126;**

c) The Respondent shall forthwith execute necessary documents to facilitate the transfer and registration of three acres' portion from Land Reference Number BUNYALA/BULEMIA/4126 in favour of the Applicant within thirty (30) days from the date of judgement, failure to which, the Deputy Registrar shall execute the same in favour of the Applicant;

d) Each party shall meet their own costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF MARCH, 2022.

A. OMOLLO

JUDGE