



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL SUIT NO. 36 OF 2001

IN THE MATTER OF LAND PARCEL NO. MARACHI/BUMALA/331

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA.

BETWEEN

GABRIEL OWINO1ST PLAINTIFF/APPLICANT,

MORRIS OUMA OMONDI.....2ND PLAINTIFF/APPLICANT.

=VERSUS=

ODONGO ODWAKO KHADUDU.....1ST DEFENDANT/RESPONDENT.

ODUORI ODWAKO KHADUDU

(ALIAS)NYANGWESO.....2ND DEFENDANT/RESPONDENT.

OWINO ODWAKO.....3RD DEFENDANT/RESPONDENT.

J U D G M E N T.

By way of originating summons dated 1st November, 2001 filed through M/S. Ashioya & co. advocates. Gabriel Owino and Morris Ouma Omondi herein after referred as 1st and 2nd plaintiff, prays for the following determinations:

- “ a. **Whether** the applicants have lived openly on the suit land No. Marachi/Bumala/331 since 1939.
- b. **Whether** the applicants herein are entitled to be registered as proprietors of the suit land having acquired the title by adverse.
- c. **Whether** the suit land is registered in the name of the Respondents/Defendants herein.

d. Whether the registration of the Respondents/defendants as absolute proprietor of the suit land should be cancelled and instead the applicant's names substituted on the register.

e. Whether the permanent injunction should issue against the Respondents, their agents, servants and/or workers from interfering with the said portion of land.

f. Whether costs of this application should be awarded to the applicant.''

The originating summons is supported by the affidavit of the 1st plaintiff sworn on 2nd November, 2001 in which he deposes that;

- He was born on the land in question and they have lived on it with their father until his death in 1989.
- He continued occupying the land peacefully, openly, and uninterrupted after the death of his father.
- The long peaceful, open and uninterrupted possession and use of the land for a period of more than 12 years entitles him to acquire title to the land.

The application is opposed by Odongo Odwako Khadudu and Oduori Odwako Khadudu hereinafter referred to as 1st and 2nd defendants.

In the replying affidavit of Odongo Olwako Khadudu filed through M/S. Fwaya Nandwa & company Advocates and sworn on 28th June, 2005 he deposes that;

- He and his brothers got registered with the land in question in 1971 upon adjudication.
- The plaintiffs have not been cultivating or using the land peacefully or uninterrupted and therefore cannot claim to be registered owners by way of adverse possession.
- The plaintiffs' father had instituted criminal proceedings No.2878 of 1985 claiming that they had trespassed into his Land, Marachi/Bumala/331, but the court ruled in their favour.
- The plaintiffs' brother instituted Kakamega RMCC. 71 of 1973 intending to have them evicted but the suit was dismissed.
- The 3rd defendant is deceased.
- The plaintiffs are owners of land parcel Marachi/Bumala/1133.
- The defendants' rights have not been extinguished because they have been using the land in question exclusively.
- This case is res judicata in view of the two cases above.

While this case was pending before the court, Mr. Fwaya advocate was granted leave to cease acting for the defendants. The plaintiffs advocate was directed to serve the originating summons and all other documents to the defendants. On the 23rd July, 2012, the court directed that the proceedings be typed for the purposes of writing the judgment. While in the process of preparing the judgment, the following certificates of death were noted to have been filed with documents herein.

- Certificate of death No.B934247 showing that Owino Odwako

Khadudu died on 20th April, 1985.

- Certificate of death No.B.927133 showing that Odongo Odwako Khadudu died on 3rd November, 2005.

Following this observation, the court on 30.4.2013 directed the plaintiffs' counsel to file an affidavit clarifying which among the defendants was still alive. An affidavit by one Mourice Sylvester Ouma, the 2nd plaintiff herein sworn on 7th May, 2013 was filed on the same date and discloses the following:

- That when he filed this case, the 1st and 2nd defendants were alive.
- That the 1st defendant died on 25th December, 2010 through a road traffic accident.
- That Oduori Odwako Khadudu, the 2nd defendant, is still alive and living in Uganda.

After perusing the court record, it is clear no oral evidence was called. The plaintiff's counsel filed written submissions dated 6th December, 2010 and filed in court on 27th March, 2012. He submits that the defendants title to the land in question has been extinguished as plaintiffs have been in occupation of the land from 1939 and have lived on it peacefully, openly and uninterrupted. He referred the court to the case of ***Kiruga -vs-Kiruga and another Court of Appeal at Nairobi and the case of PETER THOU KAIRO- VRS- KURIA GACHERU Court of Appeal at Nairobi Civil appeal No. 42 of 1987***, in support of his submission that time for adverse possession commences and continues to run even after the ownership of the land in question changes.

No oral evidence was called in this case and the court has to rely on their affidavit in the support of the originating summons and the replying affidavit. The 1st plaintiff, in his affidavit dated 2nd November, 2001, depones as follows:

- That he was born in 1939 on land parcel Marachi/Bumala/331 and has lived on it since that time.
- That before 1939, his father was in actual possession of the said land and continued to be in actual possession until his death in 1989.
- That before and after the death of his father, he has continued using the land peacefully, openly and without interruption and has always regarded it as his personal property.
- That he has accordingly acquired the title to the said land through his long peaceful, open and uninterrupted possession and use for a period exceeding 12 years.

The plaintiffs claim is contradicted by the defendants through the replying affidavit of Odongo Odwako Khadudu sworn on 20th June, 2005 in which he stated as follows:

- That the father of the plaintiffs, called Augustino Omondi Wambei, has never been in actual possession of land parcel Marachi/Bumala/331.
- That his father called Odwako Khadudu had filed case against the plaintiffs father over the said land at Nambale and the court ruled in favour of his father. The plaintiffs father appealed in Bungoma African Appeal court in case No.180 of 1957 and the appeal was dismissed.
- That his brothers and himself were registered with the land in question in 1971 as first registered owners and the plaintiffs father did not file any objection.
- That the plaintiffs have not been cultivating or using the said land and cannot claim to be registered as owners by way of adverse possession.
- The plaintiff's father filed Criminal proceedings against the defendants in case No.2878 of 1985 claiming that they have trespassed in his land Marachi/Bumala/331 but the court ruled in the defendants favour.
- That the plaintiffs brother filed Kakamega RMCC. No. 71 of 1973 against the defendants and the case was dismissed.
- That the defendants' rights have not been extinguished since they have been using the said land exclusively without interference of the plaintiffs.

Having considered the contents of the said affidavits evidence, the court finds as follows;

1. That the 3rd defendant died on 20th April, 1985. This was disclosed in the first defendant replying affidavit and confirmed by the 2nd plaintiff through his affidavit of 7th May, 2013. If the plaintiffs had any claim against the 3rd defendant that outlived his death, they ought to have lodged their claim against his estate by suing the personal representative or the administrator of the estate. This was not done and the court cannot confirm that effective service of the court papers were done on the right person to represent the estate. The plaintiffs case against the 3rd defendant must therefore fail.
2. The copy of the green card filed with the affidavits herein clearly shows land parcel

Marachi/Bumala/331 was first registered in the names of the defendants on 11th February, 1971. There are no other documents of ownership that shows that the land so described, had been registered in the name of any other person before that date. The claim by the 1st plaintiff that they have

lived on the land known as Marachi/Bumala/331 from the time he was born in 1939 cannot therefore be confirmed. It is doubtful as to whether land consolidation and adjudication had taken place in that area in the year 1939 for the parcel of land they may have been living on to have been registered and given the said parcel reference. The most probable situation is that the land they were then living on was later on registered and given the parcel No. Marachi/Bumala/331.

3. Even though the plaintiffs claim to have been in peaceful, open and uninterrupted occupation of land parcel No. Marachi/Bumala/331, this claim has been disputed by the defendants. The defendants have annexed a document from the Bungoma African Appeal Case No. 180 of 1957 showing that an appeal that had been launched against the Divisional court decision had been dismissed. The replying affidavit indicated that the appeal that was dismissed had been filed by the plaintiffs father against the defendants father and this was not contradicted. Again the defendants claim that there was a case initiated by the plaintiffs father against the defendants claiming they had trespassed on land Parcel Marachi/Bumala/331 in case No. 2878 of 1985 was not also contradicted. The plaintiffs did not contradict defendants claim that their brother had filed Kakamega RMCC. 71 of 1973 against the defendants which he lost. The sum total of these cases is that there has been other cases involving land parcel Marachi/Bumala/331 involving the plaintiffs father, brother, the defendant and their father at various times.
1. That the contents of the plaintiffs affidavit in support of the originating summons claim they have been in exclusive possession of land parcel Marachi/Bumala/331 but the existence of the cases referred to above involving their father, brother, the defendants and their father clearly shows there has been other person or persons in occupation of portions of that land. The plaintiffs could not therefore have been in exclusive occupation of the land in question. The Defendants were also in occupation and that is why the plaintiffs father had instituted criminal case No. 2878 of 1985 against the defendants claiming that had trespassed on the land but lost the case. This has not been rebutted.
2. That even if the plaintiffs have been in occupation of Marachi/Bumala/331 or portions of it their occupation cannot be said to have been peaceful or uninterrupted as shown by the existence of previous litigations involving their family and the defendants family.
3. That the copy of the green card attached to the affidavits by both parties shows of an entry of 11th January, 1974 showing the government had compulsorily acquired 0.247 hectares through gazette notice No. 681 of 9th March, 1973. None of the parties addressed to the court on this but this acquisition must have reduced the size of the land Marachi/Bumala/331. To add to this, the plaintiffs have not specified how the portion or portions of the land that they use or in their possession are marked in view of the finding of this court that they cannot be in occupation of the whole piece of land while at the same time the government has acquired a portion of it. They cannot also be in occupation of the whole piece of land when the defendants have been in occupation of the same land that had made the plaintiffs father institute criminal proceedings against the based on trespass.

From the foregoing, the court finds that the claim by the plaintiffs that they have been in peaceful, open and uninterrupted possession of land parcel Marachi/Bumala/331 for a period of more than 12 years has not been proved to the standard required of a balance of probabilities. The plaintiffs claim on adverse possession has been challenged by the defendants through the replying affidavit of the 1st defendant sworn on 28th June, 2005 whose contents are uncontested. The plaintiff's case against the defendants therefore fails and the same is dismissed with costs to the defendants.

S. M. KIBUNJA,

JUDGE.

11TH JUNE, 2013.