



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH CC. NO. 4 OF 2010.

PATRICK OKHUBEDO SARRYPLAINTIFF.

= VERSUS =

LADDOCK MAKOKHA KHASENYE.....DEFENDANT.

J U D G M E N T.

PATRICK OKHUBEDO SARRY, through **ACHIENG AWUOR & CO. ADVOCATES**, commenced this suit by originating summons dated 4th February, 2010 supported by his affidavit sworn on the same date and filed on 5th February, 2010. He seeks the following determinations:

“1. Whether the plaintiff is entitled under section 38 of Limitation of Actions Act Cap 22 of Laws of Kenya, to be registered as proprietor of the entire portion of land L.R. No.

Bunyala/Bukoma/1878 measuring approximately Naught Decimal Four Naught one (0.401) Hectares.

2. Whether the Defendant is registered as proprietor of L.R. No. **Bunyala/Bukoma/1878** measuring approximately Naught Decimal Four Naught one (0.401) hectares, in trust for the plaintiff.

3. Whether the Defendant should transfer L.R. No.**Bunyala/Bukoma/1878** and measuring approximately 0.401, hectares to the plaintiff ailing which the Deputy Registrar of the High Court at Busia be authorized to execute the transfer documents in favour of the plaintiff.

4. Who pays the costs of this suit.”

In his disposition in the affidavit in support of originating summons and further affidavit deponed on 15th April 2010, the plaintiff, among others stated;

1. That land parcel Bunyala/Bukoma/399 was his grandfather’s ancestral land.
2. That his grandfather, Donati Okhisedo Sarry, settled on the land over 100 years ago and his father was born there in 1932.
3. That both his grandfather and father are now deceased but he had continued to live on that land since his birth in 1959.
4. That Land parcel Bunyala/Bukoma/1878 was first registered in the name of Makokha Kasenye, who is father to Defendant in 1978.
5. That the land was later subdivided into parcels 1562 and 1563, and later parcel 1562 was subdivided to 1878 and 1879 which are in the Defendant’s names.

6. That his family have been in possession of the portion of the ancestral land now registered as Bunyala/Bukoma/1878.
7. That his father and other relatives who have died are buried on parcel 1878 which they fenced and have been using exclusively.
8. That he has acquired title to that land by adverse possession.

In his replying affidavit, filed through M/S. Balongo & company Advocates, sworn on 10th March, 2010, Laddo Makokha Khasenye among others, stated;

1. That plaintiff never lived on Bunyala/Bukoma/1878 but on Bunyala/Bukoma/418 where his father had a homestead.
2. That plaintiff's father is buried on Bunyala/Bukoma/418 and not 1878.
3. That he allowed plaintiff to put a temporary semi-permanent structure on Land parcel Bunyala/Bukoma/399 upon his request in 2003.
4. That later when he decided to subdivide the land he asked the plaintiff to vacate but he declined.
5. That he however subdivided the land and sold some parcels without any objections being raised.
6. That he had left the land parcel Bunyala/Bukoma/399 after his father died in 1954 but left his mother and uncles on the land.
7. That plaintiff and his family have been using the land around the structure he built since 2003 when he first entered on that land.

On the 2nd November, 2011 directions were taken by consent of both counsel that the originating summons and supporting affidavit be taken as the plaint and the replying affidavit dated 20th March, 2010 be deemed as the defence. Earlier on 18th October, 2010 directions had been given that parties do file and exchange witness evidence affidavits. The said affidavits were confirmed filed by 4th July, 2011.

The plaintiff filed the evidence affidavits headed "Further Affidavits." of John Odwory Kulohoma, Cornelius Oundo Wasike and Michael Abuoga Odhiambo all sworn on 24th November, 2010.

For the Defendant, evidence affidavits headed "Supporting Affidavits." were filed by the Defendant, Ibrahim Maracha, and Leonida Ajiambo Mudibo all sworn on 31st December, 2010.

During the hearing, the plaintiff testified as PW 1 on his behalf, and called three witnesses, PW 2, PW 3 and PW 4. He stated that he was born on the land he is now claiming and that he built his house on that land in 1989. That his young brother is also settled on that land and his father who died in 1998 is buried on the land. He added that his sister, brother and sister in law who died in 1977, 2000 and 1996 respectively, are also buried on that land parcel Bunyala/Bukoma/1878.

Cornelius Oundo Wasike (PW 3) aged 75 years, told the court that plaintiff's grandfather and father have lived on the land in question for over 50 years. He added that he knew plaintiff's grandfather, and other relatives who are buried on that land. He added that he is a neighbour to plaintiff land and their houses are about 400 metres apart.

John Oduori Kulohoma aged 80 years testified as PW 3, and said he found Donati, who is grandfather to plaintiff living on the land where plaintiff lives today. He said Khasenye, brother to Defendant, owned the land that neighbours that of Donati. He added that Khasenye had told him that he had sold the portion Donati's family were using to that family.

Michael Abuoga Odhiambo testified as PW 4, and said that he was born in 1927 and plaintiff is his nephew. He said his father owned land near that of Khasenye but that Khasenye was not living on that land. He said one Otiato bought land from Khasenye to add to that Donati had and it is on that land plaintiff and his relatives have been living.

The Defendant also testified on his own behalf as DW1, and called two witnesses who testified as DW 2 and DW 3. The Defendant said Land Bunyala/Bukoma/399 was his from 1972. He subdivided the land

into parcel 1562 and 1563 and transferred the latter parcel to DW 2. He later subdivided parcel 1562 into parcels 1878 and 1879 and sold parcel 1879 to DW 3, retaining the former parcel in his names. He said nobody has ever opposed the subdivisions and that plaintiff has never lived on any of those parcels. He disputed that plaintiff's relatives are buried on parcel 1878. He said plaintiff had put up a house on parcel 1878 in 2003 without asking for his permission but does not live or use it. He said the land was initially parcel 399 and was registered in his names, Makokha Khasenge on 20th May, 1978. He later swore an affidavit and had the names rectified to read Laddo Makokha Khasenye. He said he has never built a house on parcel 399. He said plaintiff's land should be in parcel 417 which is in the names of Ochere, who was brother to his father. He disputed that plaintiff's father and brother are buried on the portion of land plaintiff uses in parcel 399. He conceded plaintiff has relatives buried on parcel 399.

Leonida Ajiambo MudiboDW2, said she bought land parcel Bunyala/Bukoma.1563 from Defendant in 1993. She said a semi-permanent house was later put up on the land adjacent to hers. She added that plaintiff house is partly on parcel 1562 and 398. She indicated that plaintiff's brother called Osogo, had built a house on parcel 1562 with permission of Defendant's, brother Joseph Magioya Khasenye. She added that plaintiff brother Osogo, who died in 2007 is buried in parcel 1562.

Ibrahim Mukuro Wancha testified as DW 3, and said in 2009, the Defendant was selling him parcel 1878 but plaintiff filed a caution. He confirmed that a portion of plaintiff house is on parcel 1878. He conceded that Land Control Board Consent to transfer parcel 1878 to him has not been obtained.

Issues for determination are as follows:

1. Whether the plaintiff has been in continuous, exclusive and uninterrupted possession of land parcel Bukhayo/Bukoma/1878 for more than 12 years.
2. Whether the plaintiff occupation of the said land has extinguished the title of the registered owner.
3. Whether the defendant registered owner of the said land and if so whether he holds the land in trust for the plaintiff.
4. Whether the defendant should transfer the land to plaintiff and in default whether the Deputy Registrar should be authorized to sign the necessary documents to effect the transfer.
5. Who pays costs of the suit.

Both counsel filed written submissions. Counsel for the plaintiff submitted that the plaintiff have been in occupation of the land for over 70 years. Alternatively were the court to take the time to have started ruling when plaintiff constructed the house on the suit land in 1989 a period of 24 years has since passed and is entitled to the land under adverse possession. He referred the court to the case of **Peter Thuo Kairo –vs- Kuria Gatheru** (1988)2 KAR 111. In support of his submission that plaintiff occupation of the land has never been interrupted, counsel referred the court to the case of **Jason Masai –vs- Masai Kipsamo** Kisumu C.A. No. 181 of 1996.

The Defendant's counsel submitted that Defendant has never abandoned the land as he has continually been subdividing it and stamped his possession of the land. He further pointed out that plaintiff house is on the periphery of the suit land and hence cannot claim the whole land. He also submitted that the issue of adverse possession does not arise as plaintiff claim the land was their ancestral land. He further submitted that plaintiff house was constructed in 2003 and by the time his suit was filed in February, 2010 the period of 12 years had not lapsed. He referred the court to the case of **Mbiva –vs- Gachui** H.C.C.2826/1997.

I have carefully considered the evidence adduced by parties and their witnesses, both verbal and in the affidavits, submissions by counsel and find as follows:

1. That the plaintiff's and Defendant's parents owned land adjacent to each other even before the land adjudication.
2. That Defendant' family had allowed the plaintiff's family to use a portion of their land Bunyala/Bukoma/399 through a land purchase arrangement as confirmed by PW 3 and PW 4.
3. That even though the plaintiff's family never got the land bought from Defendant father

transferred to their names, they have lived on portions of land parcel Bunyala/Bukoma/399 even before land adjudication and registration of the said land in the names of Defendant.

4. That the plaintiff has from his birth, in 1959, lived on land parcel Bunyala/Bukoma/399 and has since 1989, when he built a house on the portion registered as Bunyala/Bukoma/1878, been in continuous possession of that portion.
5. That the Defendant has never been in possession of land parcel Bunyala/Bukoma/399, and even when he subdivided it to create parcel Bunyala/Bukoma/1562 and 1563, he did not interrupt the plaintiff's occupation of the portion of land he had been using.
6. That when Defendant further subdivided parcel's Bunyala/Bukoma/1562 to create parcels 1878 and 1879, he did not interrupt the plaintiff's possession of the portion of land he had all along used and which he says is registered as parcel 1878.
7. That when plaintiff learnt that the Defendant wanted to sell that portion to a third party, he filed this suit to assert his claim on adverse possession.
8. That plaintiff's occupation of the portion of land now registered as Bunyala/Bukoma/1878 is from his birth in 1959. It is however obvious that at that time the person who was in actual possession of the land was not the plaintiff in this case, but his parents. The plaintiff's personal possession of the land can only be traced from the time he built a house on the piece of land in 1989. The defendant has confirmed asking the plaintiff to vacate from the land when he started subdivision exercise but the plaintiff declined. It is important to note that the first subdivision was done at the time DW2 got registered with parcel No.1563, in 1993. The plaintiff has therefore been in continuous possession of that portion of land registered as Bunyala/Bukoma/1878 for more than 12 years since 1989.
9. That the plaintiff possession of the said land parcel 1878 has been adverse to the title of the registered owner who is the Defendant herein.

10. That the Defendant therefore hold title to the land parcel Bunyala/Bukoma/1878 as trustee for the plaintiff.

As such, the court is satisfied that the plaintiff has established his case on a balance of probabilities against the Defendant and orders as follows:

1. That the plaintiff, having been in adverse possession of land Bunyala/Bukoma/1878 for more than 12 years is entitled to be registered as its proprietor under section 28 of the Limitation of Actions Act, Cap 22 of Laws of Kenya.
2. That the Defendant's title to the said land is extinguished and holds the title in trust for the plaintiff.
3. That the Defendant should transfer the land parcel Bunyala/Bukoma/1878 to the plaintiff and in default the Deputy Registrar is hereby authorized to sign all documents necessary to transfer the said land to the plaintiff.
4. The Defendant will meet the costs of this suit.

S. M. KIBUNJA,

JUDGE.

Delivered on 18th day of September 2013.