



REPUBLIC OF KENYA



KENYA LAW
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**Inziani v Makuda & 2 others (Environment & Land Case
25 of 2017) [2022] KEELC 2357 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 25 OF 2017**

**AA OMOLLO, J
JULY 14, 2022**

BETWEEN

PASKALIA AKOCHI INZIANI PLAINTIFF

AND

CHRISPINUS OUMA MAKUDA 1ST DEFENDANT

STEPHEN OUMA MAKUDA 2ND DEFENDANT

OPIYO SEMU 3RD DEFENDANT

JUDGMENT

1. By dint of an amended plaint dated 14th November 2020 and filed in court on 16th November 2020 the plaintiff prayed for judgment against the defendant as follows;
 - a. Eviction from land parcel L.R. SAMIA/BUTABONA/89, thereafter an order of injunction restraining the Defendant, their family, agents or any other person claiming on their behalf from trespassing or encroaching on the said land.
 - b. Eviction from land parcel L.R. SAMIA/BUTABONA/2705, thereafter an order of injunction restraining the Defendant, their family, agents or any other person claiming on their behalf from trespassing or encroaching on the said land.
 - c. Costs of this suit.
2. The plaintiff pleaded that she is the sole registered owner of land parcel SAMIA/BUTABONA/2705 measuring 2.115HA which aforesaid land resulted from subdivision of SAMIA/BUTABONA/89 which she also owned. She stated that the defendants have unlawfully, illegally and forcefully embarked on use of a portion of the land and the aforesaid acts of trespass and their forceful continued use of the land and alienating 3rd parties denies the plaintiff quiet, peaceful possession, use and enjoyment of the land.



3. The defendants entered appearance and filed joint defence which was later amended to a defence and counter-claim in response to the amended plaint. They stated that though the plaintiff is the registered owner of L.R. SAMIA/BUTABONA/89 she held it in trust for them on the basis that the whole of LR. NO. SAMIA/BUTABONA/89 belonged to the grandfather of the parties. That Ochieng Ouma got registered during demarcation as trustee for all his other brothers who were residing on the suit land. They pleaded that the plaintiff holds the portions previously known as L.R. SAMIA/BUTABONA/1396 and 1397 as a trustee of the 2nd defendant and 1st defendant respectively. In their counterclaim, they have claimed to have lawfully acquired by adverse possession 1.34HA and 1.33HA of L.R. NO. SAMIA/BUTABONA/89 respectively and prayed that the plaintiff's suit be dismissed with costs and judgment entered in their favour as follows;
 - i. The plaintiff's right over the two portions of land measuring 1.34HA and 1.33HA respectively out of L.R. NO. SAMIA/BUTABONA/89 or its subsequent subdivisions got extinguished by adverse possession upon expiry of the 12 years from the date the defendants came into possession.
 - ii. The Plaintiff be perpetually bared from taking and/or using the defendant's two portions measuring 1.34HA and 1.33HA respectively out of L.R SAMIA/BUTABONA/89 or its subsequent subdivisions.
 - iii. The defendants be registered as the proprietors of the two portions measuring 1.34HA and 1.33HA respectively out of L.R. NO. SAMIA/BUTABONA/89 or its subsequent subdivisions.
 - iv. The plaintiff does execute all relevant statutory documents to facilitate the subdivision and transfer the said two portions measuring 1.34HA and 1.33HA respectively out of L.R NO. SAMIA/BUTABONA/89 or its subsequent subdivisions into the names of the defendants and that in default, the Deputy Registrar do execute the same in place of the plaintiff.
 - v. The plaintiff does pay the costs of the suit and interest thereon.
4. The plaintiff filed a reply to the defence and counterclaim by stating that Ochieng Ouma-deceased never held the land in trust for anyone. She also denied that the defendants have been in open and notorious possession of any portion of L.R. SAMIA/BUTABONA/89 thus, they have not acquired the land by adverse possession.
5. At the beginning of oral hearings on 23/9/2021, Pascalia Akochi Inziani testified as PW1. She adopted her statement filed on 6/2/2017 and asserted that she is the registered owner of L.R. NO. SAMIA/BUTABONA/89 and the resulting number 2705 pursuant to an order obtained after succession objection proceedings against the defendant in BUSIA HCC. 132/2014. That She got a portion of the land as an inheritance from her late father Ochieng Ouma. She brought this suit seeking for eviction of the 1st defendant after he got on the land in 2011. The 1st defendant invited the 2nd defendant to the land and also sold a portion to the 3rd defendant. The plaintiff continued that the 1st defendant left one wife on the suit land and has another home in a separate land he had bought.
6. It is the plaintiff's case that the father to the 1st and 2nd defendant was buried in Majanji in Uganda when he passed on and that the suit land is solely hers. She produced the documents in her list of documents dated 18/1/2017 as PEX1 - 4 and further list of documents dated 14/11/2020 as PEX 5-8 as they appear in the lists.
7. On cross-examination, the plaintiff denied knowing the 1st defendant, stating that she only heard that his father died and was buried in Majanji. She said that her father was the son of Ouma Makuda but



she did not know how many wives her grandfather had. She stated that the 1st defendant and Justus (deceased) are brothers of different mothers and the 1st defendant in sub-dividing the land gave all the three portions to his brothers. She reiterated that the 1st defendant came onto the land in the year 2011 after he previously lived in Navolakhi. That the plaintiff's mother lived on the land until her demise in the year 2013. Her father was the only son in their house and he did not have stepbrothers.

8. The defendants relied on the evidence of the 1st defendant, Chrispinus Ouma Makuda, testifying as DW1. He started by adopting his witness statements dated 12/7/2017 and 24/8/2020 as his evidence. He testified that the plaintiff is the daughter of his uncle Ochieng Ouma and L.R. No. 89 belonged to their grandfather who had 3 wives. DW1 stated that the 1st wife to Ouma Makuda was called Sarah and they had 2 sons and 3 daughters. The 1st son was Ezekiel Ouma (his father) and the 2nd son was Ochieng Ouma (Plaintiff's father). That his father died in 1954 so during demarcation, the name of Ochieng Ouma as the surviving eldest son of his grandfather from the 1st house was entered in respect of the suit land. He said that Ochieng Ouma inherited his mother when his father died and all three wives together with their children were residing on his grandfather's land. The witness explained that the 2nd defendant is his step-brother while the 3rd defendant is a purchaser whom he sold land from a portion comprised in his share of land. He continued that the children of the other 2 step-grandmothers were given land elsewhere by his grandfather and the suit land remained for the children of his grandmother who are his father and Ochieng Ouma together with several daughters.
9. DW1 avers that on the ground his father's land was well known just as Ochieng Ouma's land. With the death of Ochieng Ouma, as the eldest grandson and with consultation of Justus Ouma as the only son of Ochieng Ouma took out Letters of Administration to the estate of Ochieng Ouma so as to regularize the position as it is commonly known that Ochieng Ouma got registered as trustee for the children of his elder brother Ezekiel Ouma. The suit land L.R. No. 89 was partitioned into 3 portions, one for Justus, the other for his brother and the last one for him and they were only formalising what existed on the ground. He denied that he has ever resided elsewhere and it was the plaintiff who is married elsewhere interfering with the home set up. He said he had been in actual possession of a portion out of L.R. No. 89 before it was subdivided and he had extensively developed the same and he was using it for the purposes of growing food crops and as his home since 1952 to date which is a period of over 67 years. He produced the documents in his list of documents as; Green card for L.R. No. 89 – DEX 1, Certificate of grant dated 17/2/1995 – DEX 2 and Certificate of search dated 11/11/2013 - DEX3.
10. On cross-examination by Mr Fwaya, learned counsel for the plaintiff counsel, DW1 said that he knew the 3rd defendant as he sold him ¼ acre in the year 2013 and he also sold George Muruka 2 plots. He said that the 2nd defendant has a semi-permanent house on his share of land which he built in 2018. His portion is 3¾ acres and the whole of L.R. No. 89 was 10 acres. The portion he occupied was given No. 1397 after the subdivision on L.R. No. 89 but it was revoked and had no idea the number that was later given. He was aware that after succession, the plaintiff had subdivided the suit land to several portions. He said that the green card for L.R. No. 89 was opened on 27/6/1973 in the name of Ochieng Ouma and it does not show registered to hold in trust for anyone. The next owner afterwards was himself as a personal representative of the estate of Ochieng (deceased). His father went to work in Uganda but he died in Ganga on the suit land. He stated that Justus was born in 1965 while Ochieng Ouma died in 1973. On re-examination, he stated that when they did succession they agreed to share the land into three portions. That he has lived on the suit land from birth.
11. At the close of hearings, the parties agreed to exchange written submissions. The plaintiff filed her submissions on 26th November 2021 and submitted that she is the registered owner of L.R. No. SAMIA/BUTABONA/2705. Before subdivision, the sole owner of LR. No. SAMIA/BUTABONA/89 and the defendants have not produced any evidence to the contrary. She submitted



that the subdivisions created on 30/4/2001 which had created L.R. Nos. 1393, 1396 and 1397 were concealed in BUSIA Succession Cause No. 132 of 2014 and restored to L.R. No. 89. She said that the defendants' counterclaim was in respect of the closed title LR. No. SAMIA/BUTABONA/89 and on the concealed titles and thus the claim is incompetent ab initio as the defendants have made no claim on the new titles created by the subdivision of parcel number 89. She further submitted that it was determined in the succession cause that she was not related to the 1st defendant. That the 1st defendant had no idea which parcels he occupies and the owners of the said parcel. She further submitted that the defendants have not proved any customary trust and it was not pleaded and the orders sought shall affect 3rd parties holding titles created on subdivision of L.R. No. 89. She prayed that her claim be allowed and the defendants counterclaim be dismissed with costs.

12. The defendants put in their submissions on 15th December 2021 and submitted that at the time the plaintiff's father Ochieng Ouma was being registered as proprietor of the suit land, he was being registered in trust for himself and his father's children. It was their submission that the plaintiff acquired the land by way of inheritance with existing overriding interests including those claimed by the defendants. They prayed that the plaintiff's suit for eviction be dismissed and their counterclaim be allowed as prayed.
13. Having carefully looked at the pleadings, evidence adduced, and submissions rendered, I frame the following questions for determination of the dispute;
 - a. Whether the defendants' counterclaim of adverse possession has been proved;
 - b. Whether the plaintiff has made out a case for eviction against the defendants;
 - c. Who should pay the costs?
14. In considering whether or not to evict the defendants, the court shall consider the merit of the defence and counterclaim raised by the defendants. They have raised the defence of adverse possession and customary trusts. On the question of whether the defendants have proved their claim of adverse possession, the court is guided by the principles of law on adverse possession now well settled by both statute and case law. In *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal held that Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years. It is also a well settled principle that a party claiming adverse Possession ought to prove that this Possession was "nec vi, nec clam, nec precario," that is, peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner.
15. It is the defendants' evidence that they have been living on the suit land on a portion of land measuring 1.34HA and 1.33HA respectively out of L.R. No. SAMIA/BUTABONA/89 or its subsequent subdivisions since 1952 which is more than a period of 12 years. This has been disputed by the plaintiff who has stated that the defendants trespassed onto the suit land in 2011 and the 1st defendant previously lived in Navolakhi. She denied that the defendants had any beneficiary or any other rights or interest in L.R. No. 89. According to the defendants have said that they have been in use and occupation of the land openly as they were born on the said land.
16. From the evidence adduced before the court, the 1st and 2nd defendants are implying that there existed a customary trust in that the plaintiff's father as the eldest son in the family at that time was registered as the proprietor of L.R. No. 89. The plaintiff has denied that there existed a trust as according to her, her father did not have any siblings or step-siblings. On cross-examination she stated that she did not



- know how many wives her grandfather had. She further averred that the defendants had another land though she did not name where the land was situated but admitted one of the wives of the 1st defendant lived on the suit land.
17. The plaintiff submitted that the claim by the 1st and 2nd defendants about trusts is dead because the particulars of trust were not pleaded. In paragraph 4 of the amended defence, the defendants pleaded that the land was registered in the name of Ouma Ochieng - deceased as trustee. The particulars were stated in paragraph 5 in terms of explaining representation of interests of each of the parties.
 18. A determination on the existence of trust is on a case by case basis and the Supreme Court settled the guiding principles of customary trust in the case of *Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another* SCoK No 10 of 2015 where it held thus;

“ Each case had to be determined on its own merits and quality of evidence... Some of the elements that would qualify a claimant as a trustee were: (a) The land in question was before registration, family, clan or group land, (b) The claimant belonged to such family, clan, or group, (c) The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous, (d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. (e) The claim was directed against the registered proprietor who was a member of the family, clan or group”
 19. Customary trust is proved by way of evidence and the defendants led evidence the defendants has established that there exists a relationship between the plaintiff and 1st and 2nd defendants. DW1 stated that at the time of registration of L.R. 89 in 1973 in the name of the plaintiff's father was not disputed in cross examination and his registration was the first as per the green card on L.R. 89. The 1st defendant elaborated that their grandfather and father were already deceased at the time of the demarcation of land. The defendants claim does not seem to be idle as is being implied by the plaintiff. The plaintiff stated further that the 2nd defendant was invited into the suit land in the year 2013 but she did not say where the 2nd defendant was coming from. The plaintiff stated that she acquired the land parcel number 89 in the year 2014 through transmission and was issued with a title in the year 2016.
 20. In the green card produced as Dex 1, the 1st and 2nd defendants had processed registration of the suit title number 89 into their names in 1994 through a succession process. They subsequently subdivided the land in the year 2001 and created new numbers which numbers the Plaintiff admits were registered in the defendants' names before she took out fresh letters of administration that revoked the titles of the defendants. This piece of evidence shows the 1st and 2nd defendants interest in the land as early as 1994 instead of the year 2011 which the plaintiff averred as they the year the defendants trespassed on to the suit land. I am satisfied that the defendants have shown by evidence that they are entitled to a portion of the original number 89 under both heads of customary trusts and adverse possession.
 21. Flowing on the argument laid herein above, although there is no dispute that the plaintiff is the registered proprietor of L.R. No. SAMIA/BUTABONA/89 and the resultant subdivision number SAMIA/BUTABONA/2705, the rights that accrued to the 1st and 2nd defendants were not extinguished by her registration acquired through transmissions. The defendants' interests continued on post the death of the plaintiff's father, which rights the plaintiff as the administrator is required under the law to honour. Under the provisions of Section 28 of the *Land Registration Act*, the law allows overriding interests that are not noted on the register of the title holder. Having found above that the L.R. No. 89 was held in trust by the plaintiff's father, the transmission of the said suit to the plaintiff did not dissolve the trust.



22. Further, the plaintiff argued that the defendants claim must fail because they did not know which land they were claiming. All the parties to this suit are aware that the land in question was original known as LR. No. Samia/Butabona/89. The defendants in their counter-claim pleaded that they pray for award of the size they are in occupation of being 1.34ha for the 1st defendant and 1.33 for the 2nd defendant to be carved out of LR. No. Samia/Butabona/89. This suit was filed on 6th February 2017 and the original number was closed on subdivision on 26th June 2020 by the plaintiff. Thus the parcel number 89 was in existence when the proceedings commenced. The amended plaintiff gives a specific number of Samia/Butabano/2705 from which the plaintiff want the defendants evicted from. The changing of the number did not change the right accruing by occupation or under trusts. It is my considered opinion and I so hold, that the plaintiff's attempt to defeat the claim of the defendants by subdividing the land does not add any merit to her unfounded claim. Therefore, the plaintiff's prayer for eviction fails.
23. The upshot of the foregoing is that the plaintiff's amended plaintiff dated 14/11/2020 is found unmerited and is dismissed. The defendant's counterclaim dated 24th August 2020 is allowed as follows;
- i. The plaintiff's right over the two portions of land measuring 1.34 HA and 1.33HA respectively out of L.R. SAMIA/BUTAONA/89 now comprised in the subdivision title Samia/Butabano/2705 got extinguished by adverse possession upon expiry of the 12 years from the date the defendants came into possession.
 - ii. An order be and is hereby issued barring the Plaintiff perpetually from taking and/or using the defendant's two portions comprised in L.R No. SAMIA/BUTABONA/2705.
 - iii. The defendants be registered as the proprietors of the land title L.R. No. SAMIA/BUTABONA/2705.
 - iv. The plaintiff does execute all relevant statutory documents to facilitate the subdivision and transfer the said L.R No. SAMIA/BUTABONA/2705 into the names of the 1st and 2nd defendants and that in default, the Deputy Registrar do execute the same in place of the plaintiff.
 - v. Each party to meet their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF JULY 2022.

A. OMOLLO

JUDGE

