



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL CASE NO 6 OF 2000**

**JAMES OBANDE WASUI.....APPLICANT**

**VERSUS**

**JEREMIAH OCHWADA MUSUMBA.....RESPONDENT**

**JUDGMENT**

In an originating summons expressed to be under section 38 of the Limitation of Actions Act and the Registered Land Act, James Obande Wasui claims to have acquired part of land Parcel Title No SAMIA/ LUCHULULO/BUKHULUNGU/99 by virtue of adverse possession and prays for the following orders:

1. That the applicant JAMES O WASUI be declared the absolute owner of the said portion of land measuring 4.2 LUCHULULO/BUKHULUNGU/99 which portion has cultivated and been actual possession peacefully, openly and uninterruptedly for a period of over 12 years since 1981.
2. That the Respondent Jeremiah Ochwada Musumba be ordered to execute all documents of transfer in respect of the portion measuring 4.2 Ha from parcel of land known as Title No SAMIA/LUCHULUNGU/99 in favour of the applicant failing which the Deputy Registrar of this Honourable court be empowered to execute the same on behalf of the said Respondent.
3. That the Respondent, his agent, servant and or workers be restrained permanently by an injunction from interfering with this said portion of land measuring 4.2 Ha from the said parcel title No SAMIA/ LUCHULULO/BUKHUNGU/99.
4. That the Respondent be ordered to give vacant possession of any part of the land that he may be occupying.
5. That this Honourable court do grant much further orders of reliefs as it may deem and just to grant. 6. That the costs of this application be awarded to the applicant.

The summons was filed in court on 8th March, 2000. In a supporting affidavit, the applicant depones that he has since 1981 been in peaceful, open and uninterrupted possession and use of a portion of Title No SAMIA/ LUCHULULO/BHUKULUNGU/99 measuring 4.2 Ha and he has accordingly acquired title to the said portion. He further depones that all his neighbours, friends and relatives regard the said land as his to the exclusion of everybody else.

In a replying affidavit sworn by the respondent on 16th March 2000, the respondent depones that the applicant has not been in actual possession of any part of the land known as SAMIA/LUKHULULO/ BUKHULUNGU/99. He further depones that the applicant has not acquired title by adverse possession since he has not occupied the said land for a term exceeding 12 years. He further depones that he is

advised by his advocate that the applicant cannot claim to have had peaceful actual possession as he has been sued for trespass vide Busia SRMCC No 449 of 1999. He also depones that he is further advised by his advocate that the originating summons is incompetent by virtue of Section 6 of the Civil Procedure Act and that it is incurably defective for want of adherence to the provisions of order I of the Civil Procedure Rules. He further depones that the summons is vexatious and an abuse of the court process.

From the record, it is apparent that the suit in the Senior Resident Magistrate's Court, namely Civil suit No 449 of 1999, between the same parties has been stayed pending the hearing and determination of the originating summons.

The parties opted for the originating summons to be tried on *viva voce* evidence and I so tried it on 3rd and 25th July, 2002. The applicant testified. He testified that sometime in 1981 he was informed by his wife that one Wilson Oderi Namukuba wanted to sell a parcel of land measuring 4 acres. He gave her the money to purchase the land which she did. He put up a grass house on the said land and he has been on that land since then. In 1987 he put a permanent house on the said land. He testified that the land was registered in the name of Wilson. He produced the original green card as exhibit I. That card shows that on 2.4.77, Wilson Odero Namukuba was registered as the proprietor of the parcel of land known as SAMIA/ LUCHULULO/BUKHULUNGU/99 (which I shall hereafter refer to as the suit land). It further shows that on 10.8.93, the title was closed on subdivision and three new titles issued, namely numbers 1095, 1096 and 1097. The applicant further testified that the respondent is not related to Wilson. However in April 1998, he came and built his house on part of the land occupied by the applicant. He further testified that the respondent was not the registered proprietor of the suit land. He was the registered proprietor of SAMIA/LUCHULULO/BUKHULUNDU/1214. He produced the green card in respect thereof as exhibit 2. That green card shows that the respondent is the registered proprietor of SAMIA/ LUCHULULO/BUKHULUNGU/1214 which is a subdivision of Plot No 1095 and that he brought it from one Cecilia Achola Odari for a consideration of Kshs.100,000/=. The respondent was registered as proprietor on 11.11.96. The applicant also produced a certificate of official search of SAMIA/LUCHULULO/BUKHUKUNGU/1095 as at 3.11.99 as exhibit 3. It shows that Cecilia Achola Odari was registered as proprietor thereof on 16.10.95 and that on 22.10.96, the title was closed on subdivision and new titles Numbers 1214 and 1215 were issued. The applicant insisted he has been on the land for 21 years now and he has never migrated therefrom. His prayers to the court were that the respondent should be evicted from the land and that he be restrained from interfering with his 4 acres. He further prayed that the respondent do transfer 4 acres to him and if he failed to do so, the Deputy Registrar of the Court should be authorised to do so. On cross-examination, the applicant insisted he had brought 4 acres from Wilson. He stated he could not produce the sale agreement because it was stolen from his house together with other documents of his in 1990. He admitted that when Wilson closed his title in 1993 and created three new titles, he was not included in any of the new titles. He however maintained that he continued in possession of his four acres and that that land was not included in the land Wilson had subdivided. He readily admitted that the respondent's name did not feature in exhibit 1 even though in the originating summons he was claiming four acres from SAMIA/LUCHULULO/BUKHUKUNGU/99. He said he did not know the relationship of Cecilia to Wilson. He thought Cecilia was staying with Wilson as a friend. He pleaded ignorance of the fact that Title No 1095 was a subdivision of the suit land. He admitted that since the respondent obtained his title on 11.11.96, 12 years had not elapsed. He further admitted that since the respondent came to the land, he had not had a peaceful possession. He reiterated that he was seeking four acres from parcel No 99.

The second witness for the applicant was Wilson Apopo Otege. He testified that applicant came to his present abode in 1981 to stay with Wilson Odari Namukuba who was an in-law of the applicant. He testified that he is the one who, as a village elder, planted the boundaries. He further testified that Wilson had sold to the plaintiff 4 acres for Kshs. 6,000/= and the applicant has been on the land since 1981. The witness denied any knowledge of the respondent. In cross examination, he denied any knowledge of Cecilia Achola Odari. He however admitted that the respondent had now constructed a home on the land in dispute and he was staying there. He could not however recall when the respondent put up the said house.

The respondent on his part also testified and called two witnesses to support his case. His evidence was

that he is not the registered proprietor of SAMIA/LUCHULULO/BUKHUKUNGU/99 in respect of which the applicant is claiming adverse possession. His land is SAMIA/LUCHULULO/BUKHUKUNGU/1214. He bought it from one Cecilia Achola Odari for Kshs.100,000/= in 1996. He readily admitted that when he bought the said land, he found the applicant and his deceased wife, one Agnes Auma in possession of part thereof. They had even a permanent building thereon. He had made enquiries at the time of the purchase and was assured by Cecilia that Agnes Auma was a relative of hers who had been given a temporary place of occupation in 1993 after disagreements with her husband and that she would move out. He further testified that after the respondent refused to move out of his land, he sued him in the Busia Resident Magistrate's Court in Civil Suit No 491 of 1999 which is still pending undetermined. He also testified that since he bought his land in 1996, the applicant has not peaceful possession of part thereof and that in any case, twelve years had not elapsed before the applicant filed the present suit. He expressed surprise that he is sued in respect of the suit land and stated that he could not sign any documents in respect thereof in favour of the applicant.

The second witness for the respondent was James Muchama, a relative of Cecilia Achola and Agnes Auma. He is in an African way the grand father of Agnes Auma, the late wife of the applicant, as he is the brother to the father of the mother of Agnes. Odari Namukuba was a son to his brother. He testified that Cecilia had given some land to Agnes Auma for temporary occupation as Agnes had marital difficulties. In cross examination he stated that Agnes was given the land some three years before Namukuba who was Cecilia's husband died. Later on he changed the sequence of events and stated that Agnes was given the land after Namukuba Odari's death. He also testified that Odari died in 1983. On re-examination he corrected the date of death to be 1993. It was his further evidence that he was party to the decision to give Agnes Auma some land for temporary occupation. He denied knowledge of the existence of a permanent house built by Agnes and her husband on the land in question. He was categorical that Agnes moved to the land after Odari's death. The last witness of the respondent was Cecelia Achola, the wife of the late Odari Namukuba. She testified that her husband died in 1993. She also testified she is the one who gave Agnes some land to occupy temporarily after she (Agnes) had had difficulties in her marriage. She said that was done when her husband was alive but sick. He died two months later. After Agnes settled down on the land, her husband joined her later. She further testified that she is the one who sold the respondent the land of which he is the registered proprietor. On cross-examination, she testified that the respondent bought the land after the plaintiff had put up a permanent building on part of it. She said she did not agree with Agnes and her husband putting up a permanent home on her land and she even complained to the village elder. On her reporting the matter, Agnes informed the village elder that although she had put up a permanent building, she would move out. She was adamant that she sold the whole land to the respondent as Agnes had no permanent rights to it. She did however consult Agnes and the applicant before she sold it with a view to selling it to them but they said they had no money to purchase the same and she could go and sell it if she wanted to do so.

In his brief submission after the close of the evidence, Mr Ashioya, the applicant's Advocate, contended that his client had made out a case for adverse possession. He argued that the applicant's evidence that he took possession of the land in 1981 had not been controverted. By the time the respondent purchased the land in 1996, 15 years had already elapsed. He further submitted that the rights of Cecilia to the land she had sold to the respondent had also been extinguished by that time. She, Cecilia, could not pass to the respondent rights to land which she herself did not have. He also submitted that the respondent as not a *bona fide* purchaser for value without notice. He purchased the land while aware that the applicant was in occupation of part thereof. The land was encumbered by the applicant's occupation thereof which occupation the respondent inherited and the respondent could not therefore deny the applicant his rights of adverse possession which he was enjoying prior to his purchase of the said land. He submitted that the plaintiff was entitled to the orders sought in the originating summons.

Mr Onsongo, counsel for the respondent, on his part submitted that the applicant's claim was over a title which was not and had never been the respondent's and which no longer existed. He also submitted that the applicant had not been in possession for 12 years as it was clear from the evidence of Cecilia Achola that Agnes the applicant's wife came to the land in 1993 and not 1981 as claimed by the applicant. Further more, the respondent having acquired his land in 1996, 12 years had not elapsed by the time this suit was filed in year 2000. And, he further contended, the applicant's possession had been interrupted by

the filing of Busia Resident Magistrate's Civil Case No 499 of 1999 which is still pending. He asked for the applicant's suit to be dismissed.

I have now carefully considered the evidence on record and the submissions made on behalf of the parties. It is common ground that for the applicant to succeed in a claim for adverse possession he must prove that he has been in peaceful, open and uninterrupted possession of the land in question for a period of twelve years or above. The ancient lawyers used to say that the claimant's occupation must be "*nec vi nec clam nec precario*".

The applicant's claim is predicated on his own evidence that he bought 4 acres which was part of the Land known as SAMIA/LUCHILULO/ BUKHULUNGU/99 in 1981 and he has since then been in actual physical possession thereof as of right and without interruption. And according to his advocate, it matters not that the title to the said land passed to Cecilia Achola and subsequently to the defendant. If the applicant had acquired prescriptive rights against the title of Wilson Odari Namukuba, the said Wilson's title was extinguished and he passed nothing to his wife Cecilia Achola and she in turn also passed nothing to the defendant, so the argument went.

The respondent's case on the other hand appears to be rooted in three postulates. First, as he is not the registered proprietor of the suit land, no claim for adverse possession can be maintained against him by the applicant. Secondly, that even if a claim could be maintained against him, the facts do not support it for the applicant's possession dates back to only 1993 and accordingly by year 2000 when the suit was filed, 12 years had not elapsed. Thirdly, and this appears to be in the alternative, the applicant's prescriptive rights could only run against the respondent's title from when he acquired it in 1996 and, accordingly, the period of limitation had not expired by year 2000 and the same was in any event interrupted by the filing of a suit for eviction in the magistrate's court.

It appears to me from the above stand points of the parties that three issues call for determination. First, can a suit for adverse possession lie against the respondent who is admittedly not the registered proprietor of the land subject matter of the title claimed by the applicant? Secondly, when did the applicant enter the suit land and under what circumstances. Thirdly, what is the effect of acquired prescriptive rights on the titles of subsequent owners of the property subject to prescriptive rights.

As regards the first issue, I think both the Limitation of Actions Act and the Civil Procedure Rules are pertinent. Section 38 (1) of the Limitation of Actions Act provides that where a person claims to have become entitled by adverse possession to Registered land, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land. And Order 36 rules 3 D of the Civil Procedure Rules provides that an application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons which shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. These provisions can, in my opinion, be construed in only one way: an order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the said respondent is the currently registered proprietor of the land which the applicant seeks to have registered in his name. In the instant matter, the respondent is the registered proprietor of SAMIA/ LUCHILULO/BUKHULUNGU/1214 and not SAMIA/LUCHILULO/ 99 out of which the applicant claims four acres. He is not therefore amenable to the orders sought in the originating summons. Indeed from the applicant's own exhibits, the applicant is seeking relief in respect of a title which no longer even exists as the same was closed on 10.8.93 and three new titles, namely numbers 1095, 1096 and 1097 issued. In these premises, I agree with the submissions made on behalf of the respondent that the applicant cannot get the relief he is seeking in the originating summons. The entire summons is misconceived and is for dismissal on that ground alone. However, in case I may be wrong on that, I should consider the other two issues raised.

On when the applicant entered the land and the circumstances of the entry, I am unable to believe the applicant's evidence that he entered the land in 1981 as a purchaser. He was unable to produce any documentary evidence of purchase and no explanation was proffered by him of why he was not registered as a proprietor of the land he claimed between 1981 and the date of death of Wilson Odari Namukuba from whom he claimed to have bought the land or why Wilson did not provide for him when he

subdivided his land and closed his original title and had new titles issued in favour of other persons. And the evidence of his witness was also not inspiring. He did not impress me as a truthful person and he went as far as denying knowledge of Cecilia Achola, Wilson's wife. He appeared to me to want to support the plaintiff's case by whatever means. If he was a village elder as he claimed, he was an elder unworthy not only of belief but his exalted status. An elder should not deny knowledge of the widows of other deceased elders in the village. Having said that, I hasten to add that in my opinion the applicant's conduct of not pressing for his title to the land he claimed to have purchased is more consistent with the version of events given by the respondent's witness. In that respect, I believe the evidence of Cecilia Achola that the applicant gained a foot hold to the suit land on the back of his late wife, Agnes, who had been given a place to occupy temporarily due to marital difficulties with the applicant. Cecilia, who is very old woman, impressed me a lot as a truthful witness. She was unhesitating in her testimony and was unshaken in cross-examination. And her evidence was supported in that respect by that of Dw2- James Muchama.

Although James was quite unsure of dates and appeared quite confused in respect of dates, he was firm on one thing: the applicant's wife was given a temporary place of abode by Cecilia and that he himself participated in that decision. I also find that the applicant's wife was given that land in 1993 with the expectation that she would leave sooner or later after normalisation of her relationship with the applicant. Having found that the applicant did not enter the land as a purchaser but on the wings of Agnes who had the owner's blessing to occupy the land in question temporarily, it follows that he was not on the land as of right. Accordingly, however long he stayed there, he could not acquire the title thereto by adverse possession. Moreover, even if he could acquire prescriptive rights (and I am clear he could not), he would not have been entitled to be registered as proprietor of the land when he filed this suit in year 2000 for the reason that twelve years had not elapsed since 1993. In other words, the applicant's claim also fails on the evidence.

On the impact of prescriptive rights in respect of one title on subsequent titles to the same land, I agree with the submission of counsel for the applicant that if the applicant had been in adverse possession of the land of Wilson Odari for 12 years prior to 1993 when it was subdivided and other titles registered, the proprietors of the new titles would not have been able to shake off his rights. As I understand the law, prescriptive rights are in the nature of overriding interests and they run with the Land irrespective of changes in proprietorship thereof. In the premises, If I had been satisfied on the evidence that the applicant moved to the Land in 1981 and he was there as of right and had continued thereon peacefully, openly and uninterrupted until 1993, I would have issued the orders sought provided the applicant had sought to be registered as proprietor of part of SAMIA/LUCHILULO/BUKHULUNGU/1214 in place of the respondent. I would have dismissed the respondent's Advocate's submission that time begin to run in 1996 when the respondent acquired his title as misconceived in law. Be that as it may be, I have already found on the evidence that the applicant did not move into the suit land until 1993 and even then his possession was not adverse to the title of Wilson or Cecilia as he and his wife were there as guests of Wilson and Cecilia. They were on the land with the latter's express consent. Further more, and this is also fatal to the applicant's claim, the applicant did not stake his claim to the respondent's title. In the result, the answer to the third issue though clear would be a moot point.

Lastly, I desire to say that the applicant's claim that he may have an overriding interest over the respondent's land under the provisions of the Registered Act can not be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the applicant as proprietor of the suit land by virtue of adverse possession. I will therefore express no opinion on the merits or otherwise of that claim.

The upshot of the matter is that the originating summons is dismissed with costs to the respondent.

**Dated and delivered at Busia this 31st day of July, 2002**

**A.G RINGERA**

**JUDGE**

