



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 124 OF 2017 (O.S)

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF L.R NO. BUKHAYO/MUNDIKA/2216

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION

JANE ELIZABETH BARASA.....APPLICANT

- VERSUS-

GEORGE WESONGA OJWANG'1ST RESPONDENT

CHARLES NYANGULE NAMAI.....2ND RESPONDENT

J U D G E M E N T

1. The Applicant commenced these proceedings through the Originating Summons dated 3rd July, 2017 taken out against the Respondents. The Plaintiff's case is that she has acquired by way of adverse possession L.R NO BUKHAYO/MUNDIKA/2216 measuring 0.41 Hectares and posed the following questions for determination:

- a. Whether the Applicant has been in open and notorious possession of L.R NO BUKHAYO/MUNDIKA/2216 measuring 0.41 Hectares for a period exceeding 12 years;
- b. Whether the Respondents' Title to L.R NO BUKHAYO/MUNDIKA/2216 became extinguished upon expiry of twelve years from the time the Applicant went into possession of the said land;
- c. Whether the Applicant has now acquired title to the said land by virtue of adverse possession;
- d. Whether the registration of the 2nd Respondent as Owner of the L.R NO BUKHAYO/MUNDIKA/2216 should be cancelled and the Applicant be registered as the owner of the said land;
- e. Who should pay the costs of this cause.

2. The Applicant seeks to be granted the following ORDERS;

- a. That the 2nd Respondent's right over L.R. NO BUKHAYO/MUNDIKA/2216 got extinguished by adverse possession upon expiry of the 12 years from the date the applicant came into possession;
- b. That the 2nd Respondent be perpetually barred from taking and using L.R NO BUKHAYO/MUNDIKA/2216;
- c. That the Applicant be registered as the Proprietor of L.R NO BUKHAYO/MUNDIKA/2216;

d. That the 2nd Respondent do execute all the relevant documents to facilitate the transfer of L.R NO BUKHAYO/MUNDIKA/2216 into the name of the Applicant and that in default the Deputy Registrar do execute the same in place of the 2nd Respondent; and

e. That the Respondent do pay for this cause.

3. The Originating Summons is supported by the Applicant's sworn affidavit dated 3rd July, 2017 to which is attached a copy of the green card of the Suit Land.

4. In answer to the Applicant's claim, the Respondents filed separate affidavits to the Originating Summons. The 1st Respondent filed his Replying Affidavit on the 22nd day August, 2017 stating that he acquired the title to the suit land in 1998 and asked the Applicant's husband, James Andanje to look after the land while he was away on transfer in Nairobi. That he never sold **L.R NO BUKHAYO/MUNDIKA/2216** to the Applicant who he stated stayed on the land with his permission. The 1st Respondent deposes that in 2009 he completed a transfer to the 2nd Respondent. That his relationship with James Adanje and his wife who is the Applicant was that of master-agent and that agreement cannot succeed to adverse possession hence the Applicant's Originating Summons should be dismissed.

5. Similarly, the 2nd Respondent in his Replying Affidavit filed on the 22nd day of August, 2017 stated that he legally purchased the suit land from the 1st Respondent in 2009 and is therefore entitled to the indivisible rights of a title deed holder as expressed under the Constitution and land laws. That the Applicant was the wife of the 1st Respondent's agent who was to look after the suit land on the 1st Respondent's behalf. He deposed that James Adanje the husband of the Applicant worked as his taxi driver. That the Applicant is riding on the authority/permission granted to her husband to stay on the land. That on 10/2/2013 he wrote to the Applicant's husband giving notice through his then advocate Gacheche Wamiano demanding they vacate the land. That James requested to be given time to vacate and instead in a span of three years, they renovated the premises and built more structures. He prayed that the Originating Summons should be dismissed.

6. The 2nd Respondent also filed **Busia Chief Magistrate's ELC No. 37 of 2018 Charles Nyangule Namai vs. Jane Elizabeth Barasa** where he prayed for judgement against the Applicant (Defendant) for:

- a. A declaration that Land Parcel No. Bukhayo/Mundika/2216 belongs to the Plaintiff;
- b. An order of eviction against the Plaintiff from Land Parcel No. Bukhayo/Mundika/2216;
- c. A permanent injunction restraining the Defendant, her agents, and or her servants from trespassing into Land Parcel No. Bukhayo/Mundika/2216;
- d. Costs of the suit;
- e. Any other order that this Court may deem fit to grant.

7. The CMCELC 37 OF 2018 was consolidated to the Originating Summons vide an order issued on the 26th of June, 2019 pursuant to an application dated 15th February, 2019. Directions were issued thus;

- i. High Court ELC NO. 124/17 is consolidated with lower court ELC No. 37/18;
- ii. ELC No. 37/2018 in the lower court registry be moved to the High Court registry for purposes of consolidation with ELC No. 124/17.

8. During the hearing, the Applicant called the evidence of two witnesses. The Applicant, **JANE ELIZABETH BARASA** testifying **PW1** adopted her witness statement and the filed documents as exhibits. **PW1** testified that the 1st Respondent sold her the suit land at a price of KShs.80,000 in the year 2000 and she paid the entire purchase price in three instalments. That after paying the 1st instalment, the 1st Respondent gave her possession in June, 2002 and she has been living on the suit land since then to date. That she has built a semi-permanent house on the suit land and six rental house where she receives monthly rent of KShs.3,500 from each of the houses. She added that she was also using the land for cultivation. **PW1** continued in evidence that she paid the 2nd instalment of KShs.20,000 in January 2001 and the 3rd instalment in August 2001 at the KNUT premises in Busia. That she had trusted the 1st Respondent to carry through the sale since her husband used to ferry his children to school. That she was shocked to learn in the year 2010 after tracing the 1st Respondent that he had sold the land to the 2nd Respondent.

9. Upon cross-examination **PW1** stated that she was introduced to the 1st Respondent by her husband and she knew him well as she is married in the same village as the 1st Respondent. She stated further that they entered into a sale agreement with the 1st Respondent but the agreement was destroyed in the year 2008 in a fire that burnt down her house. That her husband was her witness in the agreement. She confirmed that they had not gone before the Land Control Board to execute a transfer as the 1st Respondent told her that he would call them to execute the documents. Finally, she stated that she started living on the suit land in the year 2002 and that 2nd Respondent was her neighbour. She denied that she had never received any demand letter to vacate the suit land from Wa Miano Advocate.

10. JAMES ADANJE OYAMO testified at **PW2**. He adopted his evidence affidavit as his evidence in chief. He stated that the Applicant was his wife and the 2nd Respondent was their neighbour in Ojarii South Teso. That he used to ferry the 1st Respondent's children to

school. According to **PW2**, the 1st Respondent had given him a task to look for a buyer of his plot Bukhayo/Mundika/2216. **PW2** continued that he shared this information with the Applicant who then got interested. That in April 2000, they paid a visit to the 1st Respondent at his offices within KNUT premises and negotiations took place on price and mode of payment. He confirmed that a deposit of KShs.40,000 was paid in June 2000 and the balance in January and August 2001. **PW2** stated their house got burnt in the year 2008 and with it their copy of the agreement for sale. He concluded that they have lived on the suit plot as purchasers and not tenants.

11. On cross-examination, **PW2** stated that he knew the 1st Respondent when he was a bodaboda operator and the Respondent was the KNUT boss in Busia. That he used to ferry the 1st Respondent's children to St. Mary's school and Busia Girls' school. That besides ferrying the children to school, they had a sale agreement with the 1st Respondent and his wife, Mama Leti was his witness. **PW2** continued in evidence to state that although the 2nd Respondent was a mechanic, he never employed him in his garage. He stated further that they paid the purchase price in three instalments and started living on the land in the year 2000. That they have never received any demand letter to vacate the Suit Land.

12. The Respondents called two witnesses to testify, **DW1** being the 1st Respondent, **GEORGE WESONGA OJWANG** who stated that he is a retired teacher who was a KNUT chairperson. That in the year 1998 he bought land around Burumba from Peter Njiru whose parcel number he could not recall. That the 2nd Respondent has been his mechanic from the year 1992 to date and PW2 was working as a mechanic with the 2nd Respondent and also ferried his, (DW1's) children to school. He continued in evidence that after purchasing the land, he moved to Nairobi sometime in the year 2001 or 2002 and decided to engage PW2 to live on the land as a caretaker instead of leaving it unoccupied. That at the time, the land was bare with only a small mabati structure on it. That in the year 2009 he decided to sell the land to the 2nd Respondent as PW2 was unable to purchase the same. That the sale agreement and all the necessary transfer documents were executed and the land was duly transferred to the 2nd Respondent.

13. On cross-examination, **DW1** stated that he had not indicated in his affidavit that he had offered the Suit Land to PW2 to purchase it and he only knew PW2 and not his wife (PW1). That PW2 started living on the land in the year 2000. DW1 went further to state that the last time he visited the land was when he was selling it to the 2nd Respondent and when he did, PW2 was still living on the suit land and some temporary extensions were on it as well. That since this visit he has never gone back to the land. He continued in evidence that he moved to Nairobi together with his family in the year 2004 to serve as KNUT National Chairman. He stated further that he sold the land to the 2nd Respondent sometime in 2009 and never sold it to the Plaintiff. He concluded by stating that he was not aware whether PW2 has been removed from the suit land.

14. On re-examination **DW1** stated that he did not recall exactly when PW2 started staying on the land and that he never gave PW2 permission to construct structures on the Suit Land.

15. The 2nd Respondent, **CHARLES NYANGULE NAMAI** testified as **DW2**. He stated that he lived in Ojarii South Teso and the Plaintiff and PW2 were his neighbours. That he owned a garage in Busia town where he works as a mechanic and also trained PW2 as mechanic at the said garage. That the 1st Respondent was his client at the garage and in the year 2009 he sold the Suit land to him. He continued to state that he asked the 1st Respondent to assist PW2 with a place to stay as he was having problems with his father and that was when the 1st Respondent offered up the Suit Land to PW2 for him to live there. That an agreement for sale of the land was executed and thereafter DW2 wrote a demand to PW2 for him to vacate the suit land but he never did instead, PW1 filed this suit. He concluded by stating that later PW2 had approached him to sell them the land at K.Shs. 500,000/=.

16. Upon cross-examination, **DW2** stated that the DEX1, which is the demand letter from Gacheche wa Miano Advocates to PW2 dated 10th February, 2013, did not indicate that PW2 had received the letter. That PW2 started living on the Suit Property in the year 2001. He stated that he knows the land he bought and that the Applicant has recently developed the land. He stated further that he is the current registered owner of the suit land. That while he got title to the land in the year 2014 the process of purchasing the land began in the year 2009. That when purchasing the suit land in 2009, PW1 and PW2 were living on the land and were never invited to witness the buying of the land. That PW1 and PW2 still live on the land to date. **DW2** continued in evidence that he filed a claim for eviction before the Applicant filed their present suit.

17. Further that both PW1 and PW2 visited his garage and offered to pay him for the suit land for K.Shs 500,000 which DW2 counter offered with K.Shs. 2,000,000 in 2017. He concluded that he has not returned to the suit land since the case began although he had seen a permanent house on the land the last time he had been there. In re-examination, **DW2** stated that he did not know when the Applicant built the permanent house and neither did he give her permission to build the house on the Suit Land.

18. After the close of the hearing, parties agreed to file their respective written submissions. The Applicant filed his submissions on the 17th day of December, 2020 restating the facts pleaded in her Originating Summons and the hearing. She submitted that she had lawfully and peacefully entered the land as a purchaser in exclusive, open, continuous, uninterrupted physical possession and occupation from the year 2000 to date. She went further to submit that she continues to live on the land and has made developments thereof including permanent residential and rental houses. That the Applicant's possession of the Suit Land was and remains adverse to the title of the Respondents and just prays that the Originating Summons and Counter-Claim in Busia CMC ELC No. 37 of 2018 be allowed with costs.

19. The Applicant sought to rely on the cases of *Patrick Magu Mwangi Kimuny vs Joreth Ltd (2015) eKLR* which quoted several cases inter alia *Mawji Vs Hasham & Ano* consolidated with *Greenfield Investment Ltd and Another (2010) 2 EA 296* where it was held that:

“For the possessor to succeed, he must first establish factual possession, and that he, the possessor has the requisite intention.”

And *Ndatho Vs Itumo & 2 Others (2002) 2 KLR 637* “the possessor(s) must show that the possession was adequate, continuous and

exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor.”

20. The Respondents filed their submissions on the 11th of February, 2021. They submitted that the period which the Applicant and PW2 were staying on the suit land was with the permission of the registered owner as caretakers and were later given notice to vacate the land after it had been sold to the 2nd Respondent. That the notice to vacate stops the time from running and as such the Applicant’s claim of adverse possession cannot stand.

21. Adverse possession is a question of fact which a claimant must prove by way of evidence within the standard of probabilities. There is no dispute that the Applicant has been living on the suit land. The contested fact which the court is called to determine is:

- i. Whether or not the Applicant was in occupation through purchase or with permission of the 1st Respondent.
- ii. Whether or not the Applicant’s occupation materialised into a possession that was adverse to the Respondents.
- iii. Whether or not the 2nd Respondent is entitled to orders of eviction/permanent injunction.
- iv. Who bears the costs of the suit?

22. The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, CAP 22 Laws of Kenya, which provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

23. **Section 13** of the Act provides that:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

24. A claimant for the land on the heading of adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land for a period of excess of twelve (12) years. Justice Asike Makhandia J.A in **Mtana Lewa vs Kahindi Ngala Mwagandi (2005) eKLR** described adverse possession as below:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner.”

25. The Applicant adduced evidence that she purchased the land from the 1st Respondent for the sum of Kshs.80,000 which she paid in three instalments. She added that she took possession in June 2000 after payment of the 1st instalment. She did not however have her copy of the sale agreement which she said got burnt in a fire in the year 2008. The 1st Respondent denied there was any purchase stating that he engaged the Applicant’s husband who testified as PW2 as his caretaker. According to the 1st Respondent, he was introduced to PW2 by the 2nd Respondent. That PW2 was an apprentice in the 2nd Respondent’s juakali garage. PW2 also denied ever working for or under the 2nd Respondent and further denied working for the 1st Respondent as a caretaker.

26. The burden laid squarely on the Applicant to demonstrate that she was on the suit land through purchase and not by permission of the 1st Respondent. The only document she produced was a copy of the green card for land parcel Bukhaya/Mundika/2216 (suit parcel). She deposed in her affidavit in support of Originating Summons and stated in her oral evidence that her house got burnt in the year 2008 and amongst the things destroyed in the fire was the sale agreement executed between the 1st Respondent and herself. The Applicant does not say if and when she reported the fire incident either to the local administration or nearest police post/station. She did not call any evidence that indeed her house got burnt. In my opinion the reporting of the fire and or production of an OB number confirming such an incident and or calling independent evidence to corroborate her evidence that indeed her house at one time caught fire was key in explaining why she did not have her copy of the sale agreement.

27. Although PW2 gave evidence to corroborate the Applicant’s claim that the sale agreement got burnt, his evidence cannot be treated as

independent because the house belonged to them both. Further, he did not render any explanation why the loss of such an important document was never reported either at the time the incident occurred or prior to their giving evidence in court. The Applicant had deposed that even “neighbours, relatives and friends know the land belongs to her to the exclusion of everybody else”. None of those neighbours/friends or relatives were called to give evidence that they know the Applicant to be living on the suit land as owner or caretaker. In the case of *Patrick Magu Mwangi supra*, the Court of Appeal stated thus at paragraph 14 of the Judgement, “it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.” See *Samuel Wiki Waweru Vs. Jane Njeri Richu Civil Appeal No. 122 of 2001* (unreported).

28. The second issue is whether or not the occupation of the Applicant was adverse to the Respondents. Suppose this court took the view that indeed the Applicant entered the suit land through purchase. The Applicant in paragraph 18 and 19 of her witness statement said thus:

“18. That in the year 2010 I sought and obtained the 1st Respondent’s mobile number through which I called to inquire on my title deed and he shockingly informed me that he had financial problems which prompted him to sell the land to the 2nd Respondent and he offered to give me another parcel of land in Teso but I declined.”

“19. That upon the disclosure of the sale of my land to the 2nd Respondent who is my neighbour I went to ask why he had purchased my land and in secret and his answer was that he wanted to assist me by buying the land in order to prevent GEORGE WESONGA OJWANG from selling it to a Kikuyu man.”

29. In the case of *Wambuyu Vs Njuguna (1983) KLR at holding No. 4*, the Court of Appeal held that, “where the claimant is in exclusive possession of the land with leave and license of the Appellant in pursuance of a valid sale agreement, the possession becomes adverse and time begins to run at the time the license is determined. Prior to the determination of the license, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist. This position was reiterated by the Court of Appeal in the case of *M’Mbaoni M’Ithara Vs James Mbaka (2019) eKLR* at paragraph 18 thus,

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined. Prior to the determination of the license, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

30. For the possession to be adverse, it must be peaceful, open and continuous. In light of the disclosures made by the Applicant can the occupation be treated as peaceful? The Applicant stated that she got into the land in June 2000 after payment of the first instalment. In the year 2010, she was shocked to learn from the 1st Respondent that he had sold the suit land to the 2nd Respondent. The Applicant avers that the 2nd Respondent is her neighbour. She even inquired why he (2nd Respondent) had purchased the suit land. By 2010, the 12 years had not lapsed. From the time of discovery of the purchase of the suit land, the Applicant did not remain in peace – she offered to refund the 2nd Respondent the money but the 2nd Respondent kept taking her in rounds as explained in paragraph 21 – 28 of her evidence affidavit thus necessitating the filing of this suit.

31. The court picks out two points from this evidence. First, that the 2nd Respondent who is a neighbour did not recognise the ownership of the Applicant (the applicant having pleaded that neighbours saw her as the owner). Secondly, the peaceful occupation (though physically not disturbed) but was definitely interrupted in the mind of the Applicant and title registration before the 12 years had lapsed. Thirdly, the contract period of 6 years from June 2000 lapsed on June 2006. By the time this suit was filed 12 years had not lapsed to terminate the permission. I have applied the six year period because the contract between the two parties had not been concluded due to non-transfer of title to the Applicant’s name. Taking this scenario and the Respondent’s evidence that the Applicant’s husband got on the land with permission of the 1st respondent; this court reaches a conclusion that no adverse rights had accrued to the Applicant.

32. The Applicant submitted that the secret sale to the 2nd Respondent proved the Applicant was recognised as owner of the land otherwise as licensees, they would have been involved as witnesses in the sale transaction between the Respondents. A contract is between two parties and the court does not wish to draw an inference where the issue was not raised for her determination. The Applicant is also not challenging the validity or otherwise of the 2nd Respondents’ title that the sale was secretly done.

33. The 2nd Respondent suit was consolidated to this suit thus it became like a counter-claim to the Applicant’s claim. The burden was upon the 2nd Respondent to discharge that he is entitled to the orders of eviction sought. The 2nd Respondent produced evidence of purchase and documents executed transferring the land to him. The 1st respondent confirmed selling the suit land to the 2nd Respondent. The 2nd Respondent thus proved how he acquired ownership of the same. The Applicant however took issue in her submissions that the 2nd Respondent is not an innocent purchaser. The doctrine of innocent purchaser would hold only if the Applicant’s claim for adverse possession had succeeded. Having found that the Applicant’s claim failed and given the defence of the 1st Respondent that the Applicant’s husband occupied the land as his license, there was nothing in law stopping the 2nd Respondent from acquiring the land. There was no evidence led to any restriction placed on the title by the Applicant before the sale to the 2nd Respondent.

34. The Applicant also took issue with the Respondents’ failure to file a response to her defence and counter-claim. This in my view are semantics because the two suits proceeded as consolidated. The failure to file a defence to the counter-claim is not per se admission, the law still required the Applicant to prove the existence/basis of the claim for trust. The circumstances of this case are thus distinguishable from the case of *Mount Elgon Hardware Vs, United Millers Ltd (1996) eKLR* cited by the Applicant. No evidence was led on how constructive trust accrued. The Applicant did not lead evidence that he sought permission of the 1st respondent before putting up the structures and what were the terms of that arrangement. The claim under trust was only pleaded but no evidence was led.

35. Section 30(g) of the Registered Land Act cap 300 (repealed) recognises the rights bestowed through trust. The rule of evidence applies that he who alleges the trust must establish its existence. In the instant case, no such evidence was led hence there is nothing shown to stop the Respondent from enjoying the use of the suit land being the registered proprietor.

36. In conclusion, I reach the following findings;

a. The Applicant's claim by way of Originating Summons is not proved and is hereby dismissed.

b. The Applicant is ordered to surrender vacant possession of the suit land Bukhayo/Mundika/2216 within ninety (90) days of the delivery of this judgement.

c. In default of (b) above, eviction shall issue.

d. Once evicted, an order of permanent injunction shall issue restraining the Applicant (Jane Elizabeth Barasa) and her family or persons claiming through her from interfering with the 2nd Respondent's (Charles Nyangule Namai) user of L.R Bukhayo/Mundika/2216.

e. Cost of the two suits (now one after consolidation) awarded to the Respondents.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF APRIL, 2021

A. OMOLLO

JUDGE