



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 173 OF 2017

IN THE MATTER OF LIMITATION OF ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012, LAW OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. SAMIA BUDONGO/649

BETWEEN

GODFREY ONYANGO BWIRE.... APPLICANT

- VERSUS -

VINCENT ODUKE BWIRERESPONDENT

J U D G E M E N T

1. By an Originating Summons dated 3rd October 2017 taken out by Godfrey Onyango Bwire, this court is asked to determine the following questions:

1. Whether or not the suit land parcel No. SAMIA/BUDONGO/649 is an ancestral land and was bequeathed jointly to both the Applicant and Respondent herein.
2. Whether or not the suit land parcel No. SAMIA/BUDONGO/649 has been demarcated into two half share and sisal boundary planted.
3. Whether or not the Applicant took possession of his half share in 2000 and has been in open quiet, peaceful, and uninterrupted continuous occupation or use of the same for a period of over 12 years.
4. Whether or not the Applicant's occupation and use of half share of the suit land parcel No. SAMIA/BUDONGO/649 has matured into adverse possession.
5. Whether or not the Respondent hold the said half share of the suit land parcel in trust for the Applicant.
6. Whether or not the Respondent should be condemned to pay cost of this suit.

2. Upon determination of the questions raised, the Applicant asked for the following orders to be made in his favour;

- a. **An Order that the Respondent holds half share of suit land parcel No. SAMIA/BUDONGO/649 in trust of the Applicant.**
- b. **An Order that the Applicant has acquired the half share of the suit land parcel No. SAMIA/BUDONGO/649 by adverse possession.**

c. An Order that the said half share suit land parcel No. SAMIA/BUDONGO/649, occupied by the Applicant be transferred in the name of the Applicant.

3. The Originating Summon was consolidated with ELC No. 14 of 2019. In this suit, the Respondent in the Originating Summons (now defendant) sued the Applicant impleading that she is the legal representative of Vincent Oduke Bwire – deceased. The defendant (Vincent) was the first registered owner of L.R Samia/Budongo/649 measuring 0.6ha. That the plaintiff in the year 2009 without any justifiable cause encroached on to a portion of the suit land thereby denying the deceased family quiet and peaceful use. The defendant pleaded further that the Applicant was initially settled on his land No. Samia/Budongo/1005 which he later sold.

4. The plaintiff prays for judgment against the defendant for:

- a. An Order of eviction from L.R No. Samia/Budongo/649.
- b. Costs

5. The hearing commenced on 18th February 2020 with the evidence of Godfrey Onyango Bwire (Plaintiff). He stated that the defendant is his brother. That the suit land Samia/Budongo/649 was given to his father Hannington Bwire Kange. **PW1** said his father shared the suit land between his two wives – Anna and Faida. The plaintiff states that he also lives on the suit land from the year 2000 on the portion given to his mother. He produced pictures of his house as **Pex 1 (a) and (b)**. It is his evidence that the defendant wrote the letter dated 31/12/2012 agreeing to share the land with him.

6. The witness continued that Samia/Budongo/1005 was given to him by his father and he sold it in 2014 when he had problems. He urged the court to have the suit land shared in the manner his father had shared it. In cross-examination, **PW1** said his mother is different from the defendant's mother. That his father never sued the defendant over the suit land during the defendant's lifetime. The witness said the suit land is ancestral and is surprised his father's name is not in the green card.

7. **PW1** admitted his mother was not buried on L.R No. Samia/Budongo/649. He denied getting on to the suit land in the year 2007. That he built his first house when he was 15 years in his father's home and the second house built in his father's home while the 3rd house he built on the suit land. That it is his father who first went to the chief to complain. That the complaints were raised because the defendant was playing tricks. That he had problems with the defendant from the time he moved into the suit land. In re-examination, **PW1** stated that the letter dated 24th July 2017 was written to enable him get a share in the suit land. That L.R No. Samia/Budongo/649 is not ancestral land.

8. Wilberforce Ouma Nakhwanga testified as **PW2**. **PW2** stated that the plaintiff is a son to his nephew – Hannington Bwire. According to **PW2**, the suit land originally belonged to his grandfather called Ombogola. Ombogola bequeathed the land to Teresa Nambuka as a gift. That Teresa left the land on her demise to her son Hannington. **PW2** denied that Vincent Oduke bought the suit land. It is his further evidence that Hannington shared the land to his two wives Fridah (mother to Applicant) and Anna (mother of Respondent).

9. **PW2** concluded that Hannington planted sisal boundaries demarcating each of his wife's share. He did not understand how the land was registered in the defendant's name instead of Hannington Bwire. In cross-examination, **PW2** said he does not remember the year the land was bequeathed. He was not aware that parcel No. 1005 was registered in the plaintiff's name while parcel No. 649 was registered in defendant's name. That the plaintiff was invited on to the suit land by his father. That the dispute over the land between the plaintiff and the defendant was never resolved.

10. MacMillan Maunda testified as **PW3**. He is the senior chief of Agenda location and he knew the parties herein who are his subjects and sons to Hannington Bwire. **PW3** said that in December 2012, Hannington Bwire and the plaintiff went to his office with Hannington complaining that he registered his elder son in the suit land but it was to be shared amongst his children. That he summoned all of them to appear before him on 31/12/2012. They did appear and Vincent (defendant) agreed to share the land with his brothers. He produced the letter of agreement as **Pex 2** and the letter dated 23/7/2017 as **Pex 3**.

11. The witness was put to cross-examination by Mr. Fwaya learned counsel for the defendant. **PW3** said he does not know where Samia/Budongo/1005 is or that it belonged to the plaintiff. That **Pex 2** was written to him and was not signed by the plaintiff. **PW3** admitted writing the letter dated 24/7/2017 after the defendant refused to share the land. That the letter dated 11/10/2018 was written by an assistant chief who is not within Agenda location. That it is only the plaintiff living on the suit land as the defendant moved to a parcel of land he had purchased. This marked the close of plaintiff's Case.

12. The defendant opened his case on 19th November 2020. **DW1** adopted the contents of her replying affidavit sworn on 22nd February 2019 together with the annexed documents which he produced as **Dex 1, 2 & 3**. She also adopted her witness statement dated 8/2/2019. Her evidence is that the suit land was registered on 27/3/1980 in name of Zedekia Bwire who is the same person as the defendant. **DW1** denied the suit land is ancestral as it was given to the defendant by his father's uncle. That it is the plaintiff who was registered as owner of L.R 1005 which was ancestral land. That the plaintiff first lived in their home (at Samia/Budongo/1010), then moved to L.R No. 1005 before finally settling on the suit land. **DW1** said she wants the plaintiff evicted from the suit land and she be paid costs of the suit as the defendant was not registered in trust on behalf of anyone.

13. In cross-examination, **DW1** said she got married to the defendant in 1983. That the suit land was given to the defendant by his maternal grandfather. **DW1** denied the plaintiff has lived on the suit land for over 20 years as he only moved to the land in the year 2009. She admitted the plaintiff has semi-permanent structures on the land while the defendant was away. That it is the defendant who had put demarcations on the land. **DW1** was not away of summons to the defendant to appear before the chief. That the family meeting held in 2010 to have the plaintiff leave the land was not documented.

14. Felix Aggrey Bwire gave evidence as **DW2**. He is the son to Anna Bwire and brother to both defendant and plaintiff. He adopted his

witness statement made on 29/1/2020. He stated that the defendant was not registered in trust for anyone over L.R No. Samia/Budongo/649. That the plaintiff was given L.R Samia/Budongo/1005 which he later sold to Emmanuel Ofunja. That the plaintiff's trespassed on the defendant's land and should be evicted. **DW2** added that the plaintiff's mother had a house on L.R No. Samia/Budongo/1010 where she was also buried.

15. The witness was put to cross-examination by Miss Achala learned counsel for the plaintiff. **DW2** said he is a follower of the defendant. He denied that the defendant was registered as owner of the suit property being the eldest son. That their father was present during registration. He did not know who planted the boundary as he was away in Nairobi. He admitted the plaintiff is living on the suit land. In re-examination, **DW2** answered that his eldest brother is called Edwin Onyango. In 1980 the eldest brother was still alive. This marked the close of defence case.

16. The parties filed their submissions in December 2020. Besides giving summary of the evidence, the Applicant submitted that trust is a question of fact to be proved by evidence as held in case of *Mumo Vs Makau (2003) I EA 170*. He also cited the provisions of section 107 of the Evidence Act and section 28 of the Land Registration Act. The Applicant relied further on the case of *Isack M'Inanga Kiebia Vs Isaaya Theuri (2018) eKLR* where the court stated thus "... some of the elements that would qualify a claimant as a trustee are;

- 1. The land in question was before registration family, clan or group land.**
- 2. The claimant belongs to such family, clan or group.**
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**
- 4. The claimant could have been entitled to be registered as an owner or beneficiary of the land but for some intervening circumstances.**
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group."**

17. The defendant also recited the evidence adduced. He submitted that his counter-claim is unopposed. He submits that none of the plaintiff's witnesses led evidence to show that the defendant held the land in trust for the plaintiff. That the plaintiff has not lived on the land for over 12 years nor did his mother live on or use the land. The defendant stated that the provisions of section 24 & 26 of the Land Registration Act supports his rights as the registered owner. He urged the court to dismiss the plaintiff's case and instead enter judgment as prayed in his counter-claim.

18. From the pleadings, the evidence adduced and the submissions rendered, I pick three questions raised in the Originating Summons which requires answers to resolve this dispute;

- a. Whether or not the suit land parcel No. SAMIA/BUDONGO/649 is an ancestral land and was bequeathed jointly to both the Applicant and Respondent herein.
- b. Whether or not the Applicant took possession of his half share in 2000 and has been in open quiet, peaceful, and uninterrupted continuous occupation or use of the same for a period of over 12 years.
- c. Whether or not the Respondent hold the said half share of the suit land parcel in trust for the Applicant.
- d. Whether or not the defendant is entitled to orders of eviction.
- e. Who bears the cost of this suit?

19. Black's Law Dictionary 10th Edition defines ancestor as "**a person from whom an estate has passed.**" Ancestry is defined as, "**a line of descent, collectively a person's forbears; lineage.**" The plaintiff wants a declaration made that the land was jointly bequeathed to him and the defendant which position the defendant challenged. The burden was on the plaintiff to establish that the ancestry existed to enable him enjoy the inheritance. He led evidence to state that the land was initially owned by his father's uncles who gave it to him (Hannington Bwire). To corroborate this evidence, the plaintiff called Wilberforce who testified as PW2. PW2 comes from Sigalame sub-location which is the same village as the plaintiff. PW2 said the suit parcel initially belonged to his late grandfather Ombogola who then bequeathed it to Teresa Nambuka. According to him, Teresa the mother of Hannington left the suit land to Hannington.

20. The defendant on his part pleaded that he acquired the suit land on first registration in 1980 which land was never owned by Hannington Bwire. Secondly, that the plaintiff was also settled on land parcel No. Samia/Budongo/1005. From the two green cards produced, both parcels Samia/Budongo/649 and Samia/Budongo/1005 were registered on the same day i.e. 27/3/1980. Samia/Budongo/649 was registered in the defendant's name as the first registered owner while Samia/Budongo/1005 was registered in name of plaintiff as the 1st registered owner. Consequently, the registration of the defendant as first registered owner made him as owner thereof. His ownership could only be challenged by proving that a customary trust existed in his case.

21. The question which begs answers is whether or not the plaintiff has provided the evidence of trust. He stated that his first house was built in his father's home when he was 15 years old. From the evidence of both sides, that home was situated on L.R Samia/Budongo/1010. The plaintiff annexed a copy of ID to his witness statement which ID shows he was born in 1970 meaning he built his first house around about 1985. He said that he built his second house on his parcel No. 1005 although he does not give the year this took place. The plaintiff was however specific that he settled on the suit land (3rd house) in the year 2000.

22. The plaintiff's evidence demonstrates that L.R No. 649 was not the family home. He did not tell the court what use his mother had put the portion of the suit land prior to him building on the land. The land had not been given to his mother as his own evidence show that the land was given to his father by his uncles as gift meaning it was not an inheritance through lineage. On the basis of the evidence on record, I find no basis laid by plaintiff for his claim under customary trust.

23. The second issue is whether or not the plaintiff is entitled to the half portion of the suit land by virtue of adverse possession. Principles to prove a claim for adverse possession are well established both in statute and case law. For instance in the Case of *Mbira Vs Gachuhi (2002) IEALR 137* where it was held thus;

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

24. Has the plaintiff met all the qualifications of time; peaceful and uninterrupted occupation and with intention to dispossess the owner? According to the plaintiff, he entered the land in the year 2000. According to the defendant, the plaintiff trespassed on to the land in the year 2009. The defendant pleaded this both in his replying affidavit to the Originating Summons (paragraph 11) and in the plaint at paragraph 6. Given the time the plaintiff entered the land was challenged, it was necessary that he leads evidence to support his averment that he entered the land in the year 2000 and not 2009. The only evidence he led was as proof of possession is production of the photographs of his houses.

25. In my view the plaintiff did not call any evidence to corroborate his statement on when time began to run. PW2's evidence was not useful in regard to time of entry and use. In his evidence, he stated thus *“the plaintiff is living on the land. I do not know much on how he uses the land because I live far.”* This witness did not even know the plaintiff's name yet he says the plaintiff was taken to the suit land by Hannington. He does not specify when this took place or if he was present. This makes his evidence sound more of hearsay evidence. In my opinion and I so hold, the plaintiff did not do justice to his claim for adverse possession. Being in possession of the suit land is not in itself sufficient proof of adverse possession.

26. Thirdly, the plaintiff relied on the provisions of the letter dated 31/12/2012 which briefly stated thus;

“Dear Sir,

RE: ACCEPTED TO SHARE THE LAND WITH MY BRO. G. ONYANGO

I have accepted as mentioned above.

The land is Samia Budongo No. 649.

Yours faithfully

Vincent Oduke Bwire”

27. The letter does not constitute a contract because it was not signed by both parties. PW3 said the letter was written to him by the defendant. PW3 further produced the letter dated 24/7/2017 addressed to the Deputy Registrar Busia Court explaining that he had summoned the defendant who had agreed to share the land with the plaintiff but he has not done so. This second letter does show that the letter of 31/12/2012 was not made of freewill by the defendant. I say so because the plaintiff had said that the defendant was playing tricks in sharing the land making their father to lodge a complaint to the chief's office. The two letters thus demonstrates two things; the contents of the letter of 31/12/2012 cannot be implemented by the court on behalf of the plaintiff. The second limb is that it demonstrate the possession of the plaintiff was not intended to dispossess the registered owner given the registered owner was resisting sharing his land with the plaintiff.

28. In light of my analysis of the above in the preceding paragraphs, I find that the plaintiff has not demonstrated that the defendant held the land in trust to be entitled to ½ share of L.R Samia/Budongo/649 nor has he advanced evidence to entitle him to the land by way of adverse possession.

29. The last question is whether or not the defendant is entitled to the orders of eviction she has sought. There is no dispute that Vincent Oduke Bwire – deceased is the first registered owner of the suit land. The defendant has laid evidence that at the time he was registered on 27/3/1980 as owner of the land, the plaintiff was also given Land Parcel No. Samia/Budongo/1005. The plaintiff admitted that he was the first registered owner of L.R No. Samia/Budongo/1005 which he has sold.

30. The plaintiff had his own land which supports the averment by defendant that the deceased was not registered in trust for and on behalf of the plaintiff in respect of the suit land. If their father intended the plaintiff to get a share in the suit land then no evidence is led why he did not cause the same to be registered in joint names. The defendant was not the eldest son in the family; the eldest son was called Onyango Bwire thus the defendant as the sole registered owner, is entitled to enjoy the rights bestowed under section 24(a) of the Land Registration Act which states thus;

“Subject to this Act -

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

31. I am persuaded by the defendant to find that the plaintiff is a trespasser on L.R. No. Samia/Budongo/649. The defendant's counter-claim succeeds and the plaintiff, Geoffrey Onyango Bwire is ordered to give vacant possession of the suit land to the defendant within 90 days from the date of this judgement. In default, the defendant is at liberty to evict him using lawful means.

32. Costs of the consolidated suit is awarded to the defendant.

DATED, SIGNED & DELIVERED AT BUSIA THIS 15TH DAY OF APRIL, 2021.

A. OMOLLO

JUDGE