



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 42 OF 2019

FRANCIS ANYIGA LIGONO.....APPLICANT

VERSUS

ROSE JUMA OKUKU.....1STRESPONDENT

TERESA OJIAMBO ODUYA2NDRESPONDENT

J U D G M E N T

1. The Applicant commenced these proceedings through the Originating Summons dated 6th June, 2019 against the Respondents. The Applicant's claim is that he is entitled to 1 ½ acres or thereabouts through adverse possession out of land parcels Samia/Wakhungu-Odiado/2360 and 2361 measuring 1.342 Ha and 0.10 Ha respectively formerly Samia/Wakhungu-Odiado/130. The issues for determination are:

a. That the Applicant FRANCIS AYINGA be declared the absolute registered proprietor of 1½ acres or thereabouts out of those parcels known as Samia/Wakhungu-Odiado/2360 and 2361 measuring 1.342 Ha and 0.10 Ha respectively (formerly Samia/Wakhungu-Odiado/130) as demarcated and occupied by the applicant on the ground in which he has been in actual possession notoriously, adversely, openly and interrupted for a period exceeding 39 years (from 1980 to date);

b. That the Respondents ROSE JUMA OKUKU and TERESA ODHIAMBO ODUYA be ordered to execute all documents of transfer in respect of the said 1½ acres of those parcels of land known as Samia/Wakhungu-Odiado/2360 and 2361 measuring 1.342 Ha and 0.10 Ha in favour of the Applicant failure to which the Deputy Registrar of this Honourable Court be empowered to execute the same in place of the Respondents and the Land Registrar, Busia be empowered to dispense with the production of the original title deed if the Respondents do not comply;

c. That an inhibition do issue restraining the Respondents, their agents, servants, family members and or persons working under them their instructions from interfering with, selling, disposing of, transferring, sub-dividing, evicting the applicant or in any manner dealing with land parcels Samia/Wakhungu-Odiado/2360 and 2361 measuring 1.342 Ha and 0.10 Ha respectively pending hearing and determination of this suit;

d. That the costs of this Application be provided for.

2. The Originating Summons was supported by the Applicant's supporting affidavit dated 3rd April, 2019.

3. Despite being served with the summons, the Respondents did not file responses to the application. The return of service was filed by Joseph Orata Kweyu on the 22nd of October, 2019.

4. The matter proceeded for formal proof hearing on the 3rd of February, 2021. The Applicant testified as **PW1** and stated that he is a farmer and stays at Malanga B. He continued further that he bought the land on 20/05/1980 from Ambrose Okello Adala for Kshs.7,200 and that the 1st Respondent was the wife of Ambrose (person he bought the suit land from) while the 2nd Respondent bought a portion of the land that has been sold to him.

5. That the size of the land sold was 3½ acres and the 1st Respondent have PW1 only 1½ acres after her husband died and he only uses 1 acre because the 2nd Respondent has been using the ½ an acre. He continued further that he has been using the land since the year 1980 and that when the 1st Respondent took out letters of administration and subdivided the land, his portion lies in 2360 and 2361.

6. He concluded by adopting his witness statement in which he stated inter alia that:

a. The seller passed on and the land parcel **Samia/Wakhungu-Odiado/130** was divided into several parcels and at the time of the subdivisions the family decided to give him 1½ acres instead of 3½ acres after a resolution was reached before the area Liguru on the 22.05. 2006.

b. Before the sub-division the family and the various buyers held a meeting before the Assistant County Commissioner Samia Sub County and before the Assistant Chief on 29/05/2015 and 8/7/2015 respectively where it was agreed that all buyers receive their shares;

c. Consequently, the land was subdivided to produce Samia/Wakhungu-Odiado/2172, 2358 and later 2360 and 2361 among others from which he was to get his share of 1½ acres but the 1st Respondent registered it wholly in her name to defeat justice and further transferred Samia/Wakhungu-Odiado/2361 to the 2nd Respondent;

d. Despite the subdivisions on paper his land remains intact of the ground with the boundaries as planted in 1980, as identified by the Surveyor on 22/05/2006 and as per the mutation form; and

e. By virtue of his interrupted and consistent occupation for over 38 years he has acquired title by operation of the law and adverse possession and he should be declared and registered as owner to 1½ acres out of Samia/Wakhungu-Odiado/2360 and 2361 as demarcated and occupied on the ground.

6. **PW1** also produced the following documents in support of his case;

a. *Green card for Samia/Luchululo-Bukhungu 130 as PEX 1;*

b. *Land sale agreement dated 13.05.1980 as PEX 2 (a);*

c. *Land sale agreement dated 28.12.1982 as PEX 2 (b);*

d. *Land sale agreement dated 22.05.2006 as PEX 2 (c);*

e. *Minutes dated 29.05.2015 as PEX 3;*

f. *Minutes dated 8.7.2015 as PEX 4;*

g. *Green card for Samia/Wakhungu-Odiado 2172 as PEX 5;*

h. *Green card for Samia/Wakhungu Odiado 2358 as PEX 6;*

i. *Green card for Samia/Wakhungu Odiado 2360 as PEX 7;*

j. *Green card for Samia/Wakhungu Odiado 2361 as PEX 8;*

k. *Mutation form for Samia/Wakhungu 130 as PEX 9; and*

l. *Chief letter dated 9.3.2018 as PEX 10.*

7. The Applicant filed his submissions on the 4th of March, 2021 where he submitted on the key elements of adverse possession which a claimant must prove i.e. he has been in exclusive possession of the land openly and as of right without interruption for a period of twelve (12) years or more and that the occupation dispossessed the owner. He submitted that his claim remained unchallenged and unrebutted as the Respondents did not respond despite being served with the summons. He relied on the case of **Joseph Gahumi Kiritu vs. Lawrence Munyambu Kaburu CA No. 20 of 1996** and that of **Wilson Njoroge Kamau vs. Nganga Muceru Kamau (2020) eKLR** where the Court held that the Applicant therein had proved his claim for adverse possession.

8. Adverse possession is a question of fact which must be proved by way of evidence within the standard of probabilities. Although the originating summons has not been contested this court is still called to determine the following issues;

a. Whether the Applicant's occupation of the Suit Land is adverse to the owner.

b. Whether the Applicant is entitled to orders of eviction and permanent injunction against the Respondents; and

c. Who bears the costs of the suit?

9. 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.”

10. **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 a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

11. A claimant for the land adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. Justice Asike Makhandia J.A in **Mtana Lewa vs. Kahindi Ngala Mwangandi (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.”

12. The Applicant adduced evidence that he purchased the 3½ acres of the Suit Land from the 1st Respondent’s husband for a consideration of Kshs.7,200 in 1982 and that he has been occupying 1½ acres of the said parcel of land since the year 2006 after a meeting with the area village elder and the proprietor of the Suit Land. The sale is evidenced by the agreements for sale dated 13th May, 1980 and 28th December, 1982. It is worthy to note that the burden to demonstrate occupation by purchase lies with the Applicant and from the chief’s letter dated 9th March, 2018 and minutes of the meetings on the 29th of May, 2015 and the 8th of July, 2015 produced by the Applicant as evidence it suffices to conclude that the Applicant has been in occupation of the Suit Land by way of purchase.

13. This Court is called upon to determine whether the Applicant’s possession is adverse to that of the Respondents. Courts have held that where the claimant is in exclusive possession of the land with leave and license of the Proprietor 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 was the holding in the Court of Appeal cases of **M’Mbaoni M’Ithara vs James Mbaka (2019) eKLR** and **Wambuyu vs Njuguna (1983) KLR**.

14. For possession to be adverse the Applicant must prove that his possession was peaceful. Although the Applicant did not call any witnesses to confirm peaceful possession or otherwise, his sole evidence was not contradicted. The possession was confirmed by the minutes of the meetings held before the local administration produced as Pex 3 & 4 where the 1st Respondent and the Applicant agreed that the latter would have 1½ acres and it is only just that that agreement be honoured.

15. **In the case of Jaswantkumarba Benesingh Jethwa v Postal Corporation of Kenya [2015] eKLR, while quoting the cases of Wambugu v Njuguna [1983] KLR 172, Public Trustees v. Wanduru [1984] KLR 314, and Mungania v. Imanyara [1985] KLR 1 stated that; “that where a claimant is in exclusive possession under a contract of sale, the claimant’s possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. Where, however, the purchaser is put in possession after paying the full purchase price, his possession becomes adverse to that of the vendor when he took possession for that is the time when vendor’s possession was discontinued (Public Trustee v Wanduru, (supra).”**

16. The Applicant has provided evidence that he concluded payment of the purchase price to the initial proprietor of the land, Ambrose Okello Adala, vide an agreement dated where 28th December, 1982 where the proprietor confirmed that he had received the full consideration for the land being Kshs.7,200. This means that the Applicant’s possession of the 1½ acres of the Suit Land became adverse to that of the initial proprietor, Ambrose Okello Adala, when he took possession by discontinuing Ambrose’s possession.

17. In view of the foregoing, I arrive at the conclusion the Applicant’s claim by way or Originating Summons has been proved within the balance of probabilities. Consequently I enter judgement in the following terms;

a. The Applicant, FRANCIS AYINGA be and is hereby declared the absolute registered proprietor of 1½ acres out of those parcels known as Samia/Wakhungu-Odiado/2360 and 2361 measuring 1.342 Ha;

b. The Respondents, ROSE JUMA OKUKU and TERESA ODHIAMBO ODUYA are hereby ordered to execute transfer documents in favour of the Applicant in respect of the 1½ acres portion to be carved out of land title numbers Samia/Wakhungu-Odiado/2360 and 2361; In default of the Respondents executing the requisite documents, the Deputy Registrar shall execute the same to facilitate the registration of the suit portion in the name of the Applicant;

c. A permanent order of injunction be and is hereby issued restraining the Respondents, their agents, servants, family members and or persons working under their instructions from interfering with the Applicant’s use of the 1½ portion comprised in title numbers Samia/Wakhungu-Odiado/2360 and 2361.

d. The costs of this suit are awarded to the Applicant.

DATED, SIGNED AND DELIVERED AT BUSIA THE 30TH DAY OF JUNE, 2021.

A. OMOLLO

JUDGE