



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT CASE NO. 4 OF 2019 (O.S)

PAMELA DINDI NDUBI.....APPLICANT

-VERSUS-

JAVAN RICHARD NDUBI.....1ST RESPONDENT

PATRICK ASEMA 'A'MUGUNE.....2ND RESPONDENT

JUDGEMENT

1. The Applicant commenced these proceedings vide the Originating Summons dated 3rd July, 2017 taken out against the Respondents. The Applicant's case is that she has acquired by way of adverse possession **L.R NO BUKHAYO/KISOKO/6685** and posed the following questions for determination:

- a. Whether or not the Applicant has been in occupation of L.R NO BUKHAYO/KISOKO/6685 since 1982 continuously, peacefully and without interruption to date?
- b. Whether or not the Applicant has built two semi-permanent houses on the said piece of land without obstruction from anyone else?
- c. Whether or not the Applicant is an adverse possessor of L.R NO BUKHAYO/KISOKO/6685?
- d. Whether or not the 2nd Respondent knew or ought to have known that before he bought the suit land the Applicant was in possession of the same.

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

- a. A declaration that the Applicant has acquired title to land parcel L.R NO BUKHAYO/KISOKO/6685 through adverse possession and Land Registrar Busia County be directed to remove the Respondent's name and enter the Applicant's name as proprietor thereof; and
- b. Costs of the suit.

3. The Respondents filed separate responses to the originating summons. The 1st Respondent filed his Replying Affidavit on the 20th February, 2019 stating that the Suit Land L.R NO BUKHAYO/KISOKO/6685 belongs to the 2nd Respondent since 25th January, 2016 who acquired the same through the laid down procedure. That the Applicant is his aunt and is only interested in grabbing the land.

4. The 2nd Respondent filed his Replying Affidavit on the 6th of February, 2019 stating that he is the registered owner of L.R NO BUKHAYO/KISOKO/668. That the issues in the present suit are still pending in Busia H.C ELC No. 157 OF 2016 which was filed by the Applicant herein hence making the present suit *res judicata*. That the Applicant has not stayed in the suit land as for 36 years as she alleged and is trying to invade his land illegally.

5. The matter proceeded for hearing on the 27th of October, 2020. The Applicant called the evidence of two witnesses. The Applicant, **PAMELA DINDI NDUBI** testifying as **PW1** stated that the 1st Respondent is her nephew who introduced to her the 2nd Respondent. She stated that the suit land was initially registered in her father's name, one Johnstone Ndubi. That she started living on the suit parcel from the year 1996 and has never lived anywhere else. That the 1st Respondent's father John Bell is still alive and has never evicted her from the land.

She testified further that her father never informed her that he had gifted the suit land to the 1st Respondent. She adopted her witness statement dated 26th of February, 2019 in which she stated that the elders together with the Respondents agreed to transfer the land to him but the Respondents have refused to sign over to him the transfer documents.

6. Upon cross-examination by the 1st Respondent, **PW1** stated that she has been living on the suit land long before the 1st Defendant had been born and has acquired rights over the land. That she was shown the land in 1982 but started living on it in the year 1996. She stated further that her father gave land to all her siblings including her elder brother.

7. On further cross-examination by the 2nd Respondent, **PW1** stated that she has lived on the suit land since June, 1996 and her father brought a surveyor in the year 2011 who created the Suit Title. That the elders were directed by her father what to do with the Suit land. She stated further that Busia ELC Suit 157 of 2016 was to stop the 2nd Respondent from building in front of her house but she has since withdrawn the case. That she does not know the alternative parcel of land that she should be given as the one suggested is registered in her mother's name.

8. **HENRY WESONGA NDIDI** testified as **PW2** stating the Applicant is his cousin and that she has started living on the suit land in the year 1982 when her marriage broke down and she came back home. That her father decided to give her a place to stay measuring 2 acres for her to live with her family.

9. Put to cross-examination by the 1st Respondent, **PW2** stated that the Plaintiff started living on the suit land in 1982 and not 1996 and that he did not assist the Plaintiff in any way because there has never been a problem with the suit land. That Mzee Johnston did not gift the suit land to the 1st Respondent and during the family meeting, the 1st Respondent agreed to leave the Applicant's land. That the 1st Respondent's father was the only son of the Applicant's father and he was given his share of land. That the 1st Respondent changed the titled without anyone's knowledge. That the 1st Respondent was present during the family meeting and that he should stop interfering with the Applicant's land and stating that in that meeting there was no discussion on the issue of the refund of money.

10. In further cross-exam, **PW2** stated that Johnstone Ndubi died in 2014 when he was 100 years old. That she had no idea when the 2nd Respondent bought the suit land until the year 2018. That the dispute began when the 2nd Respondent built a mabati structure in the suit land. That the intention of the family meeting was to give the 2nd Respondent an alternative parcel of land as he had no idea that he was buying land that belonged to the Applicant. He stated further that the Plaintiff was given 2 acres out of 106 acres of the family land and the said land belongs to the her thus the 1st Respondent obtained the Title through fraud.

11. The Defence hearing began on the 1st of March, 2021 with the Defence calling two witnesses. The 1st Respondent, **JAVAN RICHARD NDUBI** testified as **DW1**. He confirmed that the Plaintiff was his aunt. He stated that he was gifted the suit land by his grandfather and he got the title in 2013. That he has given the land to the 2nd Respondent who legally owns it.

12. Upon cross-examination, **DW1** stated that even though he does not know how long the Applicant has lived on the suit land, she currently lives on the said parcel. That she was shown the parcel where she currently resides by her father, Johnstone Ndubi who died on the 1st of September, 2014. That Johnstone never chased the Applicant from the suit land even though he kept reminding her to go back to her matrimonial home.

13. The 2nd Respondent, **PATRICK ASEMA MUGUNE**, testified as **DW2**. He stated that he advertised at his place of work that he was looking for land to buy. That in the year, 2016 he met the 1st Respondent for a visit to the suit land where he met the Applicant. That after paying the purchase price, he constructed a house on the said parcel in 2016. That the Applicant is still on the land to date.

14. Upon cross-examination, **DW2** stated that the Applicant was on the suit land when he purchased it and that she informed him he that she had been given permission to live on the suit land and she had no objection to the sale. That despite him building on the said land, the Applicant still lives on same land.

15. After the close of the hearing, parties filed their respective submissions. The Applicant filed her submissions on the 12th day of April, 2021 restating the facts pleaded in her Originating Summons and the hearing. She submitted that the Respondents had testified to knowing of her occupation of the suit land and that all the transfers of the land were done when she was in possession and use of the said land. That she has satisfied all the conditions of granting adverse possession and urges this Court to grant her the orders prayed.

16. The 1st Respondent filed his submissions on the 6th of April, 2021. He submitted that there existed a similar suit BUSIA ELC 15 OF 2018 between the same parties which matter has never been settled. He submitted further that the Applicant's evidence did not support her claim for adverse possession and as such the suit should be dismissed with costs.

17. The 2nd Respondent filed his submissions on the 6th of April, 2021. He submitted that he obtained the title after following the laid down procedure and there was no claim for fraud that has been cited by the Applicant. That the Applicant has not proved her case for adverse possession and as such the suit should be dismissed with costs.

18. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

a. Whether the Applicant has proved her claim for adverse possession over the Suit Land;

b. Whether the 2nd Respondent as the registered owner of the Suit Land is entitled to order of eviction and permanent injunction; and

c. Who bears the costs of this suit?

19. 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.”

20. The Court of Appeal in the case of **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamataka Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is averse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

21. Pw1 and Pw2 testified that the Applicant has been in actual possession of the Suit Land from the June,1996 which evidence was not contradicted by the defence. There is also no denial that the Applicant had constructed several semi-permanent houses on the suit land. **DW1** testified that he was given the suit land by his grandfather as a gift sometimes in 2014 and he eventually sold it to the 2nd Respondent. **DW2** on the other hand acknowledged that when he visited the suit land before purchasing it, he found the Applicant living there and even noticed the houses constructed thereon. Before purchase of the suit land by the 2nd defendant, there is no evidence of interference of user or occupation of the Applicant.

22. The answer to the question of whether the Applicant being on the suit land, for more than twelve years, having peaceful, continuous and uninterrupted occupation of the said parcel with the knowledge of the proprietor is in the affirmative. The Applicant started living on the suit land in 1996 and until the year 2014 when her father, the original Proprietor died, she has been living peacefully thereon. By the year 2014, the Applicant had lived on the said parcel for an uninterrupted period of 18 years. PW1, PW2 and DW1 all agreed that the original proprietor, Johnstone Ndubi had never asked the Applicant to vacate the said land for the entire period that she was living on the land.

23. With regards to the second issue, the Applicant having proved that her possession of the Suit Land is adverse to that of the 2nd Respondent, she cannot be evicted. The 2nd Respondent bought land while aware of the presence of the Applicant of the land therefore time did not stop running in favour of the Applicant. This makes unavailable the defence of innocent purchaser for value without notice to the 2nd Respondent.

24. In upshot of the foregoing evidence and analysis I am convinced that the Applicant has proved her case beyond the balance of probabilities that the possession of the Suit Land was open, actual, continuous and uninterrupted for eighteen (18) years information that both the Respondents were aware.

25. The 2nd Respondent’s recourse lies with the 1st Respondent and not the Applicant and he can pursue a claim for damages against him or accept the family’s offer if at all to get an alternative parcel of land as discussed in the family meeting held on the 21st of October, 2018.

26. Consequently, I enter judgement for the Applicant in the following terms:

a. The Applicant’s Originating Summons dated 21st of January, 2019 succeeds.

b. The 2nd Respondent shall execute transfer documents for the property in favour of the Applicant within thirty days failure to which the Deputy Registrar shall execute the same to facilitate the registration of the Property in the name of the Applicant;

c. The 2nd Respondent to give vacant possession of any portion L.R No. BUKHAYO/KISOKO/6685 to the Applicant within 60 days from the date of judgement;

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

e. Once evicted, an order of permanent injunction does issue restraining the Respondents (JAVAN RICHARD NDUBI and PATRICK ASEMA A’MUGUNE), their agents, servants, employees and ALL persons claiming through them from interfering with the Applicant’s use of L.R No. BUKHAYO/KISOKO/6685; and

f. The costs of the suit are awarded to the Applicant.

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

A. OMOLLO

JUDGE