



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC NO. 21 OF 2017**

**JAMES O. E ANYANGO.....PLAINTIFF**

**= VERSUS =**

**WENSLAUSE OCHOM OKEMER.....DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 15<sup>th</sup> August, 2017, the Plaintiff brought this suit against the Defendant for prayers that:

- a. An order directing the eviction of the defendant and his agents and family members from land parcel no. SOUTH TESO/APOKOR/3537;**
- b. An order of permanent injunction against the Defendant by himself, her servants, workers, agents or any person claiming through her from cultivating, planting any crops removing boundary features or continuing in occupation or use of land parcel No. SOUTH TESO/APOKOR/3537;**
- c. Costs of this Suit and interests; and**
- d. Any other relief this Honourable Court may deem just and fit to grant.**

2. The Plaintiff claims that he is the registered owner of the suit land at all times material, and that he is thus entitled to vacant peaceful possession, occupation, and use of the land parcel after lawfully acquiring ownership through a valid purchase transaction.

3. On March 5, 2017, the Defendant filed his Defense, contesting the contents of the Plaint, specifically that the Defendant has been in peaceful occupation of the said section where his house is located for more than twenty (20) years and so vests rights of adverse possession in himself.

4. On the 25th of November, 2019, the hearing began and three witnesses were called by the Plaintiff. As PW1, **JAMES ODIWOUR ERASTOR ANYANGO testified that L.R SOUTH TESO/APOKOR/3537** is his property and that he owns it. He adopted his witness statement dated the 20th of December, 2017, in which he stated inter alia, that in January, 2015 he purchased a portion of land from Clement Etyang Okemer who informed him that it was land given to him as his share of his inheritance from his father's estate. PW1 stated further that the seller informed him that he had three brothers, the Defendant being one of them and that they had shared out their father's land through a succession cause. That the Defendant got his share being **SOUTH TESO/APOKOR/3537**. PW1 continued that after the purchase he asked the Defendant to move out to his own to his land but he refused. He is asking the Court to issue an order of eviction and injunction against the Defendant plus costs.

5. Upon cross-examination, PW1 stated that he bought the land in 2015 and it measures 1.6Ha. That before he bought the land, he went to view the same and found that some temporary mud structures were on the land but the Seller assured him that the person occupying the land, who was the Defendant, would vacate. He stated further that the Defendant has never asked him to leave the land.

6. PW1 testified on re-examination that the Seller showed him the succession documents and how the land was divided, with the Defendant having a portion. As he walked around the land, he came to the conclusion that he knew the borders.

7. **LEORNARD OKISA, PAUL**, testifying as PW2, indicated that he knows the Plaintiff since his brother sold the suit land to him. He submitted his witness statement on November 12th, 2019, in which he stated that Clement Etyang Okemer was his brother and he sold land parcel No. **South Teso/Apokor/3537** to the Plaintiff which land parcel originated from Land Parcel No. **South Teso/Apokor/21**. That the original parcel was subdivided following a court order and judgement in Busia ELC No. 46 of 2014. The land was subdivided into four

portions amongst brothers as follows

- i. South Teso/Apokor/3535 Pascal Imwatok;
- ii. South Teso/Apokor/3536 Leonard Ekisa Paul;
- iii. South Teso/Apokor/3537 Clement Etyang Okemer; and
- iv. South Teso/Apokor/3538 Wenzelause Ochou.

8. The Defendant has however refused to move to his portion and has instead sold off a half of it and is in the process of selling the remainder. PW2 added that the defendant used to stay and cultivate on his piece of Land and later moved to Clement's piece of land after the subdivision was done.

**PW2** produced the judgement in the case No. 46 of 2014 as PEx4, the Ruling in ELC 207 of 2014 as PEx6 and the Land Registrar's letter as PEx 7.

9. Upon cross-examination, **PW2** stated that Clement was living on the suit land when the Plaintiff came to purchase it. He stated further that the Defendant's relatives were buried on parcel 3536 which **PW2** currently occupied. That suit no 46 was filed because they did not want the Defendant having a share of their father's land and in the case the Deputy Registrar was to sign on the Defendant's behalf in the event he refused to sign. That the partition of the land was done in the year 2015 and the Defendant's portion was 4.1 acres which is the same in size as the portion he is currently occupying.

10. **CLEMENT ETYANG'A OKEMER** testified as **PW3** stating that he sold the suit land to the Plaintiff in the year, 2015 and that the Defendant started living on the land in 2015 after he sold the land to the Plaintiff. That the original parcel no 21 was subdivided between him, Leonard Paul, Pascal and the Defendant by a surveyor sent by court. **PW3** then adopted his witness statement filed on the 12<sup>th</sup> of November, 2019. 11. During cross-examination, **PW3** stated that the Defendant was living on the land with his family when the Plaintiff came to purchase the land and the latter has never lived on the said land. That despite several attempts to have the Defendant's relocate to his portion have been futile despite him being present during the partition. On re-examination, **PW3** reiterated that when the Plaintiff was buying the suit land the Defendant was living on the portion taken by Leonard Ekisa.

11. The Defence relied on his sole evidence. He stated that he lives at Kamanyak on the suit parcel which he inherited from his father. That the Plaintiff bought land from the family but he was to receive parcel no. 3538 and not the suit land. That he has buried his wife and children on the suit land and that according to the Teso culture, he cannot vacate the land. That he has no objection with the Plaintiff taking parcel 3538 and that the Court should direct him to go to that parcel.

12. Upon cross-examination, **DW1** stated that Clement Etyang and Leonard Wawire are his nephews. That there was a case no BUSIA HC No. 46 of 2014 where the Court decreed that each person gets 4 acres each and Clement sold the 4 acres which he had been decreed. That he has been living on the same parcel of land and has not moved since the court case. He continued further that he had not sold land to anyone. That he has never moved out of the home even after the subdivision of the land.

13. On re-examination **DW1** stated that he was not involved in the subdivision and neither did he sign the mutation form. He concluded by reiterating that he has never moved out of his home even after the subdivision and in fact when he inherited Clement's mother he built her a home in the same parcel.

14. Upon application by the Plaintiff dated 22<sup>nd</sup> October, 2020 the Court allowed the Plaintiff to recall **PW1** for production of the list of documents dated 18<sup>th</sup> February, 2021. **PW1** was recalled and he stated that he was producing the new list of documents because the Defendant had stated in his evidence that he was willing to swap parcels and that a search at Lands confirmed that parcel 3538 had already been subdivided into two. Upon further cross-examination, **PW1** stated that he obtained a copy of the agreement from the lands office and he was not a witness to the sale agreement between the Defendant and Carolyne in respect of parcel 3538.

15. **DW1** was also recalled and he stated that he did not know Carolyne Lusike Wasike and neither did he sell any land to her. He continued further that he never signed any mutation form and that the suit parcel belonged to Etyang who later sold it to the Plaintiff. On further cross-examination, **DW1** stated that he got the title to parcel 3538 after sub-division and that he has neither subdivided nor sold the land and believes that it is his children who are doing the forgeries as he signs by thumbprint. He reiterated that he does not know Carolyne Lusike Wasike.

16. On March 23, 2021, the Plaintiff filed his submissions. He restated the evidence presented in court, claiming that he is the registered owner of the suit package, which he purchased from Clement Etyang. He argued that the Defendant's evidence and testimony should be disregarded because he lied under oath about the transfer of parcel no. 3538, and that the Plaintiff's complaint should be allowed since he had proven his case to the appropriate degree of proof.

17. On March 23, 2021, the Defendant filed his submissions. He claimed that the suit parcel is part of his ancestral land, and that he had lived on it since 1931. Clement, his nephew, covertly subdivided the land, carved out LR 3537, and registered himself as the proprietor without the Defendant's knowledge or involvement. He argued that the Plaintiff entered into a sale transaction without inquiring about the ownership of the suit property in a reckless and negligent manner. He also claimed that he had obtained prescriptive rights to the suit land by adverse possession, claiming that he was born on the suit piece and has lived there since 1931. The defendant relied on the cases of **Paul Kamande Gicheha (2018) eKLR, Benjamin Kamau Murma & Others vs. Gladys Njeri C.A No. 213 of 1996** and **Titus Kigoro Munyi vs. Peter Mburu Kimani (2015) eKLR**.

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

- i. *Whether the Plaintiff legally acquired land parcel South Teso/Apokor/3537;*
- ii. *Whether the Defendant has acquired rights to the land parcel South Teso/Apokor/3537 by adverse possession;*
- iii. *Whether eviction should issue against the Defendant from the Suit Parcel and a permanent injunction issued against his, his agents, employees and family members; and*
- iv. *Who bears the costs of the suit?*

19. With regards to **whether the Plaintiff is the legal owner and proprietor of land parcel South Teso/Apokor/3537**. Section 24 of the Land Registration Act provides that 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. The Plaintiff has produced a title deed for the Suit Parcel in his name obtained on the 12<sup>th</sup> of November, 2015 together with the green card indicating that he obtained the said land through purchase from one Clement Etyang Okemer, PW3, at a consideration of K.Shs. 180,000/-. The Defendant on the other hand relies on the defence of having acquired the land by way of adverse possession.

20. The Court of Appeal in the case of **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR** while dismissing the appeal held that:

*“In the instant appeal, the respondent currently holds the certificate of title to the suit land and is in actual possession having acquired the same on 10<sup>th</sup> November, 2014 upon transfer and registration. It is therefore prima facie evidence that he is the absolute and indefeasible owner as provided for under Section 26 of the Land Registration Act. His title is also shielded from being defeated by Section 25 unless proved otherwise. The respondent further led evidence to the effect that he purchased the suit land in good faith, having executed the sale agreement and paid the purchase price as was stipulated in the sale agreement without any notice of fraud. The appellants did not tender any evidence to show that indeed the respondent had any notice of an illegality or fraud.”*

21. The Defendant has not provided this Court with any evidence to disqualify the Plaintiff as the proprietor of the Suit Parcel as provided under section 26 of the Land Registration Act. DW1 admitted that he was given parcel 3538 in the subdivision and was even willing to give the Plaintiff. He did not appeal the judgement or approach the court for a review of the judgement. He however failed to mention to this Court that he had sold part of the said parcel to one Carolyne Lusike Wasike and alleged that his children had forged his signature and sold the land. This should suffice as proof that title passed on to the Plaintiff by Clement was good title and without evidence to the contrary it is only fair to hold that the Plaintiff's title is good title and it deserves protection as provided under section 24 of the Land Registration Act. A similar position was taken in the cases of **Kiplangat Shelisheli Mutarakwa v Joseph Rotich Kones [2018] eKLR** and **Margaret Njeri Wachira v Eliud Waweru Njenga [2018] eKLR**.

22. With regards to the **second issue**, the Defendant in his defence has pleaded adverse possession in paragraph 4 of his defence. He submits that he has been on the suit parcel for more than twenty years. However, during the hearing PW2, PW3 and DW1 all agreed that the suit parcel 3537 was created after subdivision of land parcel **South Teso/Apokor/21** after a court decision in Busia ELC No. 46 of 2014 where the Court ordered the subdivision of the land into four equal parts for the parties. The Defendant was therefore obligated to demonstrate that time ran against the previous owner before subdivision and sharing of land parcel **South Teso/Apokor/21**.

23. The plaintiff relied in the judgement rendered in Busia ELC no 46 of 2014 which was produced as *pex4*. At page 3 of the judgement, under no 3 & 4 of summary of the plaintiffs evidence it is stated that the suit title which was **S.Teso/Apokor/21** was registered in the names of four (4) people and the present defendant was one of the four. It was stated by the trial judge that they held the land in equal shares. Further in that judgement (Bsa ELC 46/2014) it was stated that this Defendant was a brother to Pw3's father implying that they are family members. Consequently, the court draws the inference that the defendant occupied the suit portion as of right since he was a co-registered owner; and with consent of his co-registered owners.

24. The occupation of the defendant in my view could only become adverse after his name was removed from the title through the subdivision of **S.Teso/Apokor/21** in the year 2015 which gave each of the co-owners separate titles. For a claim of adverse possession to be successful time must have continuously run for 12 years. **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.”**

25. In the case of **Mbira -vs- Gachui (2002) IEALR 137** in considering what constitutes adverse possession 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”.**

26. Accordingly, this court holds that the time running in favour of the defendant is only two years from the date of separation of titles to the date of filing of this suit making unavailable the defence of adverse possession to the defendant. The Defendant offered the plaintiff to take L.R. **S.Teso/Apokor/3538** which he felt was due to PW3 that sold the land to the plaintiff. The Plaintiff was agreeable to this exchange of land since their sizes were equal as per the subdivision. However, when a search was conducted on number 3538 produced as *pex10* that the defendant had subdivided it into two and sold part of it to a Carolyne Lusike Wasike (*pex 11*). So the defendant cannot claim that he was not involved in the subdivision of **L.R. No. 21** to imply that he was dissatisfied with being assigned no 3538 instead of the 3537 he was occupying, yet he goes on to lay claim to L.R. No 3538 by disposing of a portion of it.

27. Thus the armies of defences raised by the defendant must accept defeat. The Plaintiff served the Defendant with a notice to vacate dated 28<sup>th</sup> September, 2016 and produced as PEx 3 before filing this suit on the 1<sup>st</sup> of February 2017. **With regards to the third issue, the Plaintiff's rights as a proprietor are protected under the law as provided under sections 24 and 25 of the Land Registration Act and no evidence has been proffered by the Defence to have those rights stripped from him as such the prayer of a permanent injunction succeeds.** I am persuaded that the Plaintiff has proved his case against the Defendant on a balance of probabilities.

28. In conclusion I enter judgement for the Plaintiff in the following terms:

**a. The Defendant is ordered to surrender vacant possession of the suit parcels No. South Teso/Apokor/3537 within ninety (90) days of the delivery of this judgement.**

**b. In default of (a) above, eviction to issue.**

**c. On recovery of vacant possession, an order of permanent injunction be and is hereby issued against the Defendant, by himself, his servants, family, agents or otherwise from entering, remaining on cultivating, planting any crops, removing boundary features of in any manner whatsoever interfering with the Plaintiff's use and occupation of Land Parcel No. South Teso/Apokor/3537;**

**d. The Plaintiff is awarded the costs of this suit.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND DAY OF JULY, 2021.**

**A. OMOLLO**

**JUDGE**