



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NO. 20 OF 2019 (O.S)**

MARY AJIAMBO NAFULA.....1<sup>ST</sup> APPLICANT

ANGELINE NABWIRE NYONGESA.....2<sup>ND</sup> APPLICANT

= VERSUS =

GEORGE WAFULA TORORO.....RESPONDENT

**J U D G M E N T**

1. The Applicants commenced these proceedings vide the Originating Summons dated 25<sup>th</sup> March, 2019 and filed on the same date against the Respondent. The Applicants' claim that they have acquired by way of adverse possession rights over half (½) acre portion comprised in **L.R NO BUKHAYO/MUNDIKA/12308** or any other title derived therefrom as on the ground currently registered in the name of GEORGE WAFULA TORORO pursuant to inheritance from the seller THOMAS TORORO OUMA (deceased). The Applicants posed the following questions for determination:

- a) **Whether the Applicants have been in open, quiet and notorious possession of the half (½) acre of a defined portion of L.R No. BUKHAYO/MUNDIKA/12308 or any other title derived therefrom as on the ground for a period of 12 years required in law for acquisition of land by adverse possession since 2006;**
- b) **Whether the Respondent's entitlement and title to the portion measuring half (½) acre described as BUKHAYO/MUNDIKA/12308 or any other title derived therefrom has become extinguished upon expiry of 12 years from the time the applicant has been in possession since the year 2006;**
- c) **Whether the Applicants have upon expiry of the said defined portion of land measuring half (½) an acre from BUKHAYO/MUNDIKA/12308 or any other title derived therefrom by virtue of adverse possession and whether such title shall be issued for the portion they possess;**
- d) **Whether the mutation should be done for a defined portion measuring half (½) an acre known as BUKHAYO/MUNDIKA/12308 or any other title derived therefrom as on the ground and registration be done accordingly;**
- e) **Who should pay the costs of this summons?**

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

- a) That the Respondent rights over the half (½) acre comprised in **BUKHAYO/MUNDIKA/12308** or any other title derived therefrom as possessed by the Applicants is extinguished by adverse possession from the time the Applicants acquired the same by virtue of a land sale transaction between the Applicants and Respondent or his predecessor;
- b) That the Applicants do and are hereby granted right of title to the half (½) acre of the portion known as **BUKHAYO/MUNDIKA/12308** or any other title derived therefrom;
- c) That the Respondent do execute all relevant documents necessary to mutate and or curve out half (½) an acre of the land described as **BUKHAYO/MUNDIKA/12308** or any other title derived therefrom as on the ground and in default the Deputy Registrar Busia Court to be authorized to do so after expiry of the defined period;
- d) Costs to be borne by the Respondent.

3. The Originating Summons was supported by the 1<sup>st</sup> Applicant's supporting affidavit sworn on 25<sup>th</sup> March, 2019 together with a statement from the 2<sup>nd</sup> Applicant. Annexed to the Summons was a copy of the land sale agreement, a valuation report of the trees on the land and the certificate of the official search in respect of the suit land.

4. On the 16<sup>th</sup> of April, 2019, the Respondent filed his replying affidavit, which stated that the Applicants are not entitled to the half (½) an acre of BUKHAYO/MUNDIKA/12308 and that, despite the fact that THOMAS TORORO OUMA was his father, the land was never registered in his name. He also deposed that the first Applicant and second Applicant's son moved into the suit land and lived there for only three years before being evicted by his father. That they planted some trees on the land while living there, but that the Applicants never stayed on the suit land for the 12 years they claim.

5. The hearing began on November 3, 2020, with the Applicants calling two witnesses. MARY AJIAMBO NAFULA, the first applicant, testified as **PW1** and stated that she works in Juakali and lives in Mabale. The Defendant's father sold them a portion of the suit land, which they have lived on since 2006. **PW1** went on to say that they began farming and even planted trees on the aforementioned land. She also claimed that she brought a surveyor to the land who established the boundaries, which are still in place despite the Respondent's efforts to remove them. **PW1** produced an agreement for sale dated September 13, 2006, as well as a copy of the official search as exhibits.

6. During cross-examination, **PW1** reiterated that the Applicants purchased half (½) acres of the suit land and that the Respondent and his father were present when the agreement was signed. That they only conducted a search after paying the purchase price because they knew the vendors with whom they shared a clan. She said that the former number of the land was LR No. 3688, which was registered in the name of the Respondent's grandfather, Ouma Tororo. LR No. 12308 was a subdivision of LR No. 5544, according to the Defendant's documents. **PW1** went on to say that the Applicants had been living on the suit land for 14 years and had never been chased from it by the Respondent or his father. That they planted trees on the suit portion, and those trees are still there today.

7. **PW1** was re-examined by her advocate, and she reiterated that, while the suit parcel is registered in the name of the Defendant, they have been on the suit land for 14 years, and the trees on the said land belong to the Applicants'.

8. The 2<sup>nd</sup> Applicant, ANGELINE NABWIRE NYONGESA, as **PW2**, adopted her witness statement filed on March 25, 2019. In her statement, she stated that she was aware that the suit land belonged to the late Thomas Tororo and that **PW1** and herself purchased the land on September 13, 2006 for KShs.50,000. That the vendor died on October 28, 2018 without having processed a title deed for them. They did, however, continue to peacefully use the suit portion by building dwelling houses and planting trees on it. The land is currently registered in the Respondent's name, and the Respondent has refused to transfer the suit portion to the Applicants. She concluded by urging the Court to grant the Applicants title to their portion of the land, which they are entitled to under the terms of the sale agreement they signed with the seller.

9. During cross-examination, **PW2** confirmed that they purchased the land on September 13, 2006 for KShs.50,000/= but did not have any documents proving that Thomas Tororo was the registered owner of the suit parcel. She went on to say that the agreement for sale was for a portion of LR. No. 3688. That her son lived on the said land for two years and that, despite the fact that he moved out of his own free will, the Applicants have continued to cultivate the said land to this day. She concluded by saying that she reported the Respondent to the police, and criminal charges were filed against him in Criminal Case No. 78 of 2019, in which she has already testified. In re-examination, **PW2** stated that she has been using the land and has even planted trees on it.

10. The Respondent relied solely on his testimony testifying as **DW1**. He stated that his father did not own the suit parcel of land and neither did his father give it to him. That he was given the land by his paternal uncle, Francis Onyango Ouma. That he has yet to taken out letters of administration for his father's estate. He continued in evidence that the Applicants had not been on the said land for the last 12 years, as claimed. That the Applicant's son built on the suit land, but the Respondent's father chased him away, and that they never returned to work on the land. **DW1** stated that his father died on 11/11/2018, and after Francis Ouma also died. **DW1** referred to the documents in his list of documents which he produced as DEX 1-5. He concluded by stating that he had never sold any land.

11. The defendant continued stating that despite the fact that there is an ongoing criminal case, he has not been charged with the crime of obtaining title by fraud. That the 2<sup>nd</sup> Applicant's son was cultivating the land but was chased away by his father. He admitted that the Applicants had been using half (½) acres of land and had planted trees on it, which are now fully grown. He went on to say that the Applicants asked his father to allow them to plant the trees there, and that they are free to come and cut the trees, but the land is his.

12. Parties were required to file the submissions within 14 days each and despite the time allocated, only the Respondent filed his submissions on the 15<sup>th</sup> of April, 2021. The Respondent stated in his submissions that the Applicants had not demonstrated peaceful and quiet possession of the suit land for a period of 12 years and had instead only demonstrated that they had lived on the suit land for 2 to 3 years. He also stated that he obtained the title to the suit land in 2017, and that he obtained the land from his uncle rather than his father. He urged the Court to dismiss the Applicants' case because they had failed to meet the required standard of proof.

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

***a) Whether the Applicants' occupation of the Suit Land became adverse to that of the Respondent; and***

***b) Who bears the costs of this suit?***

14. 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.”***

15. To establish adverse possession of land, a claimant must demonstrate that he has been in peaceful, continuous, and uninterrupted occupation of the claimed parcel for a period of more than twelve (12) years. PW1 and PW2 both testified that they purchased the land from the Respondent's father in 2006 and began to plough the purchased portion and also planted trees on it. DW1 acknowledged that the trees on the suit land belonged to the Applicants and even stated that while the trees belonged to them, the land did not.

16. According to the Respondent although the Applicants planted trees on the land, they do not live on the suit land since his father chased away the son of the second Applicant who used to live on this land making the Applicants' claim for adverse possession to fail. It is important to note that continuous use of land does not necessarily mean physically living on the land. The Applicants act of planting trees and ploughing the land suffices as continuous use of the land. The agreement for sale of land (PEX 1) between the Applicants and the Respondent's father was done on the 13<sup>th</sup> day of September, 2006 for the consideration K.Shs. 50,000/- in the presence of several witnesses including the Respondent and the Area Chief. The consideration was paid in full and acknowledged as such by the Vendor and the Respondent. In the case of **Mbira vs. Gachui (2002) IEALR 137** in considering what constitutes adverse possession held this: **“... 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.”**

17. The Agreement clearly states that the Respondent was a witness to the sale of the suit land to the Applicants and thus cannot claim he was unaware how the Applicants came on to the suit land. The minutes of the meeting on December 27, 2018 also confirm that there was a purchase between the Respondent's father and the Applicants. In an attempt to undermine the Applicants' claim, the Respondent stated that his late father, who sold the suit land, did not own it and thus no rights passed on to the Applicants. This case is not seeking specific performance of the terms of the sale agreement. Rather, the agreement was introduced to explain how the Applicants obtained access to the land. The Respondent has not denied that the Applicants occupied the claimed portion at any time. He simply disputed use for the period necessary to establish an adverse possession claim.

18. Further, the Respondent argued that he acquired his title in the year 2017 hence a claim for adverse possession had not matured against him. The answer to this argument is given in the holding in the Case of **Gitu Vs. Ndeete (1984) eKLR** the Court of Appeal stated:-

*“Mr. Gaturu attacked this part of the judgment on three grounds. Firstly, he submitted that change of ownership interrupts adverse possession, and that accordingly time did not begin to run against the appellant until he was registered as proprietor of the land in 1966. The answer to this submission is that immediately before the appellant became the registered proprietor in 1966 the Respondents were in the course of acquiring rights under section 7 of the Limitation of Actions Act, cap 22, and by virtue of section 30 (f) of the Registered Land Act, cap 300, those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take ownership subject to the rights of squatters.”*[Emphasis added].

In **Douglas Mbugua Mungai v Harrison Munyi [2019] eKLR** the Court of Appeal held that;

*The issue in the Gitu case was whether the mere change of ownership of land that is occupied by another person under adverse possession would interrupt such person's adverse possession. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under Section 7 of the **Limitation of Actions Act**, those rights are overriding interests by virtue of section 30(f) of the RLA, to which the new registered purchaser's title will be subject to.*

19. In any event, the Respondent having been a witness to the sale of the suit portion to the Applicants is under equitable doctrine of fairness precluded from adopting the defence of change of ownership to defeat the Applicants' claim. The Respondent was all along aware of the Applicants' presence on the land since he saw the son of one of the Applicant live on this portion, saw trees planted which trees according to him are still on this portion. He stated that the Applicants can proceed to cut the trees and leave his (Respondent) land to him. His evidence corroborates the Applicants' assertion that their occupation has been open and continuous.

20. The upshot of the foregoing evidence and analysis is that I am convinced the Applicants have proved their case on the balance of probabilities that the possession of the Suit portion was open, actual, continuous and uninterrupted for more than twelve years. The Respondent's defence that the suit land was given to him by his paternal uncle did not extinguish the Applicants rights which had already matured at the time he got registered in the year 2017.

21. Consequently, I enter judgment for the Applicant by holding that:

**a) The Applicants have acquired by way of adverse possession a portion of L.R. No Bukhayo/Mundika/12308 measuring half (½) an acre and which is in their possession.**

**b) The Respondent shall execute transfer documents for the half (½) acre portion to be carved from the suit property known as LR No. BUKHAYO/MUNDIKA/12308 in favour of the Applicants within thirty (30) days hereof failure to which the Deputy Registrar of this court shall execute the same to facilitate the registration of the half (½) acre portion in the name of the Applicants;**

**c) An order of permanent injunction is hereby issued restraining the Respondent, his family, agents, servants, employees and ALL persons claiming through him from interfering with the Applicants' use of the half (½) comprised in L.R. No. BUKHAYO/MUNDIKA/12308; and**

**d) The costs of the suit are awarded to the Applicants.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF SEPTEMBER, 2021.**

**A. OMOLLO**

**JUDGE**