



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LANDS COURT**

**AT BUSIA**

**ELC CASE NO. E11 OF 2020 (O.S)**

**TERESA EGESSA.....1<sup>ST</sup> APPLICANT**

**DAVID EMASE EGESSA.....2<sup>ND</sup> APPLICANT**

**CECILIA EGESSA.....3<sup>RD</sup> APPLICANT**

**CHRISTINE ASHEPETE.....4<sup>TH</sup> APPLICANT**

**-VERSUS -**

**MAKOKHA NACHIBATI.....1<sup>ST</sup> RESPONDENT**

**EXAVARION OUNOL.....2<sup>ND</sup> RESPONDENT**

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

1. The Applicants took out these proceedings vide the Originating Summons dated 6<sup>th</sup> November, 2020 and filed on the same date, against the Respondents. The Applicants' claim is that they have acquired by way of adverse possession and or through trust land **L.R NO SOUTH TESO/ANGOROM/548**. They posed the following questions for determination:

- a. Whether or not the Applicants have continuously peacefully notoriously been residing on L.R No. SOUTH TESO/ANGOROM/548 for a period exceeding 12 years;**
- b. Whether the 1<sup>st</sup> Respondent has never made an entry on L.R SOUTH TESO/ANGOROM/548 and never took possession;**
- c. Whether EXAVARIO NAMUKOMA OUNOI held the parcel in trust of the siblings of EGESA EMOIT who died in 1970;**
- d. Whether EXAVARIO NAMUKOMA OUNOI transferred land parcel SOUTH TESO/ANGOROM/548 without the knowledge and consent of the Applicants;**
- e. Whether NACHIBATI MAKOKHA has continuously sought entry to L.R SOUTH TESO/ANGOROM/548 without success; and**
- f. Whether or not the Applicants continued uninterrupted stay has matured into an adverse possession.**

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

- a. A declaration that EXAVARIO NAMUKOMA OUNOI and by extension MAKOKHA NACHIBATI held land parcel SOUTH TESO/ANGOROM/548 in trust for the Applicants;**
- b. A declaration that the Respondents have acquired L.R SOUTH TESO/ANGOROM/548 by way of adverse possession.**
- c. Costs of the suit.**

3. The Originating Summons was supported by the 3<sup>rd</sup> Applicant's affidavit sworn on 3<sup>rd</sup> April, 2019 on behalf of the other Applicants and

to which they attached a copy of the green card for the suit land, an order from Criminal Case No. 800 of 2000 and an order from the SRM Court Busia Land Dispute No. 33 of 2000.

4. Despite being served with the pleadings herein the Respondents did not file any responses to the Summons.

5. The Respondents did not appear at the hearing on April 15, 2021, and the Applicant chose to proceed with the matter through affidavit evidence. It is stated in the Affidavit sworn by the third Applicant on behalf of the other Applicants that;

a. In the 1930s, their grandfather EMOIT IKWARASI established a homestead in Pasama Village, and EGESA EMOIT, his son, also established a home in the same village.

b. EGESA EMOIT, their father, died on September 10, 1970, before the land adjudication was completed, leaving behind their mother, TERESA EGESSA;

c. As per the prevailing customs, their distant uncle EXAVERIO NAMUKOMA OUNOI, the 2<sup>nd</sup> Respondent inherited their mother, TERESA EGESSA and started cohabiting as man and wife;

d. The parcel that EMOIT IKWARASI bequeathed their father EGESSA EMOIT during adjudication was registered as L.R No. SOUTH TESO/ANGOROM/548;

e. During the adjudication, EXAVERIO NAMUKOMA OUNOI was registered as the sole proprietor of L.R SOUTH TESO/ANGOROM/548;

f. On April 22, 1998, the 1st Respondent entered into an agreement with the 2nd Respondent and transferred the suit land to him, unbeknown to the Applicants.

g. The 2<sup>nd</sup> Respondent moved out upon the disposal and went back to his homestead;

h. The Applicant continue occupying the entire parcel of L.R SOUTH TESO/ANGOROM/1548 and the 2<sup>nd</sup> Respondent has never made an entry onto the foresaid parcel;

i. The Court declare that the 2<sup>nd</sup> Respondent EXAVERIO NAMUKOMA OUNOI was registred in trust of the siblings of EMOIT EGESSA;

j. According to Teso culture and customs, EXAVERIO NAMUKOMA OUNOI had no authority over EGESSA EMOIT's estate.

k. The registration was based solely on trust and not on the Applicants' exclusion.

6. On the 12th of April, 2021, the Applicants filed their submissions and stated that they had proven that they are in occupation of the suit land, which occupation has been notorious, open, and uninterrupted for decades. That the 2nd Respondent only held the land in trust for EGESSA EMOIT's family.

7. I reviewed the pleadings, submissions, and applicable law. The following are the issues that, in my opinion, need to be resolved.:

**a. Whether the Applicants' occupation of the Suit Land is adverse to that of the 1<sup>st</sup> Respondent OR;**

**b. Whether or not the 2<sup>nd</sup> Respondent was registered as the proprietor of the land in trust for the Applicants; and**

**c. Who bears the costs of this suit?**

8. 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.”**

9. The Court of Appeal in the case of **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging that 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.”**

10. It is the Applicant’s averments that they have been living on the suit parcel from before the year 1970 when their father and husband respectively passed on. They have never been asked by the 1<sup>st</sup> Respondent to vacate the said parcel of land since he bought it from the 2<sup>nd</sup> Respondent. By the year 1998 when the 2nd Respondent was selling the suit land, the Applicant had already been living on the land for more than twelve (12) years.

11. With regards to the second issue, as to whether the 2<sup>nd</sup> Respondent was holding the land in trust for the Applicants, the Applicants have pleaded that the EXAVARIO OUNOI inherited TERESA EGESSA their mother after the death of their father. That before their father died, the suit parcel had been bequeathed to him by his father through family inheritance. The Applicants claim that the 2nd Respondent’s inheritance of their mother created a trust over the suit land in their favour. **The Court of Appeal in the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR**, while dealing with the issue of trust stated as follows:

**“A constructive trust** is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

12. The Applicants in their evidence have stated that the 2<sup>nd</sup> Respondent was only registered as the owner of suit land during adjudication because their father had passed on before registration and the 2<sup>nd</sup> Respondent had inherited their mother so it was only practical that the land be registered in his name. This Court has not had the benefit of hearing the Respondent’s side of things. However, the explanation given for the manner in which registration took place clearly demonstrates the creation of a constructive trust. The 2<sup>nd</sup> Respondent was aware that the land belonged to the Applicants during registration of the same. His decision to dispose off the suit land while the Applicants were living on the said land in my opinion amounts to unjust enrichment

13. In upshot of the foregoing evidence and analysis I am convinced that the Applicants have proved their case beyond the balance of probabilities that the possession of the Suit Land has been open, actual, continuous and uninterrupted for more than thirty years and within the knowledge of both Respondents. Therefore, the 2<sup>nd</sup> Respondent was holding the property in trust and he had no capacity to transfer the same to the 1<sup>st</sup> Respondent.

14. Consequently, I enter judgement for the Applicants in the following terms:

**a. A declaration that EXAVARIO NAMUKOMA OUNOI and by extension MAKOKHA NACHIBATI held land parcel SOUTH TESO/ANGOROM/548 in trust for the Applicants.**

**b. The Land Registrar, Busia County, is hereby ordered to cancel ALL entries on the Suit Title transferring the property from the 2<sup>nd</sup> Respondent to 1<sup>st</sup> Respondent;**

**c. The 1<sup>st</sup> Respondent shall forthwith execute transfer documents for the property in favour of the Applicants failure to which the Deputy Registrar shall execute the same to facilitate the registration of the Property in the name of the joint names of the Applicants;**

**d. The costs are awarded to the Applicants to be borne by the Respondents jointly and severally.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**A. OMOLLO**

**JUDGE**