



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 171 OF 2014

JOSEPH MJUNE ONGARO.....APPLICANT

VERSUS

WASHINGTON OCHIENG' ONGARO.....RESPONDENT

J U D G E M E N T

1) Vide the amended originating summons dated 6th December, 2011 the Applicant impleads the defendant that he has obtained by adverse possession ½ a share of land parcel No. SAMIA/BUDONGO/2168. He posed the following questions for determination:

- a) **That the applicant has lived and has been in actual possession of ½ a share of land parcel no. SAMIA/BUDONGO/2168 for a period exceeding fifty (50) years and still occupies the same to date;**
- b) **That the Applicant be declared the absolute owner of ½ a share of land parcel No. SAMIA/BUDONGO/2168 which he has cultivated and has been actual possession of peacefully, openly and uninterrupted for a period of over fifty (50) years;**
- c) **That since the Applicant has been in adverse possession of the ½ share for over fifty (50) years an order be made that he be registered as the proprietor of the said ½ share as the title of the proprietor has been extinguished under section 37 of the Limitations of Actions Act, Cap 22 Laws of Kenya;**
- d) **That despite the fact that the Respondent is registered as the absolute owner of the whole of land parcel no. SAMIA/BUDONGO/2168, he is not in actual occupation and possession of the other half of the land;**
- e) **That the Respondent be ordered to execute all documents of transfer in respect of land parcel no. SAMIA/BUDONGO/2168 in favour of the Applicant failure to which an authorized officer of this Honourable Court be empowered to execute the same in place of the Respondent;**
- f) **That the costs of this originating summons be awarded to the Applicant; and**
- g) **That any other order be made as this Honourable Court may deem fit and reasonable.**

2) The Applicant swore a supporting affidavit to the originating summons on the 6th of December 2011 where he deposed that he has been in actual possession of a ½ a share of the suit land and he has been farming and residing on the land uninterrupted since 1959, set up a home on it and thus acquired the same by way of adverse possession.

3) The Respondent in his replying affidavit filed on the 13th March, 2013 deposed that the suit land together with all other surrounding parcels of land belonged to his grandfather MIRIMO OKHAO who had three sons MENYA, ONGARO and MASIGA. He continued that due to a dispute with neighbours the family decided to share out the land and his and the Applicant's family got land parcel SAMIA/BUDONGO/268 which included their original homestead and after subdivision it changed to SAMIA/BUDONGO/2168 while their father got a land parcel SAMIA/BUDONGO/267 which was meant for himself and the younger siblings who included the Applicant.

4) The Respondent deposes that the applicant has lived on his land in their original homestead merely as a younger brother and because the Respondent allowed him to stay there as he awaited their father to give him his share of the family land. Therefore, the applicant should pursue his father to give him his share of land because the share given to the Respondent is not enough for his 4 wives and 17 children. The Respondent avers that he got his share at the time of land adjudication in recognition of his age and the Applicant only stays on the land temporarily while waiting for their father to give him a place to live. According to the Respondent, this suit is an abuse to his generosity and should be thrown out with costs.

5) During the hearing on the 16th of November, 2020, the Plaintiff called two witnesses with the Plaintiff testifying as **PW1**. He stated that the Defendant is his elder brother and he has sued him over a parcel of land that belonged to their father. That the land was registered in the name of the eldest son in every house and in their house, the Defendant was the oldest. That before their father died, he had requested the Defendant to share the land with his three siblings but the Defendant declined to do so. **PW1** continued in evidence that their father sought the Chief's help and when the matter was not resolved they escalated it to the District Officer who advised them to file the present case. That the Defendant later subdivided the land to create amongst other numbers parcel number 2168.

6) **PW1** further stated that he filed land case no. 61 of 1991 before the DO where he was awarded 21 acres of the suit land but the said award was never implemented forcing him to file the present suit at the High Court in Kakamega before it was transferred to Busia. He concluded by stating that he was born on the suit land and he lives on it with his family and the Defendant lives there as well.

7) Upon cross examination, **PW1** stated that he is claiming land No. 268 and although he does not recall the registration date of the title, the Defendant was registered as the owner. That their father owned land parcels 267, 268 before acquiring land parcel 269. That their father inherited the titles for 267 and 268 from their grandfather Nelima. That land parcel 267 was registered in the name of Henry Ogutu Ongwaro and 269 in their father's name. That the proceedings before the DO were adopted as an order of the Court but the Defendant filed an application to have the matter heard afresh. That he lives on the suit land No. 268 with the Defendant. On re-examination, **PW1** clarified that land parcel 268 was converted to land parcel 2168 and it is on the said parcel that they live on.

8) **HYMPHREY JUMA ONGARO** giving evidence as **PW2** stated that the Plaintiff and the Defendant are his brothers from the house of Margaret Akumu Ongaro and George Ongaro. That their father had two wives, Margaret and Doris Anyango to whom he gave land, with Margaret getting land parcel 268. He continued to testify that the suit parcel was registered in the name of the Defendant as a trustee for himself and PW1. That when their father acquired land parcel 267, he gave the said parcel to PW2, Thomas and Lawrence which position is the same to date. He concluded by stating that his prayer is for the suit parcel be shared equally between the Plaintiff and the Defendant.

9) During cross examination, **PW2** stated that the Defendant has 4 wives one of whom is deceased. The witness said he did not know how many children the defendant is blessed with while the Plaintiff has three wives with 2 of them living on the suit land. That four sons live on land parcel 267 while LR No. 269 is occupied by Henry Ogutu and Majimbo Ongaro who are the sons of the second wife called Doris.

10) The Defendant, **WASHINGTON OCHIENG' ONGARO** relied on his sole evidence in his defence to the claim. He started by giving his added name called Ohawo named after his grandfather. He stated that the Plaintiff is his brother. He adopted 3 affidavits filed on record as his evidence in chief together with the documents that were annexed to that affidavit. The contents of the replying affidavit are already paraphrased above. In the evidence affidavit filed in court on 23rd October 2019, the Defendant stated further that at the time of sharing the land and during adjudication, both PW1 and PW2 were young and he took care of paying their school fees. It is his evidence that his father decided to give him the parcel no 268 which also hosted the homestead while parcel number 267 was registered in their father's name in trust for the plaintiff and Pw2.

11) According to the Defendant, the plaintiff built his house on the suit parcel on understanding that he would later move to number 267. That his living on the suit land was by consent thus the claim under adverse possession could not accrue. He states that the plaintiff can only claim ancestral land through their father under customary trust since the share given to the defendant is not enough for his four wives, twelve sons and five daughters.

12) In his evidence affidavit filed in court on 2nd July, 2020, the defendant reiterated the facts contained in the earlier affidavits. He added by giving the names of his three mothers and their children. The witness went further to list the four cases he participated to preserve their land. The Defendant states that the land was shared as follows: -

“That we sat as a family of 5 persons and agreed to share out MIRIMO'S land as follows:-

- i) Parcel No. Samia/Budongo/138 for Samuel Masiga.**
- ii) Parcel No. Samia/Budongo/267 for Ongaro Mirimo (my father)**
- iii) Parcel No. Samia/Budongo/268 for Ochieno Ongaro.**
- iv) Parcel No. Samia/Budongo/269 for Ogutu Ongaro (step brother).**

Annexed and marked WOO – 5-7 are copies of some registers.”

13) He asserts that he was given parcel no 268 in his appreciation for taking part in the cases concerning the land. That the plaintiff was also to move to parcel number 267 just his brothers Humphrey, Josephat, Tom and Opiyo did. The witness added that the land is large in area because part of it comprises Agenga hill which is not arable. Finally, the defendant restated that he allowed the plaintiff to live with him as his younger brother and the plaintiff is only tilling one acre of the land not the half share as claimed. He urged the court to dismiss the suit for being misdirected and incompetent.

14) In cross-examination, the defendant stated that Joseph was his younger brother and that although he shares the same father with the Plaintiff, they cannot share the suit land equally. He concluded by stating that Agenga hills is on the suit land and he did not know the size of the land comprised in hills. On re-examination, **DW1** stated that during the sharing of the land there was a committee of five (5) people and his father was the chairman of that meeting. That he was not told that he was holding the land in trust for himself and the Plaintiff and he was not aware of any case regarding the suit property before the present case.

15) The Plaintiff filed his submissions on the 22nd of June, 2021 and submitted that he has fully satisfied the criteria for adverse possession since he has been in peaceful, open and actual possession of one half (½) of the suit parcel for over 50 years. He relied on the case of **Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR** where it has held that; “Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years”.

16) The Defendant filed his submissions on the 21st of June, 2021 submitting that although the Plaintiff submitted on the issue of trust the same was not pleaded and the Court cannot rely on the submissions evidence on trust. He submitted further that the Plaintiff had failed to prove his claim for adverse possession. That family relationship disqualifies the Plaintiff from claiming adverse possession as the Plaintiff is the Defendant’s younger brother and he lives on the suit land with the Defendant’s consent. He concluded by submitting that he holds an indefeasible title in the suit land and relied on the case of **Samson Emuru vs. Ol Suswa Farm Ltd (2005) eKLR** and **Samuel Khaimba vs. Mary Mbaisi (2015) eKLR**.

17) I have considered the parties’ pleadings, submissions and the applicable law and the issues which in my opinion arise for determination are as follows:

(a) *Whether the Applicants’ occupation of the Suit Land was adverse to that of the Respondent;*

(b) *Whether the Applicant is entitled to benefit from the suit land under customary trusts*

(c) *Who bears the costs of this suit?*

18) With regards to the **first issue**, all the witnesses including DW1 have admitted that the Applicant has been living on the suit parcel uninterrupted for over 12 years with DW1 stating that he gave the Applicant permission to live on the land while the latter awaited inheritance from his father. This testimony was however not substantiated by any other witnesses.

19) A claimant for the land under heading of adverse possession must demonstrate that he has been in hostile peaceful, continuous and uninterrupted occupation of the claimed land for a period in excess of twelve (12) years. It is the Applicant’s averments that they have been living on the suit parcel since 1959 and the Respondent has never attempted to evict him from the land. The Applicant produced proceedings from Land Disputes Tribunal Case No, 1 of 1993 which was adopted in in this case when the file was registered as Kakamega HCC NO 61 of 1991 on 26th April 1994. The award was later set aside on 29th May 1995 setting the stage for the hearing of the suit on merits. The record shows that this dispute has been pending in our Courts for a record twenty (20) years which is quite unfortunate.

20) The possession by the Applicant is not disputed and all the witnesses that testified, including the Respondent confirmed that the Applicant has lived on the land since birth. The only dispute is whether that possession was hostile to the interests of the Respondent. The burden was on the Applicant to prove when his occupation of the land turned hostile to the interests of the Respondent. The evidence on record does show that the homestead to the father of the Applicant and Respondent was built on this land thus it was natural that the Applicant was born and brought up on the suit land. The Applicant needed to go a step further and elaborate to the court what changed the events of their natural set up that translated time to start running adversely against the interest of the registered owner. Unfortunately, no such evidence came forth with the consequence that the evidence on record does not support the claim under the heading of adverse possession.

21) In respect to the second issue, the plaintiff’s witnesses confirmed that the land had been initially owned by their grandfather Mirimo and later inherited by their father who during the adjudication process had it registered in the name of the Respondent. According to the evidence adduced, the Respondent was indeed registered to hold the suit land in trust for his siblings taking into consideration the fact that this is where their homestead was and he is the first born son in their mother’s household. The Respondent went further to list the names of four of his brothers who are living on Samia/Budongo/267 without justifying why for him the suit land should be exclusively for his benefit. His argument of having many wives and children which is a matter of choice cannot form a basis for inequitable sharing of their ancestral land.

22) The Applicant’s evidence made out a good case for customary trusts, although he is let down by the pleadings filed on his behalf. Order 2 rule 10 of the Civil Procedure Rules requires that a claim for breach of trust must be pleaded and particularised. In the instant case, neither the original nor the amended originating summons pleaded the issue of customary trusts. The Respondent came out blazing in their submissions that the court cannot award the Applicant under the heading of trust since it was not pleaded.

23) However, I find exception to this case premised on the fact that although the issue of customary trust was not pleaded, it arose during in the statements of the witnesses including the affidavit evidences filed by the Respondent. In the case **Odd Jobs versus Mubia [1970] EA476**, it was held *inter alia* that:-

“A Court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue has been left to the Court for decision.”

24) Customary trusts also exist in situations where the parties belonging to the same clans or community have one member holding property on behalf of the other community members. DW1 confirmed that the land initially belonged to their grandfather who gave it to his father and the same was later registered in his name during adjudication as he was the eldest son. The Supreme Court in **Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR** held as follows with regards to customary trusts:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession

or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- a) *The land in question was before registration, family, clan or group land;*
- b) *The claimant belongs to such family, clan, or group;*
- c) *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;*
- d) *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;*
- e) *The claim is directed against the registered proprietor who is a member of the family, clan or group.”*

25) The Respondent has admitted in his replying affidavit in paragraph 13 states that he got the land in recognition of his age among his siblings. It is prudent to note that this matter proceeded to completion before the District Officer and other elders. The findings of that case (proceedings are part of the record) were as below:

- a) *According to the evidence given out by Joseph M. Ongaro they are brothers from one mother, one father;*
- b) *the shamba in dispute belonged to the family in particular the father;*
- c) *Mzee Joshua Ongaro is the true owner of the land and he vested the trust in Washington Ochieno on behalf of the brother;*
- d) *When the time of demarcation reached, he transferred one of his sons to a different portion and left the other two in one portion now in dispute;*
- e) *It is of great importance that the sons to Mzee Joshua Ongaro should respect him fully; and*
- f) *When they visited the land in dispute, we found that Washington Ochieno is occupying one side of the land while Joseph M. Ongaro also occupying the other side of the land.*

26) The father to the parties, Mzee Joshua Ongaro testified in Land Case No. 1 of 1993 and stated as follows:

“This shamba in dispute is mine among my sons. My grandfather left it to my father who in turn left it to me. In this shamba, there is my elder wife with three sons and I apportioned one son somewhere else and the two son who are before you Chairman are supposed to stay in that land. Therefore, my elder son has built there and when he refused him. Then I sent the other one to settle there and when he refused him. Then I sent my son to take the matter to Court for solution because the shamba is mine. Ochieno’s sons should get their portions from him. I am not to give them land. I am elderly and I don’t see the reason why he should take away my shamba. When this case is over, I want this shamba be split into two shares.”

27. The following facts are not really in dispute in this case:

- 1. That the parties are siblings with the defendant being the eldest in their mother’s house.**
- 2. The suit land is registered in the defendant’s names.**
- 3. That the suit land which is a resultant sub-division of the original land parcel No. SAMIA/BUDONGO/268 measuring twenty (20) acres belonged to the parties’ father who in turn was given the same by the grandfather to the parties herein**

28. The applicable law when this claim was brought to Court was section 30 of the Registered Land Act (repealed) that provided for trusts as overriding interests which did not have to be noted in the register. Currently, section 28 (b) of the Land Registration Act lists trusts including customary trusts as overriding interests to that may subsist and affect registration of land without them being noted in the register. Thus the Respondent’s assertion that the Applicant’s claim cannot stand because there was no mention of the trust in the register of the suit land is without basis as the law acknowledges trusts registration with or without their entry into the register.

29. The Applicant had pleaded that he be awarded half share in the land. He did not lead evidence that he is indeed occupying and utilizing the ½ share claimed. Going by the evidence on record that there were three sons to Akumu Nambiri who sired the parties herein, the Applicant can only get one share out of three translated to 1/3 share and which is the share this court awards him.

30. In light of the evidence adduced, I am convinced that the Applicant has made out a case of being entitled to a portion of the suit land under customary trusts. Consequently, I enter judgement in his favour in the following terms;

- (i) The registration of the Respondent as owner of L.R Samia/Budongo/268 later subdivided to create numbers 2167 and 2168 was in trust for his benefit and the benefit of the Applicant.**

- (ii) The Applicant is entitled to the equivalent of $\frac{1}{3}$ share in the suit title Samia/Budongo/2168.
- (iii) The Respondent to execute ALL documents necessary for the transfer of the $\frac{1}{3}$ share in the suit property in favour of the Applicant within forty five (45) days from the date of delivery of this judgement.
- (iv) Failure to which the Deputy Registrar shall execute the documents to facilitate the registration of the $\frac{1}{3}$ share in the suit property in the name of the Applicant;
- (v) The County Land Surveyor Busia County shall visit land parcel SAMIA/BUDONGO/2168 and pick the $\frac{1}{3}$ share acreage and proceed to subdivide the suit land between the parties;
- (vi) This being a suit between family members there shall be no orders as to costs.
- (vii) The Applicant shall meet all the costs of subdivision, transfer and registration of the $\frac{1}{3}$ share to be curved out of Samia/Budongo/2168 in his name.

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

A. OMOLLO

JUDGE