



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 87 OF 2015 (O.S)

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

LEONARD DAWAFULA JUMA.....1ST APPLICANT

ANZELIMO OKOTH JUMA.....2ND APPLICANT

= VERSUS =

CHARLES OUMA MASAKHALIA.....1ST RESPONDENT

KENNEDY OCHIENG' OUMA.....2ND RESPONDENT

J U D G M E N T

1. The Applicants commenced these proceedings vide the Originating Summons dated 24th August, 2015 and filed on the same date, against the Respondents. The Applicants' case is that they have acquired by way of adverse possession and rights over all that parcel of land measuring 0.8Ha (2 acres) comprised of **L.R NO BUKHAYO/BUGENGI/21** or out of OUMA MASHAKALI alias ALFONCE OUMA's (deceased) ½ share as demarcated on the ground by an established boundary since 1969 for determination of the following issues;

a) That the Applicants **LEONARD DAWAFULA JUMA** and **ANZELIMO OKOTH JUMA** be declared the absolute registered owners of 0.8Ha (2 acres) out of the deceased/Respondents ½ share measuring 1.6 Ha (4 acres) out of land parcel **L.R NO BUKHAYO/BUGENGI/21** as demarcated on the ground by a well-established and known boundary and in which they have been in actual possession adversely, notoriously, openly and uninterrupted for a period exceeding 46 years;

b) That the Respondents be ordered to execute all documents of transfer in respect of the aforementioned 0.8 Ha (2 acres) or thereabout of land parcel **L.R NO BUKHAYO/BUGENGI/21** as demarcated on the ground by a well-established boundary in favour of the Applicants failing which the Deputy Registrar or an authorized officer of this Honourable Court be empowered to execute the same in place of the Respondents and the Land Registrar to dispense with the production of the original title deed if the Respondents fail to comply and produce the same;

c) That an inhibition do issue restraining the Respondents, their agents and/or servants from interfering with or in any manner transferring land parcel No. **L.R NO BUKHAYO/BUGENGI/21** pending hearing and determination of this case;

d) That the cost of this Application be provided for.

2. The Originating Summons was supported by the 1st Applicant's supporting affidavit dated 24th August, 2015. Attached to the Summons was a copy of the green card in respect of the suit land, a letter from the Assistant Chief and minutes of a meeting held on the 13th of April, 1995.

3. The Respondent filed his replying affidavit dated 22nd November, 2016 and filed on the same date stating that the Applicants are not

entitled to the 0.8 Ha (2 acres) of BUKHAYO/BUGENGI/21.

4. During the hearing which stated on the 14th of March, 2018, the Applicants called four witnesses. The 1st Applicant, **LEONARD DAWAFULA JUMA** testified as **PW1** stating that he worked as a regional officer for the disabled and he resides at Esikulu village in Bukhayo Sub-County, Busia County. That the 2nd Applicant is his older brother while the Respondents are his cousins. That his father was called NICHOLAS JUMA MASAKHALIA while the Respondents' father was known as ALFONCE OUMA MASAKHALIA his step brother. PW1 continued that the suit land is registered in the joint names of the Defendants with both holding ½ a share of the 8 acres parcel of land. That his father had 6 acres while the Respondent's father had 2 acres and that during adjudication of the land a mistake was made when the two parcels were registered as one. That both the Land Registrar and the Chief confirmed the existence of the boundaries between the two parcels.

5. **PW1** continued in evidence that his father was buried on the area they occupy which was 6 acres and that the Defendants' parents were buried on the two acres when they died. He stated further that they have used that portion of land since they were born and they have trees and bananas on the land and they also use it for planting seasonal crops. That he shares the land with the 2nd Applicant and they have a boundary separating their parcels. He concluded by urging this Court to have the two acres registered in the Defendants' name and the six acres be registered in the Applicants' name.

6. Upon cross-examination, **PW1** confirmed that according to the Green Card his family and the Defendants' owned half share of the suit land. He stated further that he did not object to the Defendant's succession cause as he thought they would only succeed the two acres of land. That he was not aware that the land was equally partitioned in the year 1995.

7. On re-examination, **PW1** reiterated that he did not know the suit land has been partitioned equally even though the green card he produced indicates that the land is still intact.

8. The 2nd Applicant, **ANZELIMO OKOTH JUMA** testified as **PW2**. He stated that the Defendants were his cousins and the 1st Applicant was his younger brother. He stated that he was born on the suit land and that his father had always used 6 acres of the suit land and they are still using the same acreage of the suit land. That there is a boundary that separates the two parcels of land. **PW2** agreed with the evidence produced by PW1 and adopted his statement as his own.

9. Upon cross-examination, **PW2** stated that although their names are not included on the minutes from the Chief's barasa, they were present in the meeting. He stated that the minutes were not forged so is the letter dated 20th September, 1995.

10. On re-examination, **PW2** stated that they thought both their names and those of the Defendants are not indicated in the minutes of the meeting, their fathers' names were there. That the letter dated 20th September, 1995 was addressed to the Land Registrar and it was discussing the Defendants' father as he was alive at that time.

11. **DAVID WABWIRE MBUYA** who testified as **PW3** stated that both the Defendants and the Applicants are his neighbours. That he knew the Applicants' father, Nicholas who died in 1988 and was buried on the Applicants' side of the suit land. That the Applicants' father got the parcel of land from Mzee Adenya Namukobe who was the grandfather to the Applicants. According to PW3, the Applicants' father was given 6 acres while the Defendants' father Alfonc Ouma Masakhalia was given land by Ernest Oswama Wamukobe which land was different from the one the Applicants' father was given. That there exists a boundary put up to separate the two parcels of land. He further said that the Defendants' father died and was buried in the 2 acres of the land that the Defendants own.

12. **PW3** stated further that the allegation that there was a meeting to subdivide the land equally in 1995 was not true. That, Kipsito, the Land Registrar at that time visited the land and there was an elders' barasa which was attended by 62 people and it was resolved that the boundaries remain as they were. He urged the Court to visit the suit land to determine the boundary. He concluded by stating that he just found out that the land was issued with one number during adjudication.

13. Upon cross-examination, **PW3** reiterated that the Applicants' father had 6 acres of land and that he was sure that this was the position. He confirmed that parties were given the land by their respective fathers. That it was not true that there is no boundary between the Applicants' and the Defendants' land. He stated that the boundary is marked by sisal and trees.

14. On re-examination, **PW3** stated that the land on the ground is as it was given to the parties by their fathers. That the land was gifted to the fathers and not sold to them.

15. **OUMA ODUKA MBOMERE** testified as **PW4**. He stated that both parties to the case were his neighbours. That the Plaintiffs live on six (6) acres of the land while the Defendants live on two (2) acres with a clear boundary separating them. He stated that while he was born in the village in 1966, the boundary still exists. That the Plaintiffs' father was given six acres and was buried on the six' acre parcel while the Defendants' father was buried on the two acres' parcel. That the plaintiffs each live on 3 acres of the six-acre parcel of land which parcels they cultivate. He stated that he was present when the Land Registrar called Kipsito visited and the Registrar confirmed the old boundaries which are still there.

16. Upon cross-examination, **PW4** stated that he was not sure whether the land was surveyed or not but there is a boundary between the parties' parcels. He stated that there are two boundaries on the suit land, one between the Plaintiffs' and the Defendants' land and another between the 1st and 2nd Applicant's parcels. That the boundaries existed even before he was born. He concluded by stating that it was not true that the two parcels of land were supposed to be equal and neither is it true that the Plaintiffs want to take the Defendants' land.

17. The defence hearing commenced on the 8th of February, 2021 with the evidence of the 1st Defendant **CHARLES OUMA MASAKHALIA** testifying as **DW1**. He stated that the Plaintiffs are his cousins. That he has lived on the suit land since he was born and the

stay was peaceful until the year 1977 when their fathers decided to separate the homes. That the suit land was registered in the names of Alfonse and Nicholas, their fathers' during the first registration and in 1995, a surveyor visited the land and demarcated for each party their share.

18. **DW1** denied that they never consented to the distribution of the land as alleged in the minutes dated 13th April, 1995. He stated further that their fathers were to share the land equally and that they filed searches and mutation reflecting the sharing of ½ share each. That the boundary planted by the District Surveyor was removed by the Plaintiffs. The witness was not aware of any meeting held by the Chief and that he has never been summoned by that chief. He urged that the Court do order the land be subdivided as per the title.

19. Upon cross-examination **DW1** stated the suit land measures 8 acres and is situated in Esiguru village. He stated that although the Plaintiffs are alleging that their portion of the land measures 6 acres, no one had ever actually measured the portions. DW1 admitted that the Plaintiffs are holding a bigger portion from long ago. That the Defendants had filed an objection to the succession proceedings in July, 2010 but they have not produced those proceedings in the current suit. He continued further that there was no meeting with elders as alleged by the Chief's letter of 1995. He also confirmed that the Land Consent Board was signed by his father only because the Plaintiffs' father had died.

20. On re-examination, **DW1** confirmed that they were living on the suit land and that the Chief and Elders have no right to confer land to people. He concluded by stating that his late father involved the Plaintiffs' mother in the process of registration of the suit land.

21. Parties were required to file the submissions within 15 days each. The Applicants filed their submissions on the 7th of June, 2021. They submitted that they have demonstrated that they have been in actual exclusive, continuous, open, notorious, hostile occupation to the title and interest of the true owner of the suit land. That the adversity and hostility of possession is exhibited by the fact that all along, the Defendants have not willingly let the Applicants enjoy possession of the 6 acres against their two acres.

22. The Applicants sought to rely on the following cases **Wilson Njoroge Kamau vs. Nganga Mucuru Kamau (2020) eKLR**, **Celina Muthoni Kithinji & 5 others vs. Safi ya Bintiswale & 87 others (2018) eKLR** and **Mjane Lewa vs. Kahinda Ngala Mwangandi (2005) eKLR**, which decisions put forth the principle that a claimant for land by adverse possession must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner on his own volition.

23. The Respondents filed their submissions on the 3rd of June, 2021. They submitted that the Plaintiffs have not been living on the extra two acre of land as alleged as each family has separate parcels on the suit land. That the Applicants are not entitled to the 2 acres by way of adverse possession which two acres belong to the Respondents. That the Applicants have not demonstrated that they have been in actual possession of the 2 acres out of the 4 acres that belong to the Respondent and they have not proved whether they dispossessed the Respondent of the two acres they claimed.

24. The Respondents relied on the following cases **Kilimo Shutu & 6 others vs. Godfrey Karume Civil Appeal No. 85 of 2015**, **Wambugu vs. Njuguna (1983) KLR 172** and **Mibira vs. Gachuhi (2002) 1EALR 137** which cases the Applicant also referred to in their submissions. In the recent decision of **Kilimo Shutu and 6 others Vs Godfrey Karume Civil Appeal No. 85 of 2015**, the Court of Appeal observed that; **"It is now firmly established that for a claim of adverse possession to succeed, the party claiming ownership by adverse possession must demonstrate that the possession has been actual, exclusive, continuous, open and notorious and also hostile to the title and interest of the true owner. In other words, it has to be proved that the adverse possessor has used the land which he claims as of right, nec vi, nec clam, nec Arcario (no force, no persuasion)"**.

25. 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 Applicants' occupation of the disputed 2 acre portion of the suit land is adverse to that of the Respondent; and

b) Who bears the costs of this suit?

26. A claimant for the land under adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land for a period in excess of twelve (12) years. All the witnesses confirmed that the all the parties have lived on the suit land for over thirty (30) years. PW1, PW2, PW3 and PW4 stated that the Applicants live on six (6) acres of the land and even buried the Applicants parents on their portion of the suit land. They all confirmed that the suit land was jointly owned by the fathers of the parties herein. According to the Applicants' father owned six (6) acres and the Respondents' father owned their two (2) acres.

27. 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 position taken 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 adverse 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." (Underline mine for emphasis).

28. From the examination of the Respondents' documents especially the letter of application for consent and the mutation form the names of

both owners are appearing but it is not clear who was carrying out the subdivision because no signatures are visible on the face of the two documents. The Land Registrar's letter dated 10th April 1995 is also addressed to both Nicholas and Alfonse. The Applicants argue that Nicholas died in the year 1988 thus could not have participated in this transaction. The documents do not add any evidentiary value because the subdivision was never effected on the title which remains to date as Bukhayo/Bugengi/21.

29. From the green card for Bukhayo/Bugengi/21 produced as *Pex 1* and relied upon by the Applicants in support of their claim, entry number one dated 13/8/1971 reveals that the land was jointly registered in the name of Nicholas Mashakala-deceased one half share and Alfonse Ouma-deceased one half share. The record shows the land has not been sub-divided although the respondents alleged that the late Nicholas attempted to partition the suit land during his lifetime. They relied on the letter of consent issued by Nambale Land Control Board and dated 7th February, 1995. Although there is a mutation form dated 2/4/1995 showing the subdivision of parcel No. 21 into 4597 and 4598 which were equal in sizes, the land records produced seemed not to indicate if the subdivisions were registered. The respondents further put reliance on these documents to demonstrate that the intentions of the two brothers was to share the suit land equally and not in the ratio of 6 acres: 2 acres as now being claimed by the applicants.

30. Therefore, proceeding from the premise that parcel No. Bukhayo/Bugengi/21 is intact, can the claim for adverse possession by the applicants be sustained? The copy of records state that the ownership of the land between the applicants' family and the respondents' family is joint and their shares are given. The shares can be treated as undivided because the partition to ascertain ownership on the ground to conform with that on the title has not been undertaken.

31. Both parties correctly submitted the law on adverse possession that the claim can only succeed where the owner has been dispossessed or the owner has left the land on his accord/will and the claimant taken possession thereof. In this instance, the applicants would like the court to sever the ownership of the suit land without following the process of separating title that is jointly registered. In my understanding and interpretation of the law of joint ownership especially where the shares of the joint owners are stated, it is the title deed to govern the rights of parties and not allegations based on ground positions. The ground position cannot confer ownership of land upon the respondent that would warrant any rights to accrue in favour of the applicants.

32. The Applicants claim if any can only accrue after the title has been partitioned so that time begins to run against the Respondents from the time they are registered as owners of their half share in Bukhayo/Bugengi/21. The Applicants' submission that by the time the Respondents obtained a grant of letters of administration of their father's estate their rights had long expired in 1983 is in my view a misinterpretation of the law on joint ownership. This is because the share of Alfonse Juma – deceased on the title/copy of records had not been interfered with. No wonder the Land Registrar in entry No. 4 in the register made on 2nd September 2009 noted that Alfonse Juma's share still holds. The applicants did not elaborate to this court what had severed the co-ownership of the suit title. Section 91 sub sections 3, 4 & 7 of the Land Registration Act states;

“(3) An instrument made in favour of two or more persons and the registration giving effect to it shall show -

(a) Whether those persons are joint tenants or tenants in common; and

(b) The share of each tenant, if they are tenants in common.

“(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently -

(a) Dispositions may be made only by all the joint tenants;

(b) On the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or”

“(7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.”

33. The Supreme Court of Kenya in the Case of **John Mbogua Getao Vs Simon Parkoyiet Mokare and 5 others** at paragraph 39 stated thus, **“the group ranch was therefore owned by members of the group in equal but undivided shares until such time that each member acquired their individual title”**

At paragraph 40, the Supreme Court said thus, **“At common law, each co-owner is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others; if he could, there would be separate ownership and not co-ownership. No one co-owner has a better right to the property than another. Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land.”** (See Megarry and Wade, *'The Law of Real Property'* 6th Edition Pages 477 and 480).

At paragraph 41 **“Applying these principles to the dispute at hand, we cannot see the legal basis upon which the appellant could lay claim to the parcel of land in question, to the exclusion of any other member of the group ranch. For as long as the group ranch remained undivided, his share in the land was equal to the other members of the group. It remained a tenancy**

in common until each member went their separate ways, having acquired their individual titles...”

34. Borrowing the analogy of the Supreme Court discussed John Mbogua Getao supra in regard to land owned under group ranches together with the relevant statutory law cited, I reach a finding that the Applicants’ claim cannot succeed for as long as the suit title Bukhayo/Bugengi/21 has not been partitioned between the two owners. Consequently, I hold that the suit has no merit and is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 6TH DAY OF OCTOBER, 2021.

A. OMOLLO

JUDGE