



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ORIGINATING SUMMONS NO. 108 OF 2017**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF LAND TITLE NO. WANJARE/BOGIAKUMU/8029**

**BETWEEN**

**WILFRED MASENGE MIGIRO ONDABU MOSETI.....APPLICANT**

**VERSUS**

**MASAGEGE OBONDI.....1<sup>ST</sup> RESPONDENT**

**SUSAN MORAA BOSIRE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant commenced this suit by way of Origination Summons dated 8<sup>th</sup> May 2017 and amended on 25<sup>th</sup> February 2020 seeking a determination of the following questions:

- (i) Has the Applicant herein been in open and uninterrupted occupation of a portion of land measuring 86 feet by 120 feet (0.1 hectares) in land parcel number WANJARE/BOGIAKUMU/8029?
- (ii) If so, could the said open and uninterrupted occupation/possession be said to be adverse to a portion of land measuring 86 feet by 120 feet (0.1 hectares) in land parcel number WANJARE/BOGIAKUMU/8029?
- (iii) Has the Applicant therefore acquired title to the said land parcel no. WANJARE/BOGIAKUMU/8029 by adverse possession under the law of Limitation of actions Act against the registered proprietor?
- (iv) Can the Respondents now be compelled to transfer the said land parcel to the Applicant herein and in default, can the Deputy Registrar of this court execute the necessary documents on their behalf?
- (v) Who bears the costs of this Originating Summons?

2. On 1<sup>st</sup> April 2019 the court directed that the Originating Summons be converted into a Plaint and the parties were directed to file their witness statements and their respective bundles of documents so that the case could proceed for hearing. When the matter came up for hearing on 24<sup>th</sup> February 2021 the parties agreed that the matter be canvassed by way of written submissions and the court granted them time to file their submissions. In the meantime, counsel for the Applicant informed the court that the 1<sup>st</sup> Respondent had since died and the Applicant did not wish to pursue the administrator of his estate and his claim was against the 2<sup>nd</sup> Defendant. The court therefore withdrew the case against the 2<sup>nd</sup> Defendant and directed that the Originating Summons be amended accordingly. The Applicant filed his submissions dated 15<sup>th</sup> April 2021 while the Respondent filed his submissions dated 7<sup>th</sup> May 2021.

## APPLICANT'S SUBMISSIONS

3. Learned counsel for the Applicant summarized the Applicant's case as follows; The Applicant entered into a land sale agreement with 3 vendors namely; Masagege Obondi (deceased), Bernard Swoyo and Joseph Juma Thomas on 25.7.1996. The said agreement was for the purchase of a portion of land measuring 86 feet by 120 feet (0.1 hectares) in land parcel no. WANJARE/BOGIKUMU/861. A copy of the sale agreement was annexed to the Applicant's Supporting Affidavit sworn on the 8<sup>th</sup> May 2017 as annexure WMM01.

4. It is the Applicant's case that upon entering the said sale agreement, the vendors put him in possession of the suit property though they never obtained the consent of the Land Control Board nor did they transfer the suit property to him. The Plaintiff further contends that upon obtaining the Grant of Letters of Administration in respect of the estate of Timon Bondi who was initially the registered owner of the suit property, Masagege Obondi (deceased) sub-divided land parcel no. 861 into parcels 8028 and 8029. Land parcel no. WANJARE/BOGIKUMU/8029 was subsequently transferred to Susan Moraa Bosire, the 2<sup>nd</sup> Respondent herein. Copies of the extracts of the register for parcels no. 8028 and 8029 are annexed to the Applicant's affidavit.

5. The Applicant contends that parcel no. 8029 which is the suit property herein was transferred to the 2<sup>nd</sup> Respondent in 2017 when the Applicant was already in occupation thereof. After the 2<sup>nd</sup> Respondent was registered as the owner of the suit property, she attempted to evict the Applicant and this is what prompted him to file this suit. The Applicant relies on the witness statements of Joseph Nyangaresi and Mary Nyakerario Swoyo which were filed by the Applicant.

6. It is the Applicant's contention that since the Respondents did not file any Replying Affidavit in response to the Originating Summons, the Applicant's testimony stands unchallenged. The Applicant contends that he has been in continuous uninterrupted occupation of parcel 861 since 1996 and by the time the same was sub-divided and parcel no. 8029 was registered in the 2<sup>nd</sup> Respondent's name he had been in occupation thereof for a period of 21 years. Counsel has relied on the case of **Kasavi v Mawaoni Investment Ltd & 4 Others (2004) 1KLR 184** where the Court of Appeal held as follows:

*"Section 38(1) of the Limitation of Actions Act authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years wither after the dispossession of the owner or by discontinuation of possession by the owner on his own volition. A person's title under adverse possession can be acquired under this Limitation of Actions Act for a part of the land. The mere change or ownership of the land does not interrupt such person's adverse possession. The identification of land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession."*

7. It is therefore the Applicant's submission that he has proved his case on a balance of probabilities and he should be granted the reliefs sought.

## RESPONDENT'S SUBMISSIONS

8. Learned counsel for the 2<sup>nd</sup> Respondent submitted that the Applicant had not proved that he had been in possession of parcel no. 8029 for a period of 12 years, as the sale agreement annexed to his supporting affidavit does not state that he was given vacant possession of the suit property nor does it show that he paid the purchase price in full. He contends that the Applicant has not demonstrated any evidence of open, continuous and uninterrupted possession of the suit property.

9. In response to the Applicant's contention that the Applicant's evidence is unchallenged, counsel has submitted that Order 37 of the Civil Procedure Rules does not provide that a Respondent must file a Response to the Originating Summons and a party served with a claim for adverse possession can oppose such a claim on the strength of the law.

10. Citing the case of **Maweu v Ranching and Farming Cooperative Society (1985) KLR 430**, counsel submitted that the Applicant had not proved possession which could be said to be adequate in continuity, open, in publicity and in extent as to prove that it was adverse. He pointed out the contradictions in the Applicant's witness statements which give conflicting dates as to when the Applicant took possession of the suit property. It was counsel's further submission the Applicant entered the suit property with the permission of the beneficial owner and his possession cannot be said to be adverse to the title of the owner.

## ISSUES FOR DETERMINATION

11. Having carefully considered the pleadings, and rival submissions, I discern the following as the issues for determination:

1. Whether the Applicant is entitled to an order of adverse possession.
2. Whether the Respondent should be compelled to transfer a portion of land measuring 86 feet by 120 feet (0.1 hectares) in land parcel number WANJARE/BOGIKUMU/8029 to the Applicant.
3. Who should bear the costs of this suit.

## ANALYSIS AND DETERMINATION.

12. In the case of **Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR** the Court of Appeal set out what one needs to prove

in a case of adverse possession;

*...In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition...(emphasis ours).*

13. The Applicant's case is that he bought a portion of land measuring 86 feet by 120 feet comprised in land parcel number WANJARE/BOGIAKUMU/861 from Masegege Obondi (deceased), Bernard Swoyo and Joseph Juma Thomas through a sale agreement dated 25<sup>th</sup> July 1996. He thereafter took possession of the land but the same was never transferred to him. Instead, Masegege Obondi who was one of the vendors sub-divided the land into two parcels known as WANJARE/BOGIAKUMU/8028 and 8029 and transferred parcel no. 8029 to the Respondent in 2017. It is his contention that by the time the said parcel was transferred to the Respondent, he had been in possession thereof openly, without any interruption since 1996 and he had been planting perennial crops like maize and napier grass as well as trees along the boundary.

14. Applicant's affidavit evidence was not challenged as the Respondent opted not to file a Replying Affidavit. However, in his submissions, counsel for the Respondent has argued that the provisions of Order 37 do not make reference to a response to an Originating Summons. In the case of *Peter Irungu Wainaina v Chege Njihia (2014) eKLR* the Court of Appeal faced with a situation where the Respondent had failed to file a Memorandum of Appearance after being served with an Originating Summons held as follows:

*"The appellant argued that Order IX of the former Civil Procedure Rules was not applicable where a suit was instituted by way of an Originating Summons. We respectfully disagree with the appellant's contention and hold that Order IX which provided for appearance of parties was applicable even where suits are commenced by Originating Summons. Order IX rule 1 provided that:-*

*"A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him, or, if no interlocutory judgment is so entered, at any time before final judgment."*

15. It is therefore clear that a party who is served with an Originating Summons is required to not only enter appearance but also file a Replying Affidavit.

16. Furthermore, on 1<sup>st</sup> April 2019, the court gave directions in which the Originating Summons was converted into a Complaint and the parties were required to file their documents and witness statements but the Respondent did not deem it necessary to file any documents.

17. Counsel for the Respondent has also argued that the 2<sup>nd</sup> Respondent got registered as proprietor of parcel no. WANJARE/BOGIAKUMU/8029 on 13<sup>th</sup> March 2017 and therefore the period of 12 years had not expired for a claim of adverse possession to accrue.

18. My understanding is that the Applicant filed this suit against Masegege Obondi (deceased) 1<sup>st</sup> Respondent and Susan Moraa (2<sup>nd</sup> Respondent). The deceased was the owner of parcel number WANJARE/BOGIAKUMU/861 before he sub-divided it into parcels number 8028 and 8029 and transferred parcel number 8029 to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Respondent who had earlier on sold the portion which was subsequently registered as parcel number WANJARE/BOGIAKUMU/8029 to the Applicant died before the suit was set down for hearing. This does not mean that time only started running in favour of the Applicant in 2017 as he had been in occupation of the suit property since 1996. The 2<sup>nd</sup> Respondent therefore acquired the suit property subject to the Applicant's overriding interest therein as contemplated by section 28 of the Land Registration Act.

19. In the case of *Kasave v Mawani Investment Ltd & 4 Others 2004 1KLR* the Court of Appeal held that a person's title by adverse possession can be acquired under the Limitation of Actions Act for part of the land and the mere change of ownership does not interrupt such person's adverse possession.

20. In *Githu Vs Ndeete (1984) KLR 776* the Court of Appeal held that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession.

21. Counsel for the 2<sup>nd</sup> Respondent has also raised the issue that the deceased had no capacity to sell the suit property and that consent of the Land Control Board was not obtained. This would have counted if the Applicant was solely relying on the validity of the sale agreement. In *Public Trustee vs. Wanduru, Madan JA* stated as follows; -

*"... adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.*

22. In the instant case the claim is based on the fact that the Applicant has been in open, exclusive and uninterrupted possession of the suit property since 1996, which fact has not been controverted by the Respondent. In the circumstances, I find and hold that the Applicant has proved his case on balance of probabilities. Consequently, I enter judgment for the Applicant and make the following final orders:

a) A declaration is hereby issued that the Applicant has acquired title to a portion of land measuring 86 feet by 120 feet

comprised in land parcel number WANJARE/BOGIKUMU/8029 by adverse possession under the Limitation of Actions Act.

b) The Respondent is hereby compelled to transfer the said land parcel to the Applicant herein within 60 days failing which the Deputy Registrar of this court shall execute the necessary documents to effect the said transfer on behalf of the Respondent.

c) The costs of this suit shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF OCTOBER, 2021.

J.M ONYANGO

JUDGE