



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 67 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 35 of 2019}

ELIAS CHARLES OMBOGA (Suing through SYLVIA OMBOGA and

FRIDAH KEMUNTO OMBOGA (Donees).....PLAINTIFF

VERSUS

ZAPHANIA NYAKERIGA ONDIEKI.....1ST DEFENDANT

CHARLES ONDIEKI NDEGE.....2ND DEFENDANT

JUDGMENT

The Plaintiff filed an Originating Summons dated 4/11/2019 in court seeking some reliefs through his daughters Sylvia Bonareri Omboga and Fridah Kemunto Omboga through the power of Attorney duly registered as No. 3 on 28/8/19. The Plaintiff resides in the U.S.A and it would have been so expensive for him to prosecute the case from there. Sylvia Omboga also later relocated to the U.S.A during the pendency of the suit and had to adduce her evidence online from Bethesda in Maryland. The determinations sought in the said Originating Summons are: -

1. A declaration that the Defendant's rights to recover a portion of land known as LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679 measuring 100Ft by 50Ft is barred under the limitations of actions Act, Chapter 22 of Laws of Kenya, and their title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.
2. There be an order that the Plaintiff be registered as the proprietor of portion of LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679 measuring 100Ft by 50 Ft in place of the defendants' who currently holds the Title to the suit land.
3. There be an order that the Plaintiff be registered as the proprietor of a portion of the land parcel No. LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679 measuring 100Ft by 50Ft in place of the 2nd Defendant who currently holds the Title to the suit land.
4. The portion measuring 100Ft by 50Ft out of Land LR. NO. NORTH MUGIRANGO. BOKEIRA I/2679 be sub-divided and the Title in respect thereof be issued in favour of the Plaintiff.
5. There be an order restraining the Defendants either by themselves, agents, Servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said portion of land measuring 100Ft by 50Ft comprising of all the parcel of land known as LR. NO. NORTH MUGIRANG/BOKEIRA I/2679 any manner whatsoever and/or howsoever.
6. The Deputy Registrar and/or the Executive Officer of the Honourable High Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of land measuring 100Ft by 50Ft comprising the parcel of land known as LR. NO. NORTH MUGIRANGO/BOKEIRA I/ 2679 in favour of the Plaintiff, in the event of default by the defendants to execute the necessary transfer instruments.
7. Costs of the Originating Summons be borne by the Defendants.
8. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

and the same were buttressed by the following grounds: -

1. **THAT** the Plaintiff has been in occupation of a portion of land known as LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679
2. **THAT** the land was previously registered in the name of KEMUNTO ONDIEKI as LR. NO. NORTH MUGIRANGO/BOKEIRA I/1065.
3. **THAT** the Plaintiff had purchased a portion of the land for valuable consideration.
4. **THAT** Succession of the whole parcel of land LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679.
5. **THAT** a portion of the parcel of land purchased by the Plaintiff from the original title lies in LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679.
6. **THAT** the 2nd Defendant has caused the land to be registered in his name without taking into consideration the Plaintiff's interest.
7. **THAT** the Plaintiff and his family have been on the land and have made substantial developments on the land.
8. **THAT** the Plaintiff fully paid the total consideration for the land.
9. Subsequently, the Plaintiff has continuously, openly and without interruption occupied the portion of the original parcel of land measuring 100Ft by 50Ft without interference by the previous registered owner and Defendants herein.
10. Notwithstanding the 2nd Defendant's registration, the Plaintiff has continued to occupy and/or cultivate a portion of the suit land, with the knowledge of the Defendants.
11. The Plaintiff's occupation and possession of the land has been continuous consequently, the Plaintiff has acquired prescriptive rights over the portion of the suit land.
12. In the premises, the Defendants herein have been privy to and/or aware of the Plaintiff's rights over a portion of the suit land.
13. The Plaintiff's interest (s) over the portion of the suit land merits registration.
14. At any rate, the Plaintiff's rights and/or interests are vindicated vide Section 28 of the Land Registration Act No. 3 of 2013.

Both Donees filed written statements each to support the Plaintiff's claim. Fridah's statement is dated 19/10/2021. Beside Sylvia Omboga swore the Affidavit in support of the Originating Summons on 4/11/19. On his part, the 2nd Defendant swore an Affidavit on 08/01/20 to support the reliefs sought which he solely relied upon during the hearing in court on 11/11/21. In the said statement, the 2nd Defendant admitted that it is indeed true the Plaintiff bought a piece of land from Nyabuto Ondieki which the Plaintiff has occupied for over 40 years. The 1st Defendant though duly served with Summons to enter appearance never filed any document in court. PW1, Fridah Kemunto Omboga told the court that his father bought 100ft by 50ft portion of land out of Title No. NORTH MUGIRANGO/BOKEIRA 1/1065 back in 1978 vide an Agreement dated 28/10/1978 from One Nyabuto Ondieki who is now deceased at a consideration of Kshs. 3,250/= all of which was paid to the said Mr. Ondieki. This land was initially registered in the name of Kemunto Ondieki who died on 15/2/97 and who was the mother to Nyabuto Ondieki. The 1st Defendant is a brother to the late Nyabuto Ondieki. The 2nd Defendant took out letters of Administration in respect to the late Kemunto Ondieki's Estate and a copy of the Grant which was issued in Kisii H.C. Succession Cause No. 256 of 2001 was produced in court. The certificate of confirmation of Grant in respect thereof was issued on 14/3/02. After the certificate of confirmation of Grant was issued the parcel of land L.R. NO. NORTH MUGIRANGO/BOKEIRA 1/1065 was sub-divided to give rise to several parcels of land including parcel number LR. NO. NORTH MUGIRANGO/BOKEIRA 1/2679 measuring 2.97 Hectares wherein the parcel of land that was bought by the Plaintiff is situate. A copy of the Title Deed in respect of NORTH MUGIRANGO/BOKEIRA 1/2679 was also produced in court. The same was registered on 28/5/2009 and the proprietorship section shows the owner as Charles Ondieki Ndege the 2nd Defendant, of P.O, Box 54 – 2333, SONDU with effect from 14/07/08.

It is clear from the aforesaid Title Deed that NORTH MUGIRANGO/BOKEIRA 1/2679 is a sub-division of NORTH MUGIRANGO/BOKEIRA 1/1065. After purchasing the parcel of land, the Plaintiff immediately took its possession peacefully and fenced it and put up a permanent house in 1980. The 2nd Defendant occupies the rest of the aforesaid land. The Plaintiff has since then been in quiet possession without any interruption and any time he and/or any member of his family are in Nyamira, they reside in the house put up thereon. Besides the three-bed roomed permanent house the suit land i.e. the 100ft by 50ft on NORTH MUGIRANGO/BOKEIRA 1/2679 is surrounded by a barbed wire and there are also vegetations on the land such as trees as well as onions.

The 2nd Plaintiff's witness, Sylvia Omboga who testified so clearly online from Bethesda, Maryland in the U.S.A said that she was adopting her statement dated 07/09/21 and filed in court on 05/10/21 and her Supporting Affidavit sworn and filed on 4/11/19. The Affidavit adds material to their statements. Under paragraph 8, Sylvia Omboga depones that the mother of Nyabuto Ondieki and the 1st Defendant was Kemunto Ondieki who remarried elsewhere after her husband's death. She continues to depone that the 2nd Defendant was also a grandson to Kemunto Ondieki and that the original land NORTH MUGIRANGO/BOKEIRA 1/1065 was in the name of their mother Kemunto Ondieki. She further depones that all the Defendants were aware at all material times that the Plaintiff had purchased the suit property where he was residing with his family. The same was not a secret. In her viva voce evidence, Sylvia testified in court that the family has another bigger piece of land in Gucha at a place called Nyamache in Kisii County which is ancestral but that they have not developed the same. They chose

to develop the suit property because their late mother was a nurse, working at Matongo which is a walking distance from the suit property. She therefore used to walk to her place of work.

Sylvia Omboga further testified that the family has possessed and been in occupation of the suit property for over 43 years now, exclusively and peacefully. According to the witness the 1st Defendant has since cautioned the said land.

In her statement M/s Kemunto said that there was a suit in Nyamira Civil Suit Number 43 of 2007 where the 1st Defendant sued the 2nd Defendant over claims that the 1st Defendant has an interest in the original parcel land number NORTH MUGIRANGO/BOKEIRA 1/1065. But although the parties never produced any documents and proof of this the witness testified that the court ruled that the 1st Defendant be given a ¼ of the parcel number L.R. NORTH MUGIRANGO/BOKEIRA 1/2679. If a quarter of this land is taken the remainder would be 2.2275 Hectares yet what the Plaintiff is after is only 1/8 of an Acre. The Plaintiff would therefore be accommodated comfortably. The witness concluded her testimony by saying that both Defendants have always been aware of the Plaintiff's occupation of the suit land since the Defendants also reside in the neighbourhood.

Mr. Masese did not cross-examine any of the witnesses.

On his part, the 2nd Defendant said that the late Nyabuto was actually his uncle since his (2nd Defendant's) father was also a son to Kemunto Ondieki under whose care he remained. He says that he could have already transferred the suit property to the Plaintiff were it not for the fact that the first Defendant cautioned the whole parcel i.e. NORTH MUGIRANGO/BOKEIRA 1/2679 of which the suit property is part. He says that he is ready to transfer from the suit land NORTH MUGIRANGO/BOKEIRA 1/2679 which is ancestral the 100 by 50 feet purchased by the Plaintiff from his late uncle as soon as the caution placed by the 1st Defendant is lifted. As mentioned above the 1st Defendant, though served, preferred not to participate in these proceedings.

These are the facts that came out of the evidence in court.

In the case of *Kweyu v Omuto, Court of Appeal, Civil Appeal No. 8 of 1990* the Court held that in deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts.

Adverse possession is all about Laches.

The rationale behind the doctrine of adverse possession was aptly captured in the case of *Kahindi Ngala Mwangandi vs. Mtana Lewa, ELC NO. 108 of 2011 Malindi*, where the court citing the case of *Adnam vs. Earl of Sandwich (1877) 2 QBD 485* held as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties”.

A person who seeks to acquire Title to land through the doctrine of adverse possession by way of occupation of the suit land must establish that he has been in occupation *nec per vim, nec clam, nec precario*, a [Latin](#) legal term meaning 'without force, without secrecy, without permission' i.e. nonconsensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims, for the statutorily prescribed period without interruption. He must have the right intent to claim and hold the land in opposition to the rest of the world. He must show, on evidence, that the true owner or persons interested in the property have proper knowledge of the adverse assertion of ownership by the occupant who has no colour of right to the land and has the intent to hold it solely for himself (donated by the exercise of the act of dominion over the land, which includes making ordinary use and taking ordinary profit of which the land is susceptible in its present state).

From the evidence, it is not in dispute that the Plaintiff has been on the suit premises since 1978. The Plaintiff testified that after he bought the suit land from the late Nyabuto Ondieki, the 1st Defendant's brother, he took possession of the same meaning that he dispossessed the Defendant. The possession must be adverse. Adverse possession is occupation inconsistent with the Title of the true owner; inconsistent with and in denial of the right of the true owner of the premises. The Plaintiff initially took possession of the 100X50 feet out of the suit premises with the permission of the Defendant.

When does permissive possession become adverse?

If occupation was originally taken with the permission or agreement or license of the true owner, then you must show that on a certain (stated) specific date after the permissive or consensual entry or occupation, the possession began to become adverse or that on such and such a date, the proprietor deliberately abandoned the land or is dispossessed or he discontinued his possession.

It is the Plaintiff's evidence that he has been using the 100X50 feet of the suit land and the late Nyabuto Ondieki deliberately abandoned and was dispossessed of his possession of that particular portion. The Defendants have therefore not been occupying the portion of the suit land claimed by the Plaintiff. It is therefore not in dispute that the Deceased was dispossessed of the 100X50 feet of the suit land and was not in actual occupation of the same since 1978. He was dispossessed of it, and did discontinue his possession of it. In the case of *N'gati Farmers' Co-operative Society Limited –vs- Codicillary Ledidi & Others* the Court of Appeal held that: -

“.....the claim for adverse possession requires that the owner has been in possession but is now out of possession (either because he has been dispossessed or because he has simply discontinued possession).

It must be shown by the occupier, that there was dispossession of the proprietor, or discontinuance of possession by the proprietor. “Dispossession” ‘means the adverse possessor comes in and drives out the person in possession from the possession of the land; while “discontinuance” is when the person in possession goes out and is followed into possession by another. And for this I wish to associate myself with the strong views of Chesoni JA (as he then was) in the case of Wanje –vs-Saikwa (No.2) Civil appeal Number 72 of 1982 {1984}KLR at page 288 quoting Megarry’s manual of the laws of real property:-

“.....in order to acquire by the statute of limitations a Title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.....”

In Mbuyi vs Maranya Meru HCCC No. 283 of 1990, Justice Kuloba went to great heights to explain discontinuance or dispossession of the proprietor in order to found a claim for adverse possession by stating as follows: -

“..... An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession..... The adverse possession must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil.....there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by the incoming person. A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in Title against the past twelve or more years.”

The other thing a beneficiary of the doctrine i.e. the adverse possessor must show with exactness is the definite portion he occupies. **The land, or portion of land, adversely possessed must be a definitely defined or at least an identifiable portion, with a clear boundary or identification.** The portion given to the Plaintiff was by measurements and its acreage was very well defined. From the evidence adduced in Court, it is possible to ascertain what portion the Plaintiff occupies. As well as what acreage it is, 50X100 feet. The same has been fenced with a barbed wire. There is a permanent house, onions and trees planted thereon.

The upshot of the above is that the Plaintiff has occupied a well-defined and determinate portion of the suit land for a period of over 12 years, 43 years to be exact, most of which were without the Deceased’s permission and the lack of permission was even compounded when the 1st Defendant cautioned the suit land to forbid transfer of the same to the Plaintiff and therefore his use of the land was adverse to the owner’s. He also occupied the suit land without secrecy, without permission’ i.e. nonconsensual, actual, open, notorious, exclusive and adversely and without interruption for the statutorily prescribed period of over 12 years.

Can a claim for Adverse Possession be urged against the estate of a deceased person?

I must state here that as soon as I observed that there is an order being referred to in the Senior Resident Magistrate’s Court, Nyamira being Civil Case No. 43 of 2007 which was described in the statement of Fridah Kemunto Omboga dated 19/10/21 in a very vague way I became curious. The same reads as follows: -

“That later on the 1st Defendant sued the 2nd Defendant at Nyamira Court vide Civil Case No. 43 of 2007 over claims that he also had an interest in the original parcel of land which had already been sub-divided and yielded new titles and inclusive of LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679. That the court ruled in favour of the 1st Defendant and ordered that he be given a ¼ share of the parcel of land LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679.”

I would have expected the Plaintiff to include copies of the proceedings in the above case in the bundle of documents in order to shed light of what transpired. Although ours is an adversarial system, my curiosity led me into the archives to get the file and go through it so that I arrive at an informed Decision. My fishing ordeal observed that the aforesaid matter has been re-opened and the same has an Application coming up for Hearing on 07/12/2021. The lower Court was moved by the 1st Defendant herein (as the Plaintiff in the lower court) who sued the 2nd Defendant herein for the following orders:

1. An order of rectification of the Register respecting KISII/NORTH MUGIRANGO/BOKERIA I/1065.
2. A permanent injunction restraining the the Defendant from claiming ¼ share of KISII/NORTH MUGIRANGO/BOKERIA I/1065 or interfering with the Plaintiff’s peaceful enjoyment and/or possession thereof.
3. Costs of the suit.

On 23rd October 2008 Judgment was delivered as follows:

1. THAT an order of rectification do and is hereby issued rectifying the Register in respect of KISII/NORTH MUGIRANGO/BOKERIA I/1065 showing that a ¼ share of it be and is hereby owned by the Plaintiff herein.
2. A permanent injunction be and is hereby issued restraining the Defendant from claiming a ¼ share of KISII/NORTH MUGIRANGO/BOKERIA I/1065 or interfering with the Plaintiff’s peaceful enjoyment and/or possession thereof.

The Plaintiff later filed a Notice of Motion dated 12th September 2012 to have the court grant leave to the Executive officer of the court to execute transfer documents on behalf of the Defendant who had refused to comply with the aforesaid Judgment and after realizing that the Defendant therein (the 2nd Defendant herein) had already sub-divided the suit land, on 12th March 2014 the Plaintiff (1st Defendant herein) amended his Motion to read KISII/NORTH MUGIRANGO/BOKERIA I/2679. The same was granted on 22nd September 2015 in the following terms:

THAT the Land Registrar, Nyamira County do cause to be registered in the names of ZEPHANIAH NYAKERIGA ONDIEKI ¼ (a quarter) share out of Land Title No. KISII/NORTH MUGIRANGO/BOKERIA I/2679 which resulted from the original Title No. KISII/NORTH MUGIRANGO/BOKERIA I/1065.

Subsequently, Jane Mokeira Osero, Imelda Bochaberi Onyanda, Peter Ogero Ogendi and Benson Omayo Minyira sought to be joined as parties to the suit for purposes of being heard on an Application that the sub-division of KISII/NORTH MUGIRANGO/BOKERIA I/1065 was illegal and that the same should be revoked. The aforesaid Applicants were joined in the suit on 17th August 2021 and an inhibition placed on all the resultant sub-divisions of KISII/NORTH MUGIRANGO /BOKERIA I/1065 and the Application urging the revocation of the resultant Titles is coming up for Hearing on 7th December, 2021.

Have the rights of the Plaintiff been overtaken by all these changes?

In **Mwangi & Another –v – Mwangi, (1986) KLR 328**, it was held that

“the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse Possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership”.

In the case of **Samwel Nyakenogo v Samwel Orucho Onyaru [2010] eKLR**, the Court of Appeal held as follows:

‘**For** about 19 years, the Respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the Respondent’s said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West KITUTU/MWAKIBAGENDI/28 which was confirmed on 15th June, 1999 did not interrupt the respondent’s Adverse Possession of the portion he bought from the deceased.’

It is against the background of decided case law and the evidence adduced in affidavits and statements by the witnesses and their oral evidence on oath that I find that the Deceased’s rights to the suit land became extinguished long before he died and the title was therefore being held in trust for the Plaintiff. The Defendants obtaining letters of grant of administration intestate, obtaining confirmation of grant in which the Deceased’s estate was distributed did nothing to oust the rights of the Plaintiff. By the time they petitioned for the grant the Deceased’s rights over the suit land had been extinguished. It matters not that the Defendants have already transferred the Title of the suit land to themselves. All the rights granted and those sought in Nyamira C.M.C.C. No. 43 of 2007 are all subservient to the Plaintiff’s already acquired rights under the doctrine of Adverse possession and cannot be taken away.

The court is perturbed that the 1st Defendant herein has chosen to participate in the lower court’s suit and knowingly failed to participate in this case in order to defeat the rights of the Plaintiff herein which are fortunately already secured. And since there is enough land in **LAND PARCEL NO. NORTH MUGIRANGO /BOKEIRA 1/2679** to accommodate the Plaintiff herein, it shall be so.

The suit therefore succeeds, and judgment is hereby entered in favour of the Plaintiff in the following terms:

- (a) A declaration is hereby issued that the Defendant’s rights to recover a portion of land known as LR. NO. NORTH MUGIRANGO/BOKEIRA I/2679 measuring 100Ft by 50Ft is barred under the limitations of actions Act, Chapter 22 of Laws of Kenya, and their title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.
- (b) The Plaintiff has acquired Title for the portion of land measuring 50 Feet by 100 Feet in **LAND PARCEL NO. NORTH MUGIRANGO /BOKEIRA 1/2679** under the Provisions of the Laws of Limitations of Actions Act, against the Defendant.
- (c) The Defendant shall transfer to the Plaintiff herein the portion of land measuring 50 Feet by 100 Feet out of the **LAND PARCEL NO NORTH MUGIRANGO/BOKEIRA 1/2679** within the next 30 Days from the date of this Judgment.
- (d) The Deputy Registrar of this Honourable Court be is ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of land measuring 100Ft by 50Ft to be exercised out of the parcel of land known as LR. NO. NORTH MUGIRANGO/BOKEIRA I/ 2679 in favour of the Plaintiff, in the event of default by the defendants to execute the necessary transfer instruments as ordered in (c) above.
- (e) The Plaintiff shall have the costs of this suit which shall be borne by the First Defendant.

Judgment dated, signed and delivered at Nyamira this 18th Day of November 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Ms. Shilwatso holding brief for Ms. Ndemo

Defendants: 2nd Defendant present in person