



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NO. 90 OF 2017 (O.S.)**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT 22 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF L.R. NO. BUNYALA/MUDEMBI/886**

**AND**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION**

**BETWEEN**

**JENIPHER AKOTH ONYANGO.....APPLICANT**

**= VERSUS =**

**PETER OCHIENO OKUMU.....RESPONDENT**

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

1. The Applicant commenced these proceedings vide the Originating Summons dated 2<sup>nd</sup> May, 2017 and filed on the same date against the Respondent. The Applicant claims that they have acquired by way of adverse possession rights over 1.0 acres of land out of **L.R No. BUNYALA/MUDEMBI/886** measuring 2.223 acres or any other title derived therefrom as on the ground currently registered in the name of PETER OCHIENO OKUMU. The Applicant posed the following questions for determination:

- a) *Whether the Applicant has been in open, quiet and notorious possession of 1.0 acre out of L.R. NO. BUNYALA/MUDEMBI/886 for a period exceeding 12 years.*
- b) *Whether the Respondent's title to L.R NO. BUNYALA/MUDEMBI/886 became extinguished upon expiry of 12 years from the time the Applicant went in to possession of the land i.e. from the year 1982.*
- c) *Whether the Applicant has now acquired title to the said land by virtue of adverse possession.*
- d) *Whether the registration of the Respondent as owner of whole of L.R. NO. BUNYALA/MUDEMBI/886 should be cancelled and sub-division ordered into two portions with a view to the Applicant getting registered as owner of a portion measuring 1.0 acre and the Respondent do retain 1.223 acres out of L.R. NO. BUNYALA/MUDEMBI/886.*
- e) *Who should pay costs of the suit.*

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

- i) **That the Respondent's right over L.R. No. BUNYALA/MUDEMBI/886 got extinguished by adverse possession upon the expiry of 12 years from the time the Applicant came into possession that is from the year 1982.**
- ii) **That L.R. No. BUNYALA/MUDEMBI/886 be ordered sub-divided into 2 portions of 1.0 acres and 1.223 acres and the Applicant be ordered to get registration of 1.0 acre.**

**iii) That the Respondent be ordered to execute all the relevant statutory documents required of him to facilitate transfer of the portion measuring 1.0 acre out of the L.R. No. BUNYALA/MUDEMBI/886 into the names of the Applicant and that in default, the Deputy Registrar of the court do execute the same in place of the Respondent.**

**iv) That the Respondent be perpetually barred and or enjoined from, using and or in any way interfering with the Applicant's portion measuring 1.0 acre out of L.R. NO. BUNYALA/MUDEMBI/886.**

**v) That costs of this case be borne by the Respondent.**

3. The Originating Summons was supported by the Applicant's supporting affidavit sworn on 2<sup>nd</sup> May, 2017 together with a statement.

4. On the 1<sup>st</sup> August 2017, the Respondent filed his replying affidavit, which stated that the Applicant is not entitled to the 1.0 acre of BUNYALA/MUDEMBI/886 and that the land was registered in the name of OCHIENG' OKINDO his father who is now deceased and he never instructed him to share his property. He filed a succession cause was filed and there was no objection at all by the applicant. He deposed that the applicant is his neighbour and resides in BUNYALA/MUDEMBI/887 which is registered in the names of her late father-in-law. He further deposed that the applicant has been interfering with his boundary that is between BUNYALA/MUDEMBI/886 and 887. He applied to Land Registrar for boundary determination on 4/4/2017 and thereafter the Applicant filed this suit against him. Annexed to the Replying Affidavit was a copy of title deed, copy of official search and land register of 886, copies of death certificate and chief's letter, copies of Kenya Gazette, grant and certificate of confirmation of grant, copy of search to 887, copy of boundary dispute summons dated 4/4/2017.

5. The hearing began on 22<sup>nd</sup> October 2018, with the Applicant calling two witnesses. JENIFFER AKOTH ONYANGO the applicant herein, testified as **PW1**, and stated that her husband is the late Nicholas Atongo and she married him in 1999. Her land parcel is on parcel no. BUNYALA/MUDEMBI/886. She testified that she is claiming one acre from that portion as part of the parcel of land they own, parcel No. BUNYALA/MUDEMBI/887, which is registered in the name of her late father-in-law. She stated that parcel no.886 is in the name of Peter Ochieng Okumu, the respondent herein. She claimed that her late husband put up a home for her in 2007 on the portion of land, part of which is in parcel No. 886 and that he put the boundary there in 1982.

6. She stated that did not know the defendant before as he resides in Malindi. She claimed that parcel No. 886 where the defendant's wife lives is the same title where she was living with Barnabas Ochieng' Okindo who had no wife nor children. She further averred to being aware that the Respondent is the son of the sister of Barnabas Ochieng Okindo. It is her testimony that the one-acre portion from land parcel 886 already belonged to her late husband even before the Respondent came to the scene. She asked the court to give her an order for the one acre her possession to be registered in her name and for all the prayers in her suit be granted. **PW1** produced the green card annexed to the summons as *Pex No.1*.

7. During cross-examination, PW1 asserted that her husband was gifted land by Ochieng Okindo who is now deceased. She stated that she did not know whether there had been succession proceedings for the estate of Barnabas Ochieng Okindo. PW1 admitted that she got a notice that the Land Registrar was to come and put a boundary between parcel no.886 and 887. She admitted that she has not shown the court anything to prove she is using the one-acre portion. She reiterated that she has lived on the land since 1999 and her house was built there in 2007. She stated that she found the defendant on the land when she was got married.

8. FREDERICK OKELLO MAKHANGA, giving evidence as **PW2**, adopted his statement dated 16<sup>th</sup> April 2018 as evidence in chief. He testified that he knew the defendant who is his uncle. PW2's mother, Marita Okido was the sister to Ochieng Okido-deceased whom he resided with since childhood at his home in BUNYALA/MUDEMBI/886. The witness continued that the Respondent was a nephew of Ochieng Okido-deceased. **PW2** stated that to avoid acrimony, Ochieng Okido allowed the Respondent to settle on part of the suit land with his troublesome wife. He further stated that the Respondent resides in Malindi while his wife resides on his said uncle's land. According to **PW2**, Ochieng Okido-deceased before his demise in 2012, called him, the Respondent's wife and his elder brother Muleke and informed them that when he dies his land should be partitioned into 2 portions. The Respondent was instructed to take the portion he already resided on and **PW2** was to take the portion then occupied by Ochieng Okido-deceased.

9. He stated that his uncle had given land measuring about 1 acre to PW1's husband long before the respondent came to settle on the suit land. He further stated that the boundary between his uncle and PW1's husband was made of planted trees which are now old and big. He claimed that the Respondent obtained letters of administration without his knowledge and got registered as the owner of BUNYALA/MUDEMBI/886. He further averred that BUNYALA/MUDEMBI/886 should be partitioned into 3 portions, one acre to the Applicant and survey be carried out to ascertain the acreage of the portion given to the Respondent and the balance thereof given to him.

10. Upon cross-examination, PW2 admitted that the Respondent's wife lives on the land. He clarified that in paragraph 9 of his written statement he talked of two portions as the desirable subdivision suggested by the deceased owner because he considered the applicant's portion as already given to her. He admitted that in his replying affidavit dated 26/10/2015 in Succession Cause No. 287/2012, at paragraph 7 he had said that the deceased had left no oral will but stated that whoever wrote it made a mistake. According to PW2, at the time succession was ongoing, the portion occupied by PW1 had no problem and that PW1 was aware of the succession proceedings. He could not recall when PW1 started living on the land. On re-examination, the witness denied that the replying affidavit in the succession cause was his stating that he had seen it for the first time in this court. He also stated that he realised that the Respondent was occupying a portion of the land that he was given and that is why he joined the succession proceedings.

11. The matter proceeded for further hearing on 27/2/2019 with the evidence of the Respondent. He started by adopting the contents of his Replying Affidavit dated 31/7/2017 and his affidavit evidence filed on 20/4/2018 in response to PW2's affidavit. He stated that to his knowledge, the Applicant has never resided on BUNYALA/MUDEMBI/886 and that he is the sole proprietor of the suit land after he was registered as such on 11/12/2013. The suit land was previously registered in the name of Ochieng Okido-deceased. He stated that he was staying with the deceased Ochieng Okido before his death and when he passed away on 12/6/2012 he was left as the sole next of kin. He claimed that no one including PW2 demanded property of the deceased during the funeral. He deposed that PW2 filed an objection in

Succession Cause no. 287 of 2012 for revocation/annulment of grant and the objection was dismissed.

12. The Respondent stated that PW2 lives about 10kms away from the disputed land which is his established home. He had also established his home on the suit parcel when the deceased was still alive and even after his death, his stay has been open and continuous without any interruption and all the neighbours acknowledge him as the sole beneficiary of the estate. He produced the green card to BUNYALA/MUDEMBI/886 as DEX 1, green card to BUNYALA/MUDEMBI/887 as DEX 2 and the summons to fix the boundary issued by the land registrar as DEX 3.

13. On cross examination, DW1 stated that he got the suit land from his late father Barnabas Ochieng Okello and that before he came to the suit land he was living on his biological father's land. He stated that the deceased called him to stay with him as he did not have a child and he took up the invitation. He claimed that he only has one wife and there was nobody else living on the land. He stated that the Applicant has her own land being land parcel no. 887. The Respondent asserted that there is no visible boundary between his land and the plaintiff's land though the plaintiff's portion has trees. DW1 said that the deceased called him to stay with him in 1984 and that he went and built his home there. He denied ever having a dispute with the PW1's husband over the boundary all that duration.

14. The Respondent reiterated that he was the sole beneficiary of Barnabas Ochieng's estate. He added that he would wish to know the extent of his boundary as the deceased never pointed it to him. He further stated that he was not aware that the deceased had given PW1's family one acre of his land in 1983. He also stated that he took out succession proceedings for the estate of the deceased and he got the title deed for the suit land.

15. By a letter of consent dated 14/5/2019 executed between the advocates of the parties on record and filed in court on 17/6/2019, the parties agreed that the County Surveyor Busia should visit L.R. NO. BUNYALA/MUDEMBI/886 and 887 and determine the extent of their boundaries. The County Surveyor after the visit, prepared a report dated 12/1/2021 and filed it in court on 26/1/2021. The findings of the County Surveyor Busia was that the Applicant had encroached onto the Respondent's land parcel no. 886 by approximately 0.2Ha as shown in sketch number 3 annexed to the report.

16. The Applicant filed her submissions on 6<sup>th</sup> May 2021 and submitted that her evidence was corroborated by PW2 to the effect that she was staying with her elder sister who was the wife of Nicholas Atogo. She further submitted that the County surveyor confirmed that land parcel 886 was encroached into by land parcel 887 to the extent of 0.2 Ha and she therefore prayed for that portion she has been in possession of plus costs. The Respondent did not file any submissions.

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

- a) Whether the Applicant has encroached on the Respondent's land or**
- b) Whether the Applicants' occupation of a portion of the Suit Land became adverse to that of the Respondent; and**
- c) Who bears the costs of this suit?**

18. The finding of the County Surveyor confirmed that the Applicant had occupied a portion land parcel no. 866 measuring 0.2 Ha. The report also stated that the Applicant's family has been using the 0.2Ha of the Respondent's land since 1982 as per the explanation of the Applicant and that of the neighbours. PW1 stated in her evidence that her late husband put a boundary on suit portion in 1982 by planting trees which are now all grown. In diagram 3 of the Land Surveyor's report, it stated that there is an existing visible eucalyptus boundary on the encroached portion of the land which is being used by the applicant. In his replying affidavit which DW1 adopted as his evidence, he stated that the applicant had been interfering with his boundary that is between land parcel no. 886 and 887. The Respondent went further to state that there is no visible boundary between his portion and the applicant's portion but admits that the plaintiff's portion has trees. The Respondent in his evidence added that the deceased never showed him the boundaries of the suit land and he wanted the Land Registrar to identify the boundaries for him.

19. The evidence of the Respondent is contradictive in material respects. He denies that the Applicant is not in occupation of part of his land but goes on to add that he does not know the extent of the boundaries of his land. He further admitted that there are trees on the Applicant's side of the land. I am therefore satisfied that the trees DW1 was referring to are the same one the County Surveyor was referring to in his report as being the boundary in the encroached land portion. The Respondent's case is that he settled on the suit land in 1984. He does not say that the Applicant or her husband planted the trees after he took occupation of the suit land thus corroborating the Applicant's evidence that her husband put demarcations on the suited portion in 1982 or earlier than 1984.

20. To establish adverse possession of land, a claimant must demonstrate that he has been in peaceful, continuous, and uninterrupted occupation of the claimed parcel for a period of more than twelve (12) years. PW1 testified that her late husband had put a boundary in 1982 and when she got married in 1999 she joined him in possessing the land and utilizing it and is still using it to date. She also stated that her late husband was gifted the land by the deceased which in my view served the purpose of explaining she had acquired a share of land parcel no.886. Pw2 corroborated the Applicant's case by stating that the Applicant's has always been in possession of the suit portion and which possession has been continuous and peaceful.

21. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows: -

*“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the*

owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, **Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184** and **Wanje v saikwa (2) (supra)**. In the first decision, the court was emphatic that 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 twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use.

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

22. In the instant case, PW1 stated that her late husband was gifted the portion of land by Barnabas Ochieng Okindo-deceased. DW1 stated that he was not aware that the deceased owner had given the applicant one-acre out of land parcel No.886 or that any such transaction took place in 1983. Since possession herein has been confirmed by the County Surveyor’s report and the Respondent having denied the deceased making out any such gift yet the Respondent has never taken possession of the disputed portion. It can only be deduced that the occupation of the half (½) by the Applicant was hostile to that of the deceased owner and subsequently the Respondent.

23. Section 36 and 43 of the Land Registration Act contains the mandatory formal requirements on disposition of land. It is clear that the mandatory formal disposition relating to gifting land or disposition of land were not met by PW1’s deceased husband or the late Barnabas Ochieng Okindo. There is no evidence that the acceptance of the gifted land was in writing. As such, the applicant’s husband’s occupation of the suit land was adverse to the late Barnabas Ochieng Okindo’s title and subsequently DW1’s title. I therefore find that the applicant has proved her claim of adverse possession.

24. In the totality of the evidence put before the court, I do find that the Applicant has been in open, notorious, exclusive and uninterrupted possession of the 0.2Ha for a period of over 12 years. The court holds that the Applicant’s claim for adverse possession is merited to the extent of being entitled to half (½) acre portion of L.R No BUNYALA/MUDEMBI/886. The costs of the suit awarded to the Applicant.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**A. OMOLLO**

**JUDGE**