



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 55 OF 2018

IN THE MATTER OF LIMITATION OF ACTIONS CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION

OF DEFINED PORTION ON LAND PARCEL SOUTH TESO/AMUKURA/166

BY EJAPU EKAKORO

BETWEEN

GAD EJAPU EKAKORO.....APPLICANT

VERSUS

JOHN ONYA EKESA

(Sued as Legal Representative of the estate of (deceased) EKAKORO OKURU).....RESPONDENT

J U D G M E N T

1. The Applicant commenced these proceedings vide the Originating Summons dated 7th June, 2018 and filed on 20th June 2018 against the Respondent. The Applicant claims that they have acquired by way of adverse possession rights over 4 acres' land portion comprised in **L.R NO SOUTH TESO/AMUKURA/166** measuring 2.8 Ha or any other title derived therefrom as on the ground currently registered in the name of JOHN ONYA EKESA pursuant to Succession Cause. The Applicant posed the following questions for determination:

a) **Whether the Applicant has been in open, quiet and notorious possession of 4 acres of defined portion of L.R. SOUTH TESO/AMUKURA/166 for a period of 60 years exceeding 12 years required in law for acquisition of land by adverse possession.**

b) **Whether the Respondents entitlement and title to a portion measuring 4 acres out of SOUTH TESO/AMUKURA/166 now measuring about 2.8 Ha has become extinguished upon expiry of 12 years from the time the applicant has been in possession since he reached age of majority in 1968 having been born in 1950 on said portion of land.**

c) **Whether the Applicant has acquired title to the said portion of land measuring 4 acres out of 2.8 Ha from SOUTH TESO/AMUKURA/166 by virtue of adverse possession and whether such title shall be issued for the portion he possesses.**

d) **Whether mutation should be done for a defined portion measuring 4 acres from land parcel no. SOUTH TESO/AMUKURA/166 and registration be done.**

e) **Who should pay costs of this application?**

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

i) **That the Respondents rights over 4 acres out of L.R. NO. SOUTH TESO/AMUKURA/166 measuring approximately 2.8**

Ha as possessed by the Applicant is extinguished by adverse possession from the time the applicant acquired the same.

ii) That the Applicant do and is hereby granted right of title to the 4 acres of the portion from SOUTH TESO/AMUKURA/166.

iii) That the Respondent do execute all relevant documents necessary to mutate and or curve out 4 acres out of SOUTH TESO/AMUKURA/166 and in default the Deputy Registrar High Court Busia to be authorised to do so after the expiry of defined period.

iv) Costs be borne by the Respondent.

3. The Originating Summons was supported by the Applicant's supporting affidavit sworn on 7th June 2018 and his written witness statement filed. Annexed to the Summons was a copy of the chief's letter and the certificate of the official search in respect of the suit land.

4. The Respondent filed his Replying Affidavit to the Originating Summons, claiming that the Applicant is ineligible for adverse possession because his possession of any portion of the land compromised in L.R. NO. SOUTH TESO/AMUKURA/166 has not been peaceful and uninterrupted. He deposed that this matter is subjudice BUSIA HC ELC CASE NO. 133 of 2016, which has yet to be heard and decided. He claimed that the applicant is chasing a wild goose because his challenge to the grant's issuance was dismissed in BUSIA HC P&A NO. 458 of 2014. He also stated that the Originating Summons is defective because it was filed without a green card, in violation of the law. He claimed that this suit is res judicata and should be dismissed with costs.

5. On November 26, 2020, the hearing began with the Applicant calling three witnesses. The applicant testified as **PW1** and stated that he is a farmer living in Kodedema village. PW1 indicated in his witness testimony dated 7/6/2018 that the Respondent is the son of his deceased brother, Ekesa. Since 1950, he has lived on the land known as SOUTH TESO/AMUKURA/166 on a portion measuring 4 acres that is clearly demarcated on the ground by hedges. His mother and three of his children are buried on his portion of the suit property. He claimed that his father, Ekakoro Okuru (deceased), was also the father of the previous registered proprietor hereof, Ekesa Ekakoro-deceased and who was registered as a trustee to the estate.

6. The Applicant continued that before his brother, Ekesa Ekakoro died, one of their brothers, Alfred Nyongesa Ekakoro, went and settled somewhere with his family, leaving the three brothers in occupation, as stated in the local administrator's letter. That the Elders placed boundaries separating each brother's share which demarcations are still visible and in place. He further stated that he has a family of roughly 30 individuals who have lived on the designated portion for the past 40 years and that he is entitled to the 4 acres of the suit land that is currently registered in the Respondent's name. The witness avers that his occupancy, stay, and use of said portion has been peaceful, and that he has obtained rights of ownership over it He submitted the official search certificate as *PEX 1* and the chief's letter dated 4/8/2015 as *PEX 2*.

7. During cross-examination, PW1 confirmed that the Respondent is his nephew and that he is claiming the land as ancestral land, not because he has lived on it for 70 years. He acknowledged that this was not his first disagreement with the Respondent. The first was over who should receive compensation from KETRACO, and the money was paid to the Respondent despite the fact that the matter remained unresolved. The second point of contention occurred when his son Elly died and the Respondent obtained an injunction preventing the burial. They were later permitted to bury by the court. The third dispute involves Respondent's case No. 133 of 2016. He stated that he was born on the suit land and that it was registered in the name of his sibling. He lacked any evidence that Ekesa was his brother. He indicated that Succession Cause No. 458/2014 existed for the purpose of distributing the suit land, but he was unaware of the verdict. He did not bring a surveyor to measure his three acres since the Respondent refused to share the cost of the survey.

8. SIMON BARASA EJAPU, as **PW2**, testified that he is a farmer, that the Applicant is his father, and that the defendant is his cousin brother. He mentioned that he resides on SOUTH TESO/AMUKURA/166 in Kodedema and was also born on the land as PW1. He asserted that the family convened and appointed the Respondent as administrator of the suit land. He added that he and his wife live on around four acres and were both born in 1976. He added that they had lived quietly on the suit land until recently, when KETRACO's compensation was due.

9. **PW2** testified during cross evidence that the quarrel began about who should receive money from KETRACO. The Respondent was currently registered as the owner, but the land had previously been registered in his father's name. Simon did not have the minutes of the principal meeting at which the Respondent was elected a trustee. He added that there have been various land issues and they are currently unable to coexist peacefully. He added that the Respondent has also filed a suit claiming ownership of the property.

10. ISAAC NEWTON, in his capacity as **PW3**, testified that PW1 is his paternal uncle and the Respondent is his cousin. It is his evidence that they are currently residing on L.R. NO. SOUTH TESO/AMUKURA/166, which is his grandfather's land, and that he has lived there since he was born. He is now 54 years old and is seeking justice. He added that they had previously lived quietly on the farm and the Respondent wishes to have them removed. He further claimed that they are only interested in receiving the section of land on which they have been residing, which is 4 acres. He indicated that the Respondent is registered as owner of the land on which he is staying and that they are seeking protection.

11. During cross-examination, PW3 averred that the land is now registered in the name of John Ouya Ekesa in trust for all those in occupation. He stated that PW1's claim in the succession proceedings had been denied and that this litigation was brought on their behalf by PW1. He stated again that he is occupying approximately 4 acres. He indicated that PW1 and the Respondent had previously been involved in litigation, namely ELC 133 OF 2016, and SUCC. 458 OF 2014. He stated that a previous disagreement was resolved in front of the chief and the DO. That the initial case included a funeral dispute in which the Respondent denied PW1 the right to bury his son on the suit land. He indicated that the Respondent also resided on the land prior to selling his part and relocating. He also stated that PW1 is occupying two acres, his father is occupying one acre, and PW3 is occupying two acres, totaling 7.5 acres.

12. JOHN ONYA EKESA, testifying as **DW1** stated that he currently lives in Otur but he previously lived on SOUTH TESO/AMUKURA/166. He adopted his witness statement dated 25th February 2019 as his evidence. He stated that PW1 was living on the suit land without his permission and they have not lived in peace. He claimed that PW1 and his son beat up his brother and destroyed their crops. He moved to Otur because of lack of harmony. He stated that PW3 tried to block his payment from KETRACO. He contends that the plaintiff is not entitled to get a portion of the suit land as they have their own land. He had filed a case stopping PW1 from burying his son on the land. He relies on the documents in the list dated 25th February 2019 which were produced *Dex 1-6*.

13. Upon cross-examination, DW1 admitted that PW1 and PW3 are living on the land and they have houses on the suit portion where they have stayed on in excess of 10 years and upto 20 years. He stated that they started living there during the lifetime of his father. He claimed that they breached the welcome given to them by his father as they refused to move out after getting their land. He stated that he got registered through succession and his father did not file any case to remove PW1 from the land. He further stated that he did not produce any document showing the parcel numbers belonging to PW1.

14. The Respondent filed his submissions on 29th April 2021 and submitted that the occupation of the suit land by the Applicant has not been peaceful and peaceful occupation is an integral ingredient in a claim for adverse possession. The Applicant filed his submissions on 30th July 2021 and submitted that he has been in occupation of the suit property for a period of 60 years. He relied on the decision of **Mtana Lewa v. Kahindi Ngala Mwangandi (2015) eKLR.**

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

- a) *Whether the suit before court is sub-judice or res judicata*
- b) *Whether the Respondent is holding the title in trust for the Applicant*
- c) *Whether the Applicants' occupation of the Suit Land became adverse to that of the Respondent; and*
- d) *Who bears the costs of this suit?*

16. The doctrine of sub judice and res judicata is enshrined in Section 6 and 7 of the Civil Procedure Act which provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court;”

17. The test to determine whether the matter is sub-judice or res judicata was laid in the case of **DSV Silo vs the Owners of Sennar [1985] 2 ALL ER 104** as cited in **Bernard MugiNdegwa v James Nderitu Githae & 2 Others [2010] eKLR** and in **Henderson v Henderson [1843] 67 ER 313**, res judicata is described as:

“...where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not(except under special circumstances) permit the same parties to open the same subject of litigations in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

18. The Respondent pleaded that this suit is sub judice as there exists another matter between the parties being BUSIA ELC CASE NO. 133 OF 2016 and annexed a copy of the plaint to the replying affidavit. The prayers sought therein was a permanent injunction and an order to exhume the body of ELLY OMUKAGA BARASA from the suit land. The parties in ELC CASE NO.133 OF 2016 and the land in dispute are the same as in the present suit. However, the cause of action is different as in ELC NO. 133 OF 2016 the cause of action is encroachment/trespass and in the present suit it is adverse possession. At one point the parties expressed interest to consolidate the two suits but no formal application was made. No application was made to stay this suit and this matter having proceeded, the subjudice rule is overtaken by events.

19. The Respondent further pleaded that the Applicant's suit is res judicata as the issues raised in the affidavit in support of the Originating Summons were already canvassed in BUSIA HC P&A 458 OF 2014 and a decision made thereof. He annexed a copy of the ruling issued by the High Court Busia which was on an application for revocation and annulment of the grant issued under Sections 76 and 83(d) of the Law of Succession Act. The cause of action determined by the ruling in BUSIA HC P&A 458 OF 2014 is the revocation or annulment of grant. The claim for adverse possession could not be introduced or heard in a probate and administration cause as such the matter cannot be res judicata.

20. The Applicant has pleaded that the Respondent's father was holding the title in trust for the family as he was the first born son. The Applicant had attached to his affidavit a letter from the chief dated 2/8/2015 and produced as PEX 2 which indicated that they were all entitled to the succession land as the title was held in trust by the eldest son of Ekesa Ekakoro on behalf of the other brothers. Further, PW1 stated in his evidence that the land is ancestral land. These facts are not disputed by the Respondent who stated that the applicant had breached the welcome given when they refused to vacate the land after they got their own land. There is no dispute that the parties herein are related. There seems to be no dispute that each portion occupied by each of the sons is clearly hedged out on the ground. The court is alive to the finding made in succession cause which stated that there was nothing shown that the deceased Okuru was registered in trust of the occupants of SOUTH TESO/AMUKURA/166.

21. 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. The applicant gave evidence and produced documents to buttress his claim for adverse possession. DW1 admitted that the applicant and his witnesses occupied the land during the lifetime of his father and they have been there for a period in excess of 10 years and up to 20 years. DW1 also stated that it was PW3 who tried to block the KETRACO payment but it has not been stated when this incident occurred. The KETRACO dispute seems to have arisen after the demise of the defendant's father which period in my view was after their rights over the suit portion had been extinguished. DW1 denied that the applicant's occupation has been peaceful and claimed that PW1 and his son attacked his son though it has not been stated whether the incident was reported to the police. However, no police abstract or P3 form was produced to corroborate this assertion.

22. It has been acknowledged that there have been several disputes between the parties from the KETRACO acquisition, BUSIA ELC 133 OF 2016, and BUSIA HIGH COURT NO. 458 of 2014 though the latter was in relation to succession proceedings. The time can be said to have stopped running when the defendant filed BUSIA ELC 133 OF 2016 seeking an order of permanent injunction and which case is still pending. From the evidence adduced, by the time the case no 133 was filed in the year 2016, the rights of adverse possession had accrued and there are no rights capable of being enforced against the Applicant in respect of the approximately 4 acres portion occupied by the Applicant. Time did not stop on account of the application for revocation of grant issued in BUSIA HCC NO. 458 of 2014 since it dealt with the administration of the estate of the deceased registered owner who the Respondent has inherited his liabilities such as this suit.

23. **PW1** reached the age of majority in 1994 and in my opinion I hold that time for his claim of adverse possession started running as soon as he established his home that was separate and distinct from that of the registered owner of the land. Further, PW1 and his witnesses stated that there are boundaries which have been planted and well defined and the same was not controverted during cross examination. DW1 has also stated that during the lifetime of his father, there was no attempt to remove the applicant from the suit land. Consequently, from the analysis made herein, I find that the applicant has proved his case on a balance of probabilities. I am satisfied that he is entitled to a portion of the land title no L.R. NO. SOUTH TESO/AMUKURA/166 by virtue of adverse possession.

24. Therefore, I enter judgment for the Applicant by holding that:

- a) **The Applicant has acquired by way of adverse possession a portion of L.R. No SOUTH TESO/AMUKURA/166 measuring 4 acres and which is in his possession.**
- b) **The Respondent shall execute transfer documents for the 4 acres portion to be carved from the suit property known as LR No. SOUTH TESO/AMUKURA/166 in favour of the Applicant within thirty (30) days hereof failure to which the Deputy Registrar of this court shall execute the same to facilitate the registration of the 4 acres' portion in the name of the Applicant;**
- c) **The Applicant shall meet the costs of survey and transfer of the 4-acre portion to be carved from the suit title.**
- d) **The costs of the suit are awarded to the Applicant.**

DATED, SIGNED AND DELIVERED AT BUSIA THIS 10TH DAY OF NOVEMBER 2021.

A. OMOLLO

JUDGE