



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO. 117 OF 2016

NICHOLAS OYIOLO BALERA

JOSEPH BALERA WANYAMA.....PLAINTIFFS

= VERSUS =

JOSEPH BULUMA OBINGO.....DEFENDANT

=AND=

ROMAN BULUMA OBINGO (Defending as legal

representative of JOSEPH BULUMA OBINGO).....SUBSTITUTE

J U D G E M E N T

1. The Plaintiffs sued the Defendant vide the Plaint initially dated on 15th September 2016 and amended on 17th October 2016 seeking the following reliefs:

a) An eviction order.

b) An injunction restraining the Defendant, his family members, servants, agents and all those claiming through him from remaining on, cultivating, disposing off or in any other way dealing with land parcel BUNYALA/BULEMIA/2577.

c) Damages for trespass.

d) Costs of the suit.

2. The Plaintiffs pleaded that they are brothers and the registered owners of **BUNYALA/BULEMIA/2577**. Their claim is that the Defendant is a trespasser having unlawfully moved into the suit property and occupied a portion thereof.

3. The Defendant filed his Statement of Defence on 22nd January 2018 in his capacity as the legal representative of the named Defendant, Joseph Buluma Obingo (deceased). He asserted that he and his family have been in lawful occupation of a portion of the suit property measuring about 2 acres since the 1960s to date. That the said portion was gifted to his grandparents, Roman Obingo Khakono and Kelesenjia Mbeba Obingo, both deceased, by the original owner, the late Buluma Bende.

4. He further pleaded that his family had lived on and cultivated the property for generations with some relatives being buried thereon. The defendant claims that the suit was time barred as per the provisions of the Limitations of Actions Act and that the Defendant and his family were lawfully entitled to the two-acre portion to the exclusion of the Plaintiffs by virtue of the doctrine of Adverse Possession.

5. The suit proceeded for hearing of oral evidence on diverse dates from 28th January 2019. The 1st Plaintiff, PW 1 testified that he purchased the suit property with his brother in 1984 from one Paul Ketsyula. He admitted that the Defendant's family as well as other families including the Defendant's uncle; one Morris, resided on the property having been affected by flooding in the area. That they had temporarily moved into the property as it was on higher ground. **PW1** stated further that the other families later vacated but the Defendant's father pleaded for more time to find an alternative place to relocate to.

6. **PW1** asserted that they followed due process in acquiring the title to the suit property. He added that when they appeared before the Land Control Board in 1991, the defendant's father never raised any complaint. **PW1** stated they later had a case before the District & Provincial

Land Disputes Tribunal and the defendant's father never raised any object. **PW1** said the original number of part of the land bought was BUNYALA/BULEMIA/544 before subdivision into three parcels, BUNYALA/BULEMIA/2577, 2578 and 2580 and shared out among family members.

7. The subdivision and transfers were authorized by the Land Control Board and **PW1** and **2** were subsequently issued with a title deed to the suit property sometime in 1991. **PW1** admitted that the Defendant's father was buried on the suit property with his permission and knowledge. However, the Defendant's father had been sued to vacate the suit property before his demise. On cross-examination, **PW1** admitted that when he purchased the property, he did not know its true dimensions nor whether it extended to the portion which the Defendant's family occupied.

8. **PW1** further stated that there have been cases involving the suit property handled by the Land Disputes Tribunal and the Provincial Appeals Tribunal. He insisted that they were between himself and other parties; the Defendant's father was not involved as alleged by the Defendant. That all the previous cases were decided in his favour hence he has all along had clean and unchallenged title to the property. The plaintiffs produced as exhibits sale agreement; proceedings from the Tribunal; copy of title to the suit land; application for Land Control Board consent; letter of consent. **PW1** said they were living on the land even before they bought it.

9. In cross-exam, **PW1** said he could not remember when the defendant entered the suit land but it was a long time ago. **PW1** reiterated that they bought the land in the year 1984 without knowing it extended to where the defendant lived. That he gave the defendant notices to vacate. That the portion bought belonged to Paul Kechula.

10. **PW2** adopted his witness statement and associated himself with the evidence given by his brother, **PW1**. In cross-exam, **PW2** stated that the defendant came on the suit land because of floods and he was married to two wives at the time. That the defendant was also accompanied by his mother who died later and was buried on the suit portion. That one of the defendant's wives was also buried on the suit land albeit with permission of the second plaintiff. **PW2** did not have in court the letter serving the deceased defendant notice to vacate. That he bought the land while the defendant was already on the land. This was the close of the plaintiff's case.

11. Three witnesses testified on behalf of the Defence. The Defendant, **DW1** reiterated that a 2 acre portion of the suit property carved out of the original BUNYALA/BULEMIA/544 was gifted to his grandmother by her brother, one Buluma Bende after whom his father is named. They occupied the land in 1960 when his father, Joseph Buluma was a teenager but did not seek title documents from Paul Ketsyula because there was no compelling reason to do so. **DW1** testified further that the suit property is the only home he has known since he was born in 1980. That his family occupied the land and enjoyed quiet possession until 2018 when his father started ailing and the Plaintiffs started raising issues. The purported sale to the Plaintiffs was done by the grandsons of Buluma. **DW1** claimed to be entitled to the property by way of adverse possession. Moreover, his grandmother, father and mother were buried on the property.

12. In cross-examination, **DW1** said the suit land was gifted to his grandmother in 1960 although he does not know when demarcation was done in Port Victoria. That the sale to the Plaintiffs was done by the grandsons of Buluma. **DW1** said that his grandmother raised an objection why they were selling her home.

13. The testimonies of **DW2**, Caroline Akong'o Buluma and **DW3**, Anjeline Taabu mostly mirrored that of **DW1**. They are the stepmother and aunt to the Defendant respectively. **DW2** stated that she was married to Joseph Buluma in 1984 and settled on the suit property with him, his first wife and his mother. That the land was gifted to her mother in law by her brother as her original home was prone to flooding. Further, her brother in law, one Morris used to live on a portion of the property but had to move out because it was situated on government land on which a bridge was to be constructed.

14. Both **DW2** and **DW3** claimed that the Plaintiffs had condoled with them during the burials of their kin on their property but they were never told to move out of the suit land. In cross-exam, **DW2** stated that her brother in law called Morris moved out because his portion fell on government land where a bridge was being constructed. **DW3** said they never processed title because she knew that was their home. The evidence of **DW4** was admitted as per his statement on record which is similar to what is already stated herein above.

15. After the hearing was completed, parties put in their final submissions. The Plaintiffs' were filed on 16th October 2019. After rehashing the Plaintiffs' version of events, counsel for the Plaintiffs relied on the documents produced namely the sale agreement, land control board application and consent, green card for BUNYALA/BULEMIA/544 demonstrating that the suit property was initially registered in the names of Paul Kechula, Ogonya Kechula, Oundo Kechula and Mukono Kechula. The title was then closed on subdivision and gave rise to the suit property which was registered in the name of the Plaintiffs. It was submitted further that all this time, the Defendant did not challenge the title of the previous and current owners. Moreover, there is no evidence to the effect that Buluma Bende ever owned the property hence the Defendant has no credible line of defence.

16. The Defendant's submissions were filed on 12th November 2019. It was submitted that the Plaintiffs were not entitled to the injunctive and eviction orders sought as the Defendant's family have been in occupation of the disputed 2acre portion for generations; well in excess of the 12 year adverse possession requirement. The Defendant submitted that the Plaintiff's' claim was time barred within the meaning of section 7 of the Limitation of Actions Act. That the Defendant and his family were unaware of the transfer in ownership and other dealings regarding the property but they were in peaceful occupation all along.

17. I have read the parties' pleadings, reviewed evidence presented by both sides and the applicable law. The law of evidence is that he who alleges must prove. By the Plaintiff's evidence, it is apparent that they are the registered owners of the property and the history of their acquisition is well chronicled i.e. they purchased the property in 1984 and were registered as proprietors in 1991. The Plaintiffs admitted that the Defendant's family has been in occupation of the property even before they bought the suit title. It is also admitted the several of the Defendant's kin have been buried thereon. It is stated in **PW1**'s testimony that he initially did not know that the property they bought extended to the portion occupied by the Defendant & his family.

18. The Defendant on the other hand based his defence on the provisions of section 7 of the Limitations of Actions Act. The section provides

as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

19. Despite being registered as proprietors in 1991, the Plaintiffs brought this suit against the Defendant in year 2016 about 25 years after their registration. PW1 was equally aware of the burials of the Defendant’s relatives on the suit portion which he initially claimed to have no notice of, then admitted that he **“allowed”** which act is quite inconsistent with those of a registered owner asserting his rights on his property. In the amended plaint, it is not pleaded when the Plaintiffs **“discovered”** that the portion occupied was part of their land.

20. The Plaintiffs statement of claim in paragraph 4 of the amended plaint which pleaded that, **“The Defendant has unlawfully moved in and occupied a portion of the Plaintiffs said parcel of land. The Defendant is a trespasser”** went against the trend of evidence adduced by both sides. I say so because the plaintiffs already conceded that the Defendant was already living on the suit portion even before the Plaintiffs purchased it. The Defendant’s occupation would amount to trespass if the Plaintiffs called evidence to demonstrate that the entry of the Defendant upon the suit land was without the permission of the land owner. From the evidence presented, this burden has not been discharged by the Plaintiffs.

21. The Defendant adduced evidence that he had been living on the 2 acre portion for more than twelve (12) years is corroborated with the evidence of the Plaintiff. It was not proved that the Defendant’s father or his family sought permission from the Plaintiffs to live on the land as asserted by PW 1. Further, by openly living on, cultivating and burying their kin on the property it is evident that the Defendant’s family intended to possess the property exclusively and indeed the Plaintiffs were dispossessed by those acts. I am guided by the case of **Adnam Vs Earl of Sandwich (1877) 2QB 485** cited by the Court of Appeal in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** where the Court held thus:

“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 principles 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”

22. The Court in **Chevron (K) Ltd Vs Harrison Charo Wa Shutu (supra)** also quoted the case of **Mweu Vs Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430** which held as follows:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

23. Even if the Defendant entered the land with consent of the land owner, the consent was stopped by operation of law after the lapse of the 12 years when no suit was brought to reclaim the land from the Defendant. The Plaintiffs referred to cases that were handled by the Land Disputes Tribunal but which claims was instituted against Emanuel Mbanda Otuko and not against the Defendant herein. The registration of the Plaintiffs as owner of the title no Bunyala/Bulemia/2577 which included the portion occupied by the Defendant is deemed in equity and law to have been done in trust and for the benefit of the Defendant.

24. In light of the foregoing, the Plaintiff’s claim over the portion of land measuring 2 acres occupied by the Defendant and comprised in title No. Bunyala/Bulemia/2577 has been extinguished by operation of the law. The Plaintiffs’ suit therefore fails and is hereby dismissed. To avoid another suit being filed I shall adopt the finding of the Court of Appeal in the Case of **Gulam Mariam Noordin Vs Julius Charo Karisa Civil Appeal No. 26 of 2015;**

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu [1997] LLR 609 (CAK)*, which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey [1998] LLR 813* where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

25. Consequently, this court does make an order that the Plaintiffs shall transfer to the Defendant the two acre portion of the suit property at the latter’s expense within 30 days from the date hereof, failing which the Deputy Registrar of the Environment and Land Court shall execute, on behalf of the Defendant the necessary transfer documents. Each party to bear their own costs.

Dated, signed & Delivered at BUSIA this 30th day of Jan 2020.

A.OMOLLO

JUDGE