



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT CASE NO. 48 OF 2019 (OS)

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION OF

DEFINED PORTION OF LAND PARCEL SOUTH TESO/OSURETTE/202

JOHN OMUSE.....APPLICANT

= VERSUS =

SIFIROSA AKUMU OBUKON (being the administratrix of the estate

of OBARASA MATIENGI).....RESPONDENT

J U D G E M E N T

1. The Applicant commenced these proceedings vide the Originating Summons dated 11th July, 2019 and filed on the 12th of July, 2019, against the Respondent. The Applicant’s case is that he has acquired by way of adverse possession and rights over a defined portion of land parcel within all that land described as **SOUTH TESO/OSURETTE/202** or any other title derived therefrom as on the ground currently registered jointly in the name of SIFIROSA AKUMU OBUKON subject to succession and for determination of the following questions;

a) Whether the Applicant has been in open, quiet and notorious possession of a defined portion of L.R No. SOUTH TESO/OSURETTE/202 or any other title derived therefrom as on the ground 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 4.2 Ha of L.R No. SOUTH TESO/OSURETTE/202 or any other title derived therefrom as on the ground now measuring 4.2 Ha has become extinguished upon expiry of 12 years from the time the Applicant has been in possession since the year 1950?

c) Whether the Applicant has acquired the title to the said portion of land measuring 4.2 Ha of L.R No. SOUTH TESO/OSURETTE/202 and any other title derived therefrom as on the ground by virtue of adverse possession and whether such title shall be issued for the portion he possesses?

d) Whether the mutation should be done for a defined portion of L.R No. SOUTH TESO/OSURETTE/202 or any other title derived therefrom as on the ground and registration be done accordingly?

e) Who should pay the costs of this application?

2. The Applicant seeks the following orders:

a) That the Respondent’s rights over L.R No. SOUTH TESO/OSURETTE/202 or any other title derived therefrom as on the ground as possessed by the Applicant is extinguished by adverse possession from the time the Applicant acquired the same by virtue of a land sale transaction;

b) That the Applicant do and is hereby granted right of L.R No. SOUTH TESO/OSURETTE/202 or any other title derived therefrom as on the ground;

c) That the Respondents do execute all the relevant documents necessary to mutate and/or curve out a defined portion as occupied on the ground or any other title derived therefrom as on the ground and in default, the Deputy Registrar Busia High Court be authorized to do so after the expiry of a define period.

d) Costs to be borne by the Respondent.

3. The Originating Summons was supported by the Applicant's affidavit dated 11th July, 2019 and annexed was a copy of the green card in respect of the suit land, a copy of the official search of the suit property and a copy of the grant in respect of Busia CM P&A No. 339 of 2016.

4. The Respondent agreed to have her replying affidavit dated 22nd August, 2019 adopted as her defence. In the affidavit, she swore that:

a) She is the registered owner of L.R No. SOUTH TESO/OSURETTE/202 which title she acquired after succeeding the estate of her deceased father OBARASA MATIENGI through Busia Chief Magistrate Succession Cause No. 339 of 2016;

b) The Applicant applied for the revocation of the grant which application was dismissed with orders to the Respondent;

c) It is not true that the Applicant has been living on the suit land for more than 60 years;

d) The Applicant came to the suit land in the year 1992 to take care of the Respondent's sick mother and remained there and refused to move away even after the death of her mother.

5. The hearing commenced on the 8th of February, 2021 with the Applicant calling three witnesses. The Applicant, **JOHN OMUSE IMUKATA** testifying as **PW1** stated that he was a peasant farmer who lived in Amukura sub-county within Busia County. He sued the Respondent because she instituted succession proceedings on their father's estate without involving him yet they were siblings although from different fathers but they shared a mother. That his father was given the suit land in 1945 while the Respondent's father inherited his mother and they sired the Respondent and other siblings. That it is in account of this wife inheritance that the Respondent is claiming the suit land. He concluded by producing his list of documents dated 11/7/2019 as PExh 1 to 3.

6. Upon cross-examination, **PW1** stated that he was born in 1949 even though his ID reflects date of birth as 1952. That his parents were Emanuel Emukati Matiengi and Getruda Akello and they had him and his sister (deceased). That his parents separated when he was about 3 years old and his mother went back to Uganda as she was Ugandan. That when he turned 23 years old, he went to work in Kisumu by which time he was married. That his mother was inherited by Baraza Matiengi who was also living on the suit land and was eventually registered as the owner of the suit land in the year 1971.

7. **PW1** stated further that although he lived in Kisumu from the year 1972 to 1996, his wife lived on the suit land and she only visited him occasionally in Kisumu. That there was a boundary separating Baraza's and Emukata's parcel. That both Baraza and Emukati lived on the same homestead and PW1 built on that homestead as well. That Obaraza Matiengi got registered as the owner of the suit land owner of the land on the 9/8/1973 by which time Emukata had died. That Obaraza died in 1991 when PW1 was away in Kisumu. He concluded that although he has been using the whole parcel of land and his children live thereon, he was not aware that the Respondent was appointed as the administrator of Obaraza's estate.

8. **PAUL OKUTA IMUDOI** testified as **PW2**. He stated that he lives in Lukolis village and he knows both parties in this case. That the Plaintiff is like a nephew and the Defendant is like a niece within their clan set up. He testified that he has known the Plaintiff since birth and he lives on the land adjacent to his plot and he has lived there since he was born so do all his children and grandchildren. That the Plaintiff occupies the entire 11 acres of the land. That Obaraza is a son to his aunt while Emukata was his brother and the Defendant lives where she was married.

9. On cross-examination, **PW2** stated John is the son of Emukata Matiengi who was the son of Igulu. That Obaraza Matiengi was the one of Matiengi. That Igulu and Matiengi were brother and lived on the same land, Igulu on L.R. 251 while Matiengi lived on L.R No. 202. Akello gave Emukata two children while they were living on L.R No. 202. Akello did not live the suit land after she separated from Emukata but Obarasa built her house on the same compound/land and he took control of the land when he married Akello. The land belongs to the Plaintiff as he is the eldest and the only son of the deceased and that according to customs the daughters are not entitled to the land. Upon re-examination, **PW2** stated the Plaintiff has used the land for over sixty years and that opposition only came up in the year 2016 after the death of their mother.

10. **DAVID EPURU** gave evidence as **PW3** by adopting his witness statement dated 23rd February, 2021 as his evidence in chief where he stated that:

a) That Emmanuel Emukata Matieng'i was his cousin and that he stayed with them since childhood;

b) That John's grandparents had the following children: Emmanuel Imukata Matieng'i (John's father), Aginasio Asimeri Mataing, Obarasa Matieng'i among others;

c) That John's father married his wife Akello in 1944 and in 1945 their father Matieng'i decided to curve out a portion of the land and gave it to Emmanuel leaving the other part in his name in trust for his other children including Obarasa Matieng'i.

d) That Obarasa Matieng'i inherited John's mother, Akello when Emmanuel died and they started staying together on the parcel of

land which John's father had been given;

e) That Obarasa has no right whatsoever to claim the parcel given to Emmanuel since he has his own parcel of land;

f) That John's father had been occupying the suit parcel since the parcel was given to him until his demise in in the year 1971 and John has been occupying the said parcel of land since his childhood until now for over 68 years now; and

g) That he knows of his own knowledge that the SOUTH TESO/OSURETTE/202 rightfully belongs to John Omuse since that is the parcel of land that his father was given and that they have been occupying for over 68 years now.

11. During cross-examination, **PW3** stated that he knows Obarasa Matiengi and that he did not have a wife. That he knows Sifirosa Akumu in relation to Akello who was married to Emukata who had two children. Sifirosa was the daughter to Obarasa. That Emukata lived on the same land as Akello and Obarasa.

12. The defence called five witnesses with the Respondent, **SIFIROSA AKUMU OBURON** giving evidence as **DW1**. She stated that she knows the Plaintiff as her neighbour and her brother from different mothers. That the suit land belongs to her father, Obarasa Matiengi and she is the administrator of his estate. That using the grant she processed registration of the suit land in her name. She testified further that her father and mother lived on the suit land and they both died in 1991 and 2016 respectively. That her mother used to cultivate the land and that she brought the Plaintiff to the land and gave him a small portion measuring approximately $\frac{1}{2}$ an acre. That the Plaintiff started using the entire parcel of land after the death of their mother.

13. Upon cross-examination by Okutta advocate for the plaintiff, **DW1** confirmed that the Plaintiff lives on the suit land and that he was brought on the suit land in the year 1992 by their mother. That he has built a home on the land, cultivates the same and has even sold some parts. She stated further that the Plaintiff's son has also built on the land. That no boundary exists for the home and he uses the whole land. She concluded that she is married and lives in Mupea so do her three sisters. In re-examination, **DW1** reiterated that the Plaintiff was only given $\frac{1}{2}$ an acre of land and he lives there.

14. **JOHN ECHOCH KARANI** testifying as **DW2** stated that he lived in Akorot sublocation and is a farmer and chairperson of the clan. He testified that the Defendant is the daughter of Obarasa and Akello and she shares a mother with the Plaintiff. That the Plaintiff was brought by Akello to live on the land in the 1960's but he left in 1972 to trace his father and never returned until 1992. On returning, he was given a portion of land measuring 2 acres. Upon cross-examination **DW2** stated that the Plaintiff and the Defendant share a mother and when their mother died the Plaintiff was living on the land. He confirmed that he is aware that the Plaintiff has been living and using the suit land together with his family.

15. **DAVID EMU OMONGIN** was the third defence witness and he stated that he lives in Likolis village. The Defendant is his cousin while the Plaintiff is the son of Emukala. He stated that the Plaintiff lived on the suit land with his mother and he is the only one who lives on the said land. DW3 adopted his witness statement dated and filed on the 10th of July, 2020 reproduced thus:

a) His father, John's father and Sifirosa's father were all brothers;

b) John's mother Akello had married Emmanuel, John's father and she had two children by him before they separated and she went back to Uganda;'

c) Obarasa later married Akello who came with John. That Obarasa and Akello were blessed with four daughters namely: Sifirosa, Mary, Margaret and Josephine.

d) Upon attaining the age of 18 years, John was advised to go get land from his father but he decided to go get a job in Kisumu.

16. During cross-examination, **DW3** stated that the Plaintiff was using a $\frac{1}{2}$ an acre of land that he had been given by his mother although he was previously using the entire parcel of land. On re-examination, **DW3** stated that the Plaintiff's mother showed him the $\frac{1}{2}$ acre and although he does not remember when this was done, it could be approximately 6 years after his return from Kisumu.

17. **CHARLES EBU ASIMERI** testified as **DW4** stating that he comes from Akoret sub-location and he is a farmer by profession. He adopted his witness statement dated 10th July, 2020 as his evidence in chief where he stated as follows:

a) That he knew Obarasa Matiengi and his wife Akello who are all deceased and were blessed with four daughters: Sifirosa, Mary, Josephine and Margaret.

b) That he knew that Mama Akello before she got married to Obarasa was a former wife to Emmanuel Imakutta where they were blessed with two children (John and a daughter who is deceased). That she married Obarasa after she divorced Emmanuel and John followed her to where she got married.

c) That Obarasa, his wife and daughters were staying alone until 1991 when Obarasa died.

d) In 1993 John came back with his family claiming that he had come to take care of his mother since his father had died and all the sisters were married and there was no one to take care of her and he stayed there until 2016 when his mother died.

e) John sold a part of the suit land and the sisters approached the elders for help on how to succeed the land.

18. Upon cross-examination, **DW4** stated that the Plaintiff has been on the land since 1992 and has been using it. He concluded by stating that although Emmanuel and Obarasa are brothers, they lived separately. On re-examination, **DW4** stated that the Plaintiff has built on a portion measuring approximately ½ acre but he started using the entire parcel of land in 2016 when his mother became sickly.

19. **DESTERIO KACHERO** testified as **DW5**. He stated that he lives in Likolis village and he is a farmer. That the Defendant is the daughter of Obarasa and Akello and he does not know the Plaintiff save that he lives on the suit land. That Akello showed the Plaintiff ½ acre of the land where to build. DW5 adopted his witness statement dated 10th of July, 2020 where he stated that:

a) *Both Sifiroso and John call him father, John Omuse is the biological son to his brother Imakutta while Sifiroso is the daughter of Obarasa Matiengi.*

b) *That Obarasa and Imakutta had their separate parcels of land and Obarasa was the legal owner of the suit land and he died leaving behind the Respondents and her siblings;*

c) *The Applicant has left his father's land and decided to trespass and build on the Respondent's father's parcel of land without any justification;*

d) *The Applicant is motivated by the fact that the deceased never left behind a male heir;*

e) *He makes this statement to have the Applicant render vacant possession of the suit land since he has his own parcel of land.*

20. **DW5** on cross-examination stated that the Plaintiff is the son of Akello and that he is the one currently using the land. **DW5's** evidence marked the close of the Defendant's case and the parties were directed to file their respective submissions within 14 days each.

21. The Applicant filed his submissions on the 30th of July, 2021. He submitted that he has lived continuously and uninterruptedly in the suit land for 60 years and has therefore acquired prescriptive rights over it. That he has proved that his family has been living on the suit land and has grown from children and grandchildren and neither the Respondent and the late Obarasa Matieng questioned the occupation within the 12 years permissible to do so. He concluded by stating that all witnesses have confirmed his Applicant's continuous occupation of the suit land.

22. The Respondent filed her submissions on the 21st of July, 2021. She submitted that the Applicant started utilising the whole parcel of land in the year 2016 when their mother died and that the portion claimed by him is only 2 acres where he resides. It is their submission that this suit is an attempt by the Applicant to disinherit his sisters of their father's land. That the Applicant has failed to prove his Originating Summons and the same should be dismissed with costs to the Respondent.

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

a) ***Whether the Applicant's occupation of the Suit Land is adverse to that of the Respondent; and***

b) ***Who bears the costs of this suit?***

24. The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, CAP 22 Laws of Kenya, which provides that: -

"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."

25. A claimant for the land adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. Although the witnesses have divergent accounts on when the Applicant first took possession of the suit land, they all agree that he had been on the said land for more than 12 years (counting from the year 1992). PW1 stated that he started living on the suit land from the year 1972 but it was his wife who was in actual possession as he was working in Kisumu at the time. PW2 confirmed PW1's testimony and stated that the Applicant utilized the entire parcel of land which is eleven (11) acres. DW1 stated that the Applicant has been living and utilising ½ an acre parcel of the land since 1992 when their mother brought him to the land and it was only in 2016 that he started cultivating the entire parcel of land. DW2 stated that the Applicant was allocated two (2) acres of the land but lives on the entire parcel of land.

26. On whether, she attempted to have the Applicant evicted from the suit land, DW1 stated she has not filed any suit against the Defendant from the year 1992. The witnesses testified to the fact that the Applicant has built on the suit land, had his children build thereon and proceeded to sell some of the land (although no evidence was provided to support the allegation of the sale).

27. For the claim to succeed, must be continuous, open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner. The Applicant has sufficiently proved that his possession of the suit land has been adverse and hostile to that of the true proprietor. His occupation and use has been confirmed by the defendant and her witnesses.

28. The Court of Appeal in the case of **Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamataka Board**

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

29. From the plaintiff’s witnesses accounts, he is using the entire land which is measuring eleven (11) acres. From the defendant’s perspective, some said the plaintiff was given ½ acre while others state 2 acres. The defendant concedes that the plaintiff began using the entire land after the demise of their mother. She however did not go further to state who was using the remainder of the land before their mother died. An adverse possessor is only entitled to the portion of land that they have been actively using for the statutory period and no more than that. Since all the witnesses confirmed that the plaintiff is using the entire parcel of land except he began doing so in the year 2016. I am satisfied that the plaintiff has proved possession of the entire land.

30. In the upshot of the foregoing evidence and analysis I am convinced that the Applicant has proved that his possession of Land Reference Number SOUTH TESO/OSURETTE/202 is adverse to that of the Respondent. The Applicant has therefore proved his case on the balance of probabilities that his possession of the Suit Land was open, actual, continuous and uninterrupted for more than twelve years.

31. In conclusion, I enter judgement in the plaintiff’s favour and hold that:

a) The Applicants’ Originating Summons dated 11th of July, 2019 succeeds.

b) The Respondent executes the transfer documents for the property known as Land Reference Number SOUTH TESO/OSURETTE/202 in favour of the Applicant within thirty (30) days from the date of this judgement. Failure to comply, the Deputy Registrar shall execute the same to facilitate the registration of the Property in the name of the Applicant;

c) This being a matter between family members, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 2ND DAY OF DECEMBER, 2021.

A. OMOLLO

JUDGE