



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 144 OF 2014

1. COLLETA NERIMA OJWANG.....1ST APPLICANT

2. DENNIS MAKOKHA OJWANG.....2ND APPLICANT

3. FRANCIS WAFULA OJWANG.....3RD APPLICANT

- VERSUS -

NOBERT MAKWARA OPIYO..... RESPONDENT

J U D G E M E N T

1. By an amended Originating Summons dated 16/5/2018 the applicants brought a claim seeking for orders;

a. A declaration that the applicants have become the registered owners of a portion of L.R No. Bukhayo/Kisoko/2387 by virtue adverse possession.

b. Costs of the summons be provided for.

2. The respondent opposed the prayers through his replying affidavit sworn on 12th July 2018 and filed on 13th July 2018. He deposed that the occupation of the suit land by the applicants has not been peaceful and uninterrupted as he had previously filed a suit in the lower Court seeking orders of permanent injunction and his eviction. He proceeded to annex a copy of that plaint as “NMO 1”. That this Case was filed as an afterthought and during the pendency of Busia CMCC No. 198 of 2014 hence subjudice.

3. The case CMCC No 198 of 2014; NORBERT MAKWARA OPIYO vs COLETA NERIMA OJWANG was transferred to this Court pursuant to an order made on 25th Feb 2015. Thereafter it was consolidated with this suit. In the plaint by Norbert, he pleaded that he is the registered proprietor of LR BUKHAYO/KISOKO/2387 measuring 7.36Ha. He states that the defendant without any colour of right encroached onto his parcel of land and erected structures thereon as well as cultivating sugarcane and he blocked the plaintiff from entering on to his land.

4. Mr Norbert (hereinafter referred to as defendant) prayed for orders to issue against Coleta (hereinafter referred to as plaintiff) for;

i. An order of permanent injunction restraining the defendant by herself or agents from cultivating, planting, putting into use or in any manner interfering with the plaintiff’s use of LR NO 2387.

ii. An order of eviction be issued against the defendant and anybody claiming through her from LR NO BUKHAYO/KISOKO/2387

iii. Costs of the suit.

5. When the hearing commenced, the plaintiff called three (3) witnesses while the defence called two witnesses. The plaintiff testified as **PW1** on 14/2/2017. She states that she comes from “Segelo B” village, in Nambale area. She is the mother of the 2nd and 3rd applicants. That she was married to Vincent Ojwang Omokor – deceased. **PW1** continued that her late husband was a brother to the defendant’s father. That they had a home on L.R No. Bukhayo/Kisoko/548 which was registered in the name of the defendant’s father in trust for them. **PW1** gave a description of their portion on the suit title as running from the top where there is a river to the bottom where the church is built. That the sizes of the brothers were equal.

6. **PW1** continued that before the death of Vincent Ojwang (plaintiff's husband) and Opiyo Makoli (defendant's father), the brothers had lived peacefully. It is **PW1's** case that they have lived on this portion since 1973 and still lives on it to date with the defendant living on the part left to him by his father Omokor Opiyo. That the defendant took out succession on his father's estate without involving them. After he got registered, the defendant proceeded to destroy the existing boundaries and sub-divided the land creating three numbers 2387, 2388 and 2389. The plaintiff produced the green cards for each of these plots as **Pex 1**. **PW1** is claiming title No. 2387 which she urged the Court to give her as she has no other land.

7. In cross-examination, **PW1** admitted that the defendant had sued him in the lower court Case No. 198 of 2014 over the same parcel of land seeking to evict them. That **Pex 1** showed the defendants' father was the first registered owner. That Opiyo died before her husband and her husband died about 10 years ago. **PW1** said there is no surveyor's report to confirm she lives on sub-division No. 2387. She refused to accept 2 acres the defendant was willing to give her. In re-examination, **PW1** stated that she knew her portion is in L.R No. 2387 after the defendant filed the suit for eviction. That it is the defendant who sub-divided the land that way.

8. **Hadali Dinoi Stanslaus** gave evidence as **PW2**. He also comes from "Segelo B" village. **PW2** said the defendant's father was an elder brother to **PW1's** husband and he knew them both. **PW2** said the two brothers gave a portion of their land to the School and the Catholic Church. That they lived equally on the remaining portion and put a boundary separating their portions. That the two portions ran from the top near the church to the bottom where the river is.

9. **PW2** said he was not present when parcel No. 2387 was created. That the original title No. was 548 before it was subdivided into 3 parcels. **PW2** said he did not know the sizes of the 3 parcels. That the plaintiff's husband died in the year 2007 and the defendant's father died before the plaintiff's husband. That he is a neighbour to the [parties in this Case. **PW2** said that it is the defendant who brought problems when he decided to exclude the plaintiff from the shamba.

10. **Nyangweso Akisa Sibere** testified as **PW3**. He said he is a relative of the defendant's father. **PW3** said he is the one who put the boundary between Vincent Ojwang and the defendant's father. That the portions belonging to the brothers was an equal share of the suit land. **PW3** stated that the plaintiff and her family live where they were left by her husband. In cross-examination, **PW3** said he does not know the number of the parcel where the plaintiffs live. This marked the close of the plaintiffs' Case.

11. The defendant opened his defence as **DW1** on 17/4/2018. **DW1** said the 1st plaintiff is his aunt as she is a sister-in-law of his father. **DW1** said his father died in 1992 and he owned L.R No. 548. It is the defendant's Case that the land was subdivided by his late father. **DW1** stated that he took out letters of grant of his father's estate and produced the same as **Dex 2**. He also produced the green card for L.R no. 548 as **Dex 3**. **DW1** states that L.R No. 2387 was registered in his name and he produced the search as **Dex 4**. **DW1's** case is that the plaintiffs are not entitled to inherit this land. He denied that they have been living on the land in peace.

12. In cross-examination **DW1** said his father had 4 brothers and the plaintiffs husband/father was one of them. That the **PW1's** husband died before his father. **DW1** admitted that the plaintiffs were living on the land they are claiming before Vincent died. That his father had told him that the plaintiffs were on the land temporarily. **DW1** continued he did not include the plaintiffs in the succession proceedings because they were not dependants of his father's estate. That Vincent had no other land. **DW1** said he can give the plaintiffs' 2 acres of the suit land in good faith.

13. **Stella Ekisa Oduori** gave her evidence as **DW2**. She said she was in Court concerning her father's land. She adopted her witness statement dated 7/5/2015 as her evidence in chief. In the statement, **DW2** stated that the defendant is living on L.R No. 2387 which land belonged to their father. That the plaintiffs did not object to the succession process taken out by the defendant in respect of their father's estate. **DW2's** evidence is in support of the defendant's Case for the plaintiffs to vacate the land as the defendant is losing profit for not using the land.

14. In cross-examination, **DW2** said the defendant is her brother while **PW1** is her aunt. **DW2** concedes the plaintiffs have always lived on the place they are. That her father died in 1992 when she was already and adult. **DW2** states that his father had never sued his brother (**PW1's** husband). She was only aware of the Case filed by the defendant against the plaintiffs. This also marked the close of the defendant's case.

15. Both parties filed written submissions gave a summary of the evidence adduced by the parties. The plaintiffs submitted that they have proved their Case while the defendant urged the Court to award the plaintiffs the 2 acres he had offered them. He also prayed for costs of his suit.

16. The claim herein is premised on the doctrine of adverse possession. The question for determination here is to find out whether or not the plaintiffs have proved that they have been peacefully and uninterrupted occupation of the parcel of land for a period exceeding twelve (12) years. The evidence adduced show the parties are related. The nature of the relationship is explained as they derive rights by virtue of their relations to Vincent Ojwang Omkor-deceased and Opiyo Omokor-deceased. It is also not in dispute that the plaintiffs are living on the portion they are claiming.

17. **PW1** stated that she got married to Vincent in 1973 and she started living on the suit portion with her late husband and that she is still living there from then up till now. That the 2nd and 3rd plaintiffs who are her children have also settled on the land. **PW1** went on to state that Opiyo Omokor who is an elder brother to her late husband was registered as owner of L.R No. 548 in trust for all of them. That each of the brothers had their defined portions which they utilised peacefully.

18. The plaintiffs' case is that trouble started when the defendant took out letters of administration of his father's estate without involving them and later proceeded to sub-divide the original No. 548 into 3. **PW1** said she learnt her portion is comprised in the resulting sub-division No. 2387 when the defendant sued her in Busia CMCC No. 198 of 2014 seeking their eviction. The defendant admitted not including the plaintiffs in the succession proceedings because they were not dependants of the late Opiyo's estate.

19. Both PW2 and PW3 corroborated the evidence of PW1. They all gave a description of the portion occupied by the plaintiffs. PW2 said he is a village elder and he is the one who planted the boundary marks which separated the two portions held by Vincent & his brother Opiyo. A green card for L.R No. 548 showed that Opiyo was registered as owner thereof in 1971. It is said that PW1's husband died before the defendant's father. The defendant's father is said to have died in 1992. The defendant claimed that it is his father who sub-divided his land before he died. In my opinion and I so hold, that the subdivision whether done by the defendant or his father did not affect the rights of the plaintiffs as it did not constitute not one of those steps provided in law to stop time from running.

20. The defendant and his witness have not disputed the fact that the plaintiffs are occupying a portion comprised in title L.R No. 2387. The defendant states that he had been told by his late father that the plaintiffs were occupying this land on a temporary basis. The duration of this temporary period is not given i.e when it began running or when it was to stop. Neither was there any evidence rendered to corroborate the assertion that the defendant's father had given his brother this disputed portion on a temporary basis.

21. DW1 also concedes that the plaintiffs have no other land. He offered to give them 2 acres out of the suit land. The defendant did not explain why he was giving them the 2 acres when he had pleaded that they are not entitled to any portion of the suit land and prayed for their eviction. In light of the evidence adduced, the plaintiffs have demonstrated that both constructive trust was created between the two brothers (Vincent and Opiyo) and their families. So that even if Opiyo was the first registered owner, he held the title in trust for the portion that Vincent and his family occupied.

22. Further, the occupation by the Ojwang's (plaintiffs) was open and peaceful. The occupation has been proved to be in excess of 12 years whether counted from 1973 during the lifetime of the defendant's father or from 1992 after his death. Consequently the defendant succeeding his father was subject to the rights acquired by an adverse possessor. The plaintiffs are therefore entitled to the entire portion they are occupying not just the 2 acres the defendant is offering. In the High Court case of Kimani Ruchire –v– Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B, Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”

23. The defendant's counsel in cross-examination of PW1 put to her that she did not have a survey report (which is true) that the land they are occupying is parcel number 2387. The plaintiffs evidence is that they knew they were occupying an equal portion of L.R No. 548. She said she knew her land was comprised in the No. 2387 after sub-division after she was sued by the defendant in CMCC No. 198 of 2014. In that suit the defendant at paragraph 3 and 4 of the plaint thus;

“3. The plaintiff is the registered legal owner and the proprietor of land parcel No. Bukhayo/Kisoko/2387 measuring approximately 7.36Ha.”

“4. That the defendant without any colour of right and without the consent of the plaintiff has encroached into the plaintiffs' parcel and erected structures on it and is cultivating sugar cane plantations on the suit parcel and has blocked the plaintiff from entering into his land hence this suit.”

24. The pleadings in 198 of 2014 confirmed that the plaintiffs are occupying a defined portion. The last question is whether this suit stopped time from running in favour of the plaintiffs. The said suit is still pending. From this court's record, an application dated 24/2/2015 was made by the applicants seeking to have the two suits consolidated (this suit and 198/2014). The orders were made on the 25/2/2015 calling for the file No. CMCC of 198 of 2014 to be transferred to this Court for purposes of consolidation with this case. An order for consolidation was made on 9/11/2015. The two suits thus became one and the issue of the first suit stopping time from running does not arise.

25. Having analysed the evidence adduced by both parties, I am satisfied that the plaintiffs have proved their Case on a balance of probabilities. I enter judgement in their favour as prayed in the Originating Summons. The defendant's claim for permanent injunction and eviction of the plaintiffs from parcel No. Bukhayo/Kisoko/2387 has not proved and is hereby dismissed.

26. Costs of the consolidated suit is awarded to the plaintiffs in the Originating Summons.

Dated, signed and delivered at BUSIA this 30th day of April, 2020.

A. OMOLLO

JUDGE