



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**  
**CIVIL CASE NO. 153 OF 2014 (O.S)**  
**IN THE MATTER OF LIMITATIONS OF ACTIONS ACT**  
**AND**  
**IN THE MATTER OF LR. NO. NORTH TESO/ANGURAI/474**  
**AND**  
**IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION**  
**BETWEEN**

**BEATRICE OKUMU OMONYA**

**ABRAHAM JEREMIA IRUKAN.....APPLICANTS**

**= VERSUS =**

**RASOMO OSILINGI OMUNYONGOR alias**

**RASOMO OMUNYONGORI.....RESPONDENT**

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

1. Beatrice Okumu Omonya and Abraham Jeremiah Irukan took out this Originating Summons dated 24<sup>th</sup> July 2014 against Rasmo Osilingi Omunyongor seeking to be declared as owners of a portion of L.R No. North Teso/Angurai 474 by way of adverse possession. Consequently they are asking for the following reliefs;

- a) That the respondent's rights over a portion measuring approximately 5 acres out of L.R North Teso/Angurai/474 got extinguished by adverse possession upon expiry of the 12 years from the date the applicants came into possession.
- b) That the respondent be perpetually barred from taking and or using L.R. North Teso/Angurai/474.
- c) That the applicant be registered as the proprietor of apportion measuring approximately 5 acres out of L.R. North Teso/Angurai/474.
- d) That the respondent do execute all the relevant documents to facilitate the transfer of a portion measuring approximately out of L.R. No. North Teso/Angurai/474 into the name of the applicant and that in default the deputy registrar do execute the same in the place of the respondent.
- e) That the respondent do pay the cost of this Case.

2. The respondent opposed the Summons through a replying affidavit sworn on 13<sup>th</sup> November 2014. He deposed that L.R. No North Teso/Angurai/474 is registered in his name. The respondent denies that the late Richard Eric Etori who is the husband to the 1<sup>st</sup> applicant purchased a portion of the suit land measuring approximately 5 acres in 1980 and paid the consideration in full. The respondent further denied that the sold portion was demarcated on the ground and that the 1<sup>st</sup> applicant established a homestead on it since 1981 and he has been using it to date. The respondent added that the 1<sup>st</sup> applicant is not a widow of the late Richard Eric Etori as she alleges.

3. The respondent had also filed a suit Bungoma ELC Case No. 159 of 2014 on 27<sup>th</sup> August 2014 against Beatrice Omonya and Abraham Irucani asking for orders of eviction of the defendants, their servants and/or employees from the suit title North Teso/Angurai/474. He had pleaded that on 13/2/2014 the defendants had consented to vacate from the suit land having been trespassers but to date despite several pleas they failed to do so hence this suit. The particulars of trespass were given thus;

(i) *Entering the plaintiff's land without permission.*

(ii) *Constructing and ploughing houses on the suit land without permission.*

(iii) *Failing to vacate the land despite demand made.*

4. The suit by Rasimo was consolidated with the current suit BSA ELC Case 153 No. 2014 on 2/3/2017 and heard as one Case. The 1<sup>st</sup> plaintiff opened her Case on 15<sup>th</sup> May 2018 as **PW1**. **PW1** stated that she came from Angurai village in Busia County. She is the mother of the 2<sup>nd</sup> plaintiff. **PW1** said that on 6<sup>th</sup> January 1980, the defendant sold land to her and her husband in order for him to raise school fees for his children. That she occupied the sold land in 1981, built 3 grass-thatched houses on it and started living thereon. That she was chased away from the suit land in the year 2017.

5. **PW1** further stated that the sold portion was demarcated on the ground and in or about the year 2000, the 2<sup>nd</sup> plaintiff established his home on the suit land by building one permanent house, a semi-permanent and one grass thatched houses where he lives to date. The 1<sup>st</sup> plaintiff attached a certified copy of the register to show the land is registered in the defendant's name. **PW1** said she is in actual possession of the land and has developed it extensively and uses it to the exclusion of everyone else for a period exceeding 20 years. She denied consenting to vacate the suit land on 13/2/2014 but later in court she admitted she signed the agreement of 13/2/2014 because it showed they bought the suit land.

6. **PW1** in cross-examination stated that when they bought this land, it was registered in the name of the defendant's father. She also stated that they are using a portion measuring 5 acres. That the defendant also lives on a portion of the land with his 5 sons. That she is the one who produced the money that was used to purchase the land. That for now she is not living on the land but she still cultivates it. In re-examination **PW1's** evidence was that the defendant destroyed her house that was on the land. She reported the matter to the police and the defendant was charged. That she was chased from the land after the filing of this case.

7. Dominic Imae Onindo testified as **PW2**. He is a brother-in-law to the defendant. He adopted his written statement dated 19/8/2015 as his evidence in chief. In the statement, **PW2** said that it is within his knowledge that the husband of the 1<sup>st</sup> plaintiff the late Richard Etori purchased a portion of land measuring 5 acres from the defendant in 1980 from L.R No. North Teso/Angurai/474. That he was present alongside other witnesses including the late Fabiano Emojong, Patrick Ambuchi and Murunga Ernest. **PW2** said he was a witness to the defendant during the transaction.

8. **PW2** continued that the purchase price paid was cash Kshs.6,500 and heads of cattle and an agreement was made. Thereafter a sisal boundary was fixed demarcating the sold portion in the presence of Fabiano Emojong who was the village elder then. **PW2** added that the 1<sup>st</sup> plaintiff and her late husband took actual possession of the sold portion by establishing a homestead and planting food crops. He also stated that the 2<sup>nd</sup> plaintiff who is the son to the 1<sup>st</sup> plaintiff has also built a home on the suit portion.

9. In cross-examination, **PW2** said the purchaser built on the land then left. That the purchaser who was the 1<sup>st</sup> plaintiff's husband started using the land after purchasing it. Currently the 1<sup>st</sup> plaintiff does not live on the land. That the written sale agreement got burnt in the house. As at date of testimony, **PW2** did not know what was being planted on the land. That the 2<sup>nd</sup> plaintiff may have been 15 years old at the time of the sale. In re-examination he maintained he was present when the land was bought. That the 1<sup>st</sup> plaintiff was also present and sisal boundaries were planted.

10. The second plaintiff testified as **PW3**. He said that the land was purchased by his late father in 1980. That he grew up living on this land. That they also grew crops and planted trees on it. In the year 2000, he established his homestead by building 3 houses and a pit latrine. **PW3** stated that the respondent has not interfered with his physical occupation and use of the land. That all his friends, relatives and neighbours know the land belongs to him. He urged the Court to allow their claim.

11. During cross-examination, **PW3** said he was born in 1978 and he has lived on the suit land since he was a child. **PW3** said they have never left the land until recently when he was chased away and his house demolished. He admitted that the defendant sued them for eviction in Bungoma Civil Case No. 159 of 2014. He reported the defendant to the police and he was charged. **PW3** admitted he does not have letters of administration in respect of his father's estate.

12. **PW4**, Ben Etyang who is a resident of Adanya sub-location within Busia County. He confirmed that the husband of the 1<sup>st</sup> plaintiff purchased the suit land from the defendant and was demarcated on the ground. **PW4** also confirmed that the 1<sup>st</sup> plaintiff and her husband established a home therein and later the 2<sup>nd</sup> plaintiff established his home thereon around 2002. **PW4** stated that the 2<sup>nd</sup> plaintiff engaged him in building his permanent house. That there exists a boundary separating the plaintiff's portion and the defendant.

13. In cross-examination, **PW4** said he is 56 years old and he knew both the 1<sup>st</sup> plaintiff's husband and the defendant. That the purchaser was buried on a separate land from the suit land when he died in 1997. That currently no one is living on the land. **PW4** could not tell when the plaintiff left the land. This marked the close of the plaintiffs Case.

14. The defendant opened his defence on 9<sup>th</sup> February 2019 giving evidence as **DW1**. The defendant said he never sold the land and he does

not know the plaintiffs. **DW1** said his son called Joseph is the one using the land. **DW1** said the husband of the 1<sup>st</sup> plaintiff never bought land from him and the plaintiffs have never lived on his land.

15. In cross-examination, **DW1** said he knew the 1<sup>st</sup> plaintiff's husband but denied selling land to him. That the plaintiffs never built on his land but built on the side of land belonging to Sulemeti secondary school. **DW1** said Omonya – deceased used to farm a portion of the suit land measuring 7 acres pursuant to an agreement they had that he uses it for 7 years then leave. **DW1** denied boundaries were placed on the 7 acre portion. That the 2<sup>nd</sup> plaintiff had built a 2 roomed – house which came down.

16. Joseph Omunyongor Silingi testified as **DW2**. He lives in Amurai and is a farmer. **DW2** states that he is a farmer and son of the defendant. That he knew as a fact the plaintiffs do not live on the suit land as they vacated it in January 2014 upon being served with summons to enter appearance in Bungoma ELC Case 159 of 2014.

17. During cross-examination, **DW2** said he is a retired soldier having retired in the year 2006. By 1981 he had already joined the army. **DW2** confirmed that he found the 2<sup>nd</sup> plaintiff living on the suit land in the year 2006 and was also farming on approximate ½ acre in the middle of their plot. According to **DW2**, the 2<sup>nd</sup> plaintiff lived there from 2006 – 2014 but his houses are no longer on the land. That as at 27/8/2014, the 2<sup>nd</sup> plaintiff had not moved out of the land. **DW2** said he is the one who prepared the agreement of 13<sup>th</sup> February 2014, and it was about “Switi”, nothing to do with the suit land.

18. JOHN EPONG OSILINGI testified as **DW3**. According to **DW3**, the 2<sup>nd</sup> plaintiff got on to the suit land in the year 2007 when he farmed and built on it. In his written statement, he stated that the plaintiff having no houses on the suit land as they vacated in January 2014 voluntarily after being served with summons in Bungoma ELC Case No. 159 of 2014.

19. **DW3** in cross-examination said he was born in 1972. That the 2<sup>nd</sup> plaintiff was brought on the land in 2007 by his mother and built a house of 16 iron sheets, grass-thatched kitchen and a toilet. That the 1<sup>st</sup> plaintiff lives in the nearby Sulemeti secondary School. That the 1<sup>st</sup> plaintiff cut trees that were on the suit land to pay school fees. That when the plaintiffs came to build on the suit land is when they heard they were claiming purchaser's interest. **DW3** did not know the size of land the plaintiff was using. That the whole land is 5 acres and they also occupy a part of it. **DW3** denied he has ever been arrested over dispute arising from the suit land. This marked the close of the defendant's Case.

20. The claims herein is for adverse possession by the plaintiffs on one part and for orders of eviction on the second part of the defendant. The parties filed their respective submissions which I have read and considered. The questions the court seeks to answer;

*(a) When did the plaintiffs get on to the suit land?*

*(b) Did their occupation extinguish the rights of the defendant or should eviction orders issue?*

*(c) Who pays the costs of the suit?*

21. According to the plaintiffs' evidence, they settled on the suit land in 1981 after they purchased it. It is not in dispute the land is registered in the name of the defendant as shown in the green card and copy of title produced in evidence. The defendant's evidence was contradictory as to when the plaintiffs occupied the land. According to the defendant in his plaint (ELC Case 159 of 2014) he did not specify when the plaintiffs entered the land. He only stated that they agreed to vacate on 13/2/2014. In his replying affidavit to the Originating Summons, the defendant merely denied the averments put forth in the Originating Summons and the supporting affidavit thereof.

22. In his oral evidence, **DW1** said the plaintiffs never built on his land but instead they built on the land belonging Sulemeti Secondary School. He added that he had allowed the plaintiff's husband and father to farm a portion of the land measuring 7 acres for 7 years. According to **DW1**, Omonya left the land in the year 1980. He vehemently denied there was a sale between him and Omonya. From the evidence of **DW1**, the plaintiffs' first contact with the land through their husband/father was in 1980. **DW1** however did not give details of their agreement with the late Omonya.

23. **DW2** and **DW3** stated that the 2<sup>nd</sup> plaintiff went to the land and built on it in the year 2006 and 2007 respectively but that he vacated in January 2014 voluntarily after being served with Summons to Enter Appearance in ELC Case No. 159 of 2014. From the record, ELC Case No. 159 of 2014 was filed on 27<sup>th</sup> August 2014. Further the defendants referred to an agreement dated 13/2/2014 where the plaintiffs had agreed to vacate the suit land. **DW1** said the plaintiffs failed to honour this agreement hence the reason he filed Case No. 159/2014. So when did the plaintiffs enter or leave the land according to the defendant?

24. In cross-examination of **DW2**, he confirmed that as at August 2014, the 2<sup>nd</sup> plaintiff was still on the suit land. If this was not the position, then the defendant would not have filed a suit for eviction in August 2014. The other limb is when did the plaintiff enter the land? **PW1** said in 1981 after they purchased the land in 1981 and later his son (2<sup>nd</sup> plaintiff) built his homestead in the year 2000. The evidence of **PW1** and **PW3** is corroborated by that of **PW2** who said he was a witness of the defendant during the sale transaction. Although the defendant denied selling the land, the evidence of **PW2** was quite believable as it was not vitiated even during cross-exam. **PW4** also confirmed building the 2<sup>nd</sup> plaintiff's permanent house. **PW4** was a neighbour to both parties herein. The plaintiff's evidence that they are using 5 acre portion of land that is demarcated was consistent. They have thus proved that they have been in possession of a defined portion from 1981 to August 2014 when the defendant chased them away by force.

25. The chasing away did not extinguish their rights under adverse claim as it was involuntary after this suit was filed. The defendant's suit was also filed after the lapse of 12 years of occupation by the plaintiff. The suit was thus time barred according to the provisions of Section 7 of the Limitation of actions Act cap 22. It provides thus;

***“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.”***

26. Did the occupation by the plaintiffs extinguish the rights of the defendant? For a claim of adverse possession to succeed, the owner must have been dispossessed of the use of the land or discontinued using it. In the Case of *Kweyu Vs Omutut (1990) KLR 709 at page 716* Gicheru JA had this to say;

***“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers and defeasible title upon the possessor. (Colour of title is that which a title in appearance, but in reality is). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such as title as will afford colour; and, second such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”***

27. The defendants have not stated what use they have put the portion claimed by the plaintiffs. The entire land is measuring **6.6ha** equivalent to 16½ acres. The plaintiffs are claiming a portion measuring 5 acres. They also conceded that the defendant are living on the remaining portion i.e. 11½ acres (about 4.4ha). **PW4** stated that after the defendant chased the 2<sup>nd</sup> plaintiff away, no one is living on it. I wish to add that the chasing away was also criminal as the legal process were not followed.

28. There is no dispute that the 2<sup>nd</sup> plaintiff had structures on the suit land. Whether the structures comprised of a small house built with 16 iron sheets, a grass-thatched kitchen and a toilet as stated by DW2 and DW3 or a permanent house, semi-permanent house and a toilet; the long and short of it is that it proved occupation. The plaintiffs’ occupation of the land was hostile to the rights of the defendant as the defendant denied selling the land to them and or granting him permission. You do not need consent for a claim of adverse possession to accrue.

29. In view of the evidence adduced, I am satisfied that the plaintiffs’ case has been proved within the standards provided in law. Accordingly I allow their claim and enter judgement as prayed in the Originating Summons dated 24<sup>th</sup> July 2014. The net effect of this is that the defendant’s claim for eviction fails and is hereby dismissed.

30. Costs of the suit (treated as one suit after consolidation) is awarded to the plaintiffs.

**Dated, signed and delivered at BUSIA this 29<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**