



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT BUSIA**

**CASE NO. 30 OF 2019 (O.S.)**

**IN THE MATTER OF LR. NO. BUKHAYO/BUYOFU/441**

**AND**

**IN THE MATTER OF LIMITATION OF ACITONS ACT**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT**

**ISSA ISAYA WESECHERE.....APPLICANT**

**VERSUS**

**1. FREDRICK ISEME ESENYI**

**2. PROTAS ARONI AWUOR .....RESPONDENTS**

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

1. This Originating Summons was taken out against Fredrick Iseme Esenyi and Protas Aroni Awuor who are sued as administrators of the estate Bushuru Oroni – deceased. The applicant prays for orders;

**1. That the respondent's right over a portion of L.R. No. BUKHAYO/BUYOFU/441 measuring 0.8Ha got extinguished by virtue of adverse possession upon expiry of the 12 years from the date the applicant came into possession.**

**2. That the respondents be perpetually barred from taking and or using a portion of L.R. No. BUKHAYO/BUYOFU/441 measuring 0.8ha presently under the occupation and use by the applicants.**

**3. That a portion of L.R. No. BUKHAYO/BUYOFU/441 measuring 0.8ha be and is hereby registered in the name of the applicant as absolute proprietor thereof.**

**4. That the respondent do execute all the relevant documents to facilitate the sub division and transfers of a portion of L.R. No. BUKHAYO/BUYOFU/441 measuring 0.8 hectares into the name of the applicant and that in default the deputy registrar do execute the same in the place of the respondents.**

**5. That the respondents do pay the costs of this case.**

2. The summons was supported by the applicant's affidavit sworn on 12<sup>th</sup> April 2019. Mr. Wesechere deposed that he purchased a portion of L.R. No. Bukhayo/Buyofu/441 (hereinafter referred to as the suit land) measuring 0.8ha from Eliud Wetsuli Barasa on 17<sup>th</sup> March 2006. He deposed further that the portion sold was clearly demarcated on the ground and he was allowed to take vacant possession thereof. The applicant states that he has been planting sugarcane on the suit portion since then to date. That he has also constructed 4 semi-permanent houses which he uses. It's the plaintiff's case that Eliud Wetsuli Barasa was entitled to the portion he sold as a beneficiary. According to the applicant, he is enjoying quiet and peaceful user of the sold portion and urged the court to issue the orders prayed for.

3. The pleadings were served on the defendants; the 1<sup>st</sup> defendant was served while at Busia Law Courts on 15<sup>th</sup> May 2019 and the 2<sup>nd</sup> defendant was served at his home in Budokomi village in Esikinga sub-location on the same date (15/5/2019). There is an affidavit of service filed on 3<sup>rd</sup> June 2019 giving the details of the service. However the defendants never entered appearance or file a defence to the claim.

4. The matter was set down for hearing on 19/11/2019 on which date the plaintiff opted to adopt the affidavit and witness statement filed together with the documents as his evidence in chief. Thereafter the plaintiff filed his submissions on 6<sup>th</sup> December 2019. In his statement, the plaintiff attached a sale agreement made between him and Eliud Wetsuli Barasa on 17<sup>th</sup> March 2006 selling 2 acres (0.8ha) of L.R. No. Bukhayo/Buyofu/441 for a consideration of Kshs.85,000 which was paid on execution of the agreement. The plaintiff also annexed a certified copy of records of the suit title (green card). The green card indicates at entry No. 5 the defendants were registered as personal representatives of the deceased in case No. 86 of 2007. At entry No. 6, the plaintiff registered a caution on 21/3/2012 claiming purchaser's interest. The caution was later withdrawn pursuant to an order made in civil suit whose number is not given but filed in the year 2012.

5. The plaintiff has cited the Cases of *Samuel Kihamba Vs Mary Mbaisi (2015) eKLR and Kilimo Shutu and 6 Others Vs Godrey Karume (2017) eKLR*.

In both cases, the court of Appeal held that for a claim of adverse possession to succeed, the claimant must demonstrate that;

***“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”***

6. Although the suit is undefended, this court is still under obligation to determine whether the plaintiff has proved his case. In his evidence, the plaintiff stated that he was put in possession immediately on execution of the agreement on 17<sup>th</sup> March 2006. This suit was filed on April 2019 therefore it was filed on the 13<sup>th</sup> year. The plaintiff said the portion sold is demarcated on the ground. That he has been using the land by planting sugarcane and has also developed it with 4 semi-permanent houses. Lastly the plaintiff stated that the person who put him in possession was claiming a beneficial interest on the land.

7. The plaintiff was thus put into possession by a person who although not the registered owner but had a stake in the land. The plaintiff has demonstrated that he has been using the two (2) acres of land for a period in excess of 12 years and his evidence has not been contradicted. Consequently the registration of the defendants in the year 2007 as personal representatives of the deceased owner did not extinguish the plaintiff's interest since the administrations did not take steps to recover the portion occupied by the plaintiff.

8. I am therefore persuaded to hold as I hereby do that the plaintiff has proved his case on a balance of probabilities and is entitled to the orders claimed in the summons. Accordingly I do enter judgment for him in terms of **prayers 1 – 4** of the Originating Summons. Since the suit was not defended, I award no costs to the plaintiff.

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

**A.OMOLLO**

**JUDGE**