



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 88 OF 2017 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22 OF THE LAWS OF KENYA

AND

IN THE MATTER OF L.R NO. BUNYALA/MUDEMBI/1049

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

BETWEEN

WILLIAM ODUORY MUKANGAH.....PLAINTIFF

VERSUS

URSULA NABWIRE ODHIAMBO (As personal Representative of the estate of

BUNDENJIANA ABUNGU OJIAMBO.....DEFENDANT

J U D G E M E N T

1. The applicant William Oduory Mukangah took out the Originating Summons against Ursula Nabwire Odhiambo sued as the personal representative of the estate of Bundenjiana Abungu Ojiambo – deceased. The applicant asked for ORDERS;

(1) That the respondent's right over the whole parcel of land known as L.R No. BUNYALA/MUDEMBI/1049 measuring 1.4Ha got extinguished by adverse possession upon expiry of 12 years from the time the applicant came into possession that is from the year 1984.

(2) That the applicant be ordered to be registered as the owner of L.R No. BUNYALA/MUDEMBI/1049.

(3) That the respondent be ordered to execute all the relevant statutory documents required of her to facilitate transfer of LR No. BUNYALA/MUDEMBI/1049 measuring 1.4Ha into the names of the applicant and that in default the Deputy Registrar of the Court do execute the same in place of the respondent.

(4) That the respondent be perpetually barred and or enjoined from taking, using and or from in any way interfering with the applicant's portion of suit land.

(5) That costs of this case be borne by the respondent.

2. The summons is objected to by the respondent's replying affidavit sworn on 6th March 2018. She deposed *inter alia*;

(i) That the estate is yet to be distributed.

(ii) The applicant has no claim over L.R No. Bunyala/Mudembi/1049 as he has not been staying on it.

(iii) That the applicant is only entitled to a refund of monies paid to the estate of deceased and no more.

3. The applicant gave evidence as **PW1**. He said he bought land from the defendant's mother and paid for it in five instalments. **PW1** said he was buying the whole land measuring 1.4ha and the relatives of the seller knew of the transaction. **PW1** said Bundenjiana took him to the Land Control Board and they obtained a consent. At the stage of transfer, the seller lost her ID, got sick and eventually died before the transfer was registered. **PW1** continued that he fenced the land using trees on the land which was Bunyala/Mudembi/1063. He produced the memos confirming payments as **Pex 1 – 3**, copy of Land Control Board application and consent to transfer in respect of L.R NO 1049 as **Pex 6**.

4. **PW1** states that he started using the sold land in the year 1985. That he has been planting nappier grass, ordinary grass, 6 bee hives, cassava plants and trees for firewood. That the defendant is not living on the suit land as she lives where she is married in Siaya. **PW1** also produced copy of the certificate of official search for L.R No. Bunyala/Mudembi/1049 as **Pex 7**.

5. During cross-examination by Mr. Okuta learned counsel for the defendant, **PW1** answered that he bought L.R No. Bunyala/Mudembi/1049 in 1984. That it was registered in the name of the defendant's husband who was dead at the time and the deceased did not have letters of administration at the time. **PW1** said he had transfer form duly filled but he had not produced it as an exhibit. That he had nothing to show he is farming L.R No. Bunyala/Mudembi/1049. **PW1** stated there exist a criminal case between him and Henry Mwenze for destroying a structure on the suit land. That the defendant cheated him that she would include him as a beneficiary in the succession cause.

6. Nicholas Okello Ndagwa testified as **PW2**. He said that he is a brother to the Bundenjiana – deceased. He was aware her late sister sold land to the plaintiff. That the land was given to the deceased by her father. **PW2** state that one of the deceased children was present during the talks about the sale. That the plaintiff is the one using the land he bought. During cross-examination, **PW2** admitted he did not give the number of the land sold in his statement dated 24/4/2017. That the plaintiff does not reside on the land he bought but he uses it. This marked the close of the plaintiff's case.

7. The defendant gave her evidence on 4/12/2019. She comes from Bukoba in Siaya County. **DW1** said the plaintiff is like a nephew to her. **DW1** denied that the plaintiff bought suit land stating that by 1984 the land number 1049 was not existing as registered. **DW1** continued that she knows by 1985 the said land 1063 belonged to Odhiambo Onyango and it became her mother's in 1992 vide Succession Cause No. 56 of 1990. That the plaintiff has never lived on the suit land and his attempt in the year 2016 to put a structure resulted into a fight which fight resulted in the defendant's nephew being charged in Criminal **Case No. 286B of 2017**. That the plaintiff was taking advantage of having assisted them during their mother's funeral to grab their land fraudulently. **DW1** concluded that the principle of adverse possession does not apply if indeed the plaintiff bought the land as he says.

8. In cross-examination, **DW1** said she was sure the plaintiff did not buy the land No. Bunyala/Mudembi/1049. That in **Pex 2** where her name appears, the plaintiff had asked for their ID Cards and he only told them he wanted to plant nappier grass. **DW1** said she does not know Thomas Ndagwa, Mary Anyango Opondo is her elder sister while Leornida Achieng is their last born. That the plaintiff asked for their ID's to be buying them sugar which he never did. **DW1** did not know whether or not her mother appeared before the Land Control Board. That the plaintiff is their neighbour and their mother had allowed him to extend his land abut into the suit land. This marked the close of the defence case.

9. Both parties filed their respective submissions which gave summaries of the evidence adduced. The respondent wondered why the plaintiff did not bring his claim in the Succession Cause and or vide a plaint. The respondent also wondered in her submissions why the land purchased in 1984 but the parties only went to the Land Board in 1993. That the plaintiff did not establish the essentials of adverse possession. The applicant on his part submitted that the evidence of the defendant in her statement is at variance with the evidence given in Court as she admitted in cross-examination that her mother allowed the plaintiff to extend his boundary into the suit land but not the whole of it. That the plaintiff has demonstrated through documents that he purchased the suit land.

10. The ingredients to prove a claim for adverse possession is settled both in statute law under Section 7 of the Limitation of Actions Act and through Case law. In the often cited Case of *Sisto Wambugu Vs Kamau Njuguna (1983) eKLR* the ingredients were restated thus;

(a) Possession does not become adverse before the end of the period for which permission to occupy has been given.

(b) The owner must have lost his right to the land by either being dispossessed of it or having discontinued his possession of it.

11. The question as to whether the applicant ought to have brought his claim through the Succession Cause or via plaint for specific performance was immaterial because the time already began to run in his favour after the time for enforcing the contract had expired (*based on the dates in the sale agreements*). The Originating Summon is thus properly before the Court. **The question for the Court's determination is whether or not the plaintiff has shown he dispossessed the owner of use of L.R No. Bunyala/Mudembi/1049 and/or whether the owner had discontinued use of the land.**

12. The plaintiff in his evidence stated that he started using the suit land from 1985. **Pex 2** is a sale agreement dated 1/8/1984 executed between Bundenjiana Ojiambo and the plaintiff over L.R No. Bunyala/Mudembi/1049. The respondent is listed as one of the witnesses although the document does not show the witnesses appended their signatures. **Pex 3** is also dated 1984 for purchase of the suit land. The plaintiff further produced a copy of application of Land Control Board consent to transfer and a letter of consent to transfer issued on 20/4/1993 in respect of the suit parcel. **DW1** stated the agreements were forged but left it at that. She never mentioned whether she had taken up the issue of forgery with investigating agencies. **DW1** during cross-examination said she was uncertain whether or not her mother – Bundenjiana ever attended the Land Board for purposes of obtaining the consent to transfer the suit land to the plaintiff. She had the option of verifying this by applying for minutes from the relevant control board to challenge the plaintiff's evidence but she neglected to do so.

13. The plaintiff's documents on how he got on to the land thus remain uncontroverted. The defendant alleged that parcel No. Bunyala/Mudembi/1049 was not in existence in 1984 thus it was not available for sale. She only presented copy of register for Bunyala/Mudembi/1063. This averment remained at that.

14. In respect to possession the plaintiff narrated to Court how he has been using the land i.e. through farming of cassava and beehives, planting nappier grass and trees for firewood. The defendant on her part stated that she lives in Siaya. The attempt they made at repossessing the land was when her sister's son called Henry Mwenze destroyed the plaintiff's structure on the suitland. The said Henry Mwenze who was charged with a criminal case was not called to give evidence to support the defendant's case. The said criminal case is still pending so it does not add much value to the defendant's case. In essence, the evidence on record show that defendant had discontinued use of the suit land.

15. Even though she acquired the title through transmission, the same did not stop time running in favour of the plaintiff. In conclusion, I am satisfied that the plaintiff has proved his case on a balance of probabilities and is therefore entitled to be registered as the owner of L.R No. Bunyala/Mudembi/1049. Accordingly I grant him Orders **1, 2, 3 and 4** of the Originating Summons. Each party to bear their respective costs of the suit.

Dated, signed and delivered at BUSIA this 15th day of April, 2020.

A. OMOLLO

JUDGE