



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 113 OF 2013

(Formerly HCC NO. 11 OF 2009 (O.S))

WAZIRI AWILI.....PLAINTIFF

VERSUS

VENANCIUS MUTSWENJE.....DEFENDANT

JUDGEMENT

1. This suit was instituted here via an originating summons dated 15th April, 2019. The plaintiff – **WAZIRI AWILI OMARI** (who was applicant in the o.s) instituted it against the defendant – **VENANCIUS MUTSWENZE** (who was respondent). The dispute between the parties relate to Land parcel **L.R NO BUKHAYO/MUNDIKA/2967** (hereinafter “*the suit land*”) which the plaintiff claims as an adverse possessor. The defendant is the registered owner of the suit land.

2. The plaintiff has invited the court to determine the following questions:

- a. Whether the applicant, now the plaintiff, through his father, the late Kaburu Komba Omari, has been in open and notorious possession of L.R NO BUKHAYO/MUNDIKA/2967 for a period exceeding 12 years.
- b. Whether the respondent’s, now defendant’s, title to L.R NO BUKHAYO/MUNDIKA/2967 became extinguished upon expiry of 12 years from the time the father to the plaintiff went into possession of the land.
- c. Whether registration of the defendant as owner of L.R NO BUKHAYO/MUNDIKA/2967 should be cancelled and the plaintiff be registered as owner thereof.
- d. Who should pay costs of this case.

3. The plaintiff anticipates a favourable determination of the questions posed and he therefore prays for the following orders:

- a. That the defendant’s rights over L.R NO. BUKHAYO/MUNDIKA/2967 got extinguished by adverse possession upon expiry of 12 years from the date the father of the plaintiff came into possession.
- b. That the defendant be perpetually barred from taking and/or using L.R BUKHAYO/MUNDIKA/2967.
- c. That the defendant do execute all the relevant documents to facilitate the transfer of L.R NO BUKHAYO/MUNDIKA/2967 into the names of the plaintiff and that in default the Deputy Registrar do execute the same in favour of the plaintiff and in place of the defendant.
- d. That the plaintiff be registered as the proprietor of L.R NO BUKHAYO/MUNDIKA/2967.
- e. That the defendant be ordered to surrender the title deed to L.R NO BUKHAYO/MUNDIKA/2967 to the plaintiff and that in default the production of the said title deed be and is hereby dispensed with by the Land Registrar.
- f. That the defendant do pay the costs of this case.

4. The background and/or rationale for the suit is to be found in the supporting affidavit that came with the application. The plaintiff

deposes, inter alia, that his late father – **Kaburu Komba Omari** – bought the suit land from **Alfred Egesa** on 13th March, 1975. He went into possession and allegedly even undertook some developments. But he never got to become the registered owner. At the time of purchase, the suit land was a portion of a larger parcel then said to be NO 1690.

5. That larger parcel was later subdivided into several parcels, with the suit land becoming parcel NO 2967. That parcel was registered in the name of the defendant. By virtue of the alleged continuous possession of the suit land by the plaintiff's late father, the plaintiff avers that he has become entitled to the land by adverse possession. According to the plaintiff, his late father's continuous use and possession of the suit land and his own continued use and possession entitles him to own the suit land as an adverse possessor.

6. The defendant responded to the suit by way of a replying affidavit filed on 11th January, 2010. He deposed, inter alia, that he is the registered owner of the suit land. The plaintiff is said to have been interfering with it and the plaintiff even sued him here in Busia vide PMCC NO 45 of 2008. This suit itself was said to have been filed with a view to delaying the conclusion of the other suit. The court was asked to dismiss the plaintiff's case.

7. The court started hearing the matter on 25th January, 2016. The plaintiff testified as PW1. The substance of his evidence is much in concurrence with the substance of his supporting affidavit that came with the originating summons. From his evidence, it is manifest that parcel NO 2967 came from parcel NO 1690. But during cross-examination he didn't explain why the green card availed is showing the same parcel as having come from parcel NO 2323.

8. PW2 was one **SAMUEL OGUTU MUYODI**, a caretaker or tenant of the plaintiff on the suit land. His evidence contains some history. He said the plaintiff's late father owned the land, having bought it in 1976. The father even put up some seven rooms for renting. But death came calling before he could become the registered owner. That, according to him, happened in 1999. Then in the year 2006, the plaintiff himself put up a building on the land. When that happened, somebody else came claiming ownership of the suit land. There was a dispute filed at the land tribunal. The seller of the suit land to the plaintiff's late father testified at the tribunal and the tribunal found that the suit land belonged to the plaintiff.

9. The defendant testified as DW1. He talked of having bought the land from one Michael Kubebea in the year 2002. Nobody was living on it, he said. He then got his title deed. Then in the year 2006, he found that the plaintiff had put up a building on the land. He sued him in the lower court. According to the defendant, it is not true to say that the plaintiff has been in quiet or peaceful occupation since 1976. The plaintiff, defendant said, entered the land in the year 2006.

10. The seller of the suit land to the defendant, **MICHAEL WAFULA KUBEBEA**, testified as DW2. He sold it, he testified, at KShs. 140,000/=. He himself had bought it at 60,000/= from one Alfred Egesa. Egesa seems to be the very person said to have sold the land to the plaintiff's late father. Alfred had not transferred the suit land to DW2 but he had handed over his original title deed to him. When DW2 therefore sold the land to the defendant, he made arrangements with Alfred to transfer the suit land directly to the defendant. That is precisely what seems to have happened.

11. The defendant's own brother testified as DW3. His role was that of assisting the defendant to acquire the land. The defendant himself was based in Nairobi while DW3 was teaching at a local school around.

12. After hearing, both sides filed written submissions. The plaintiff's submissions were filed on 23rd January, 2020. He submitted, inter alia, that the plaintiff "*through his late father and the family took possession of the land, erected thereon rental accommodation, and the premises have accommodated paying tenants to date*" Alfred Egesa was said to have transferred the suit land to the defendant in the year 2002 but the plaintiff submitted that he was already an adverse possessor by then, having possessed the land for a period of about 30 years. According to the plaintiff, his "*possession and occupation became adverse to the title on 13th March, 1975.*"

13. The defendant's submissions were filed on 20th January, 2020. He submitted, inter alia, that the plaintiff had failed to annex an abstract of title to his originating summons and that makes his suit a non-starter. He further faulted the sale agreement shown here purporting to show sale of the land by Alfred Egesa to the plaintiff's late father. The defendant submitted that the agreement is illegible. Further still, the plaintiff was faulted for not having letters for administration in respect of his late father's estate.

14. The defendant averred also that the plaintiff has not been in peaceful or quiet possession of the suit land as there has been several disputes relating to or surrounding the suit land. The court was urged to dismiss the suit.

15. I have considered the suit as filed, the evidence on record, and rival submissions. It is clear to me that the plaintiff's claim of adverse possession is through his late father, who is said to have purchased the land. The questions formulated in the originating summons for the court to determine and the submissions that came after conclusion of hearing makes this very clear. Yet, knowing that he was claiming an entitlement due to his late father, the plaintiff never bothered to obtain letters of administration. The defendant pointed out this serious flaw in the plaintiff's case in the submissions. And I agree.

16. And the reason for agreeing is simple. The pleadings, evidence, and even submissions make it clear that the plaintiff is tracing his claim of adverse possession way back to 1975 when his late father is said to have bought the land. If the defendant was claiming to be an adverse possessor in his own right, the need for letters of administration would not arise. But even such a claim would have to contend with the numerous suits filed relating to the suit land and the fact that the requisite period for one to become an adverse possessor may not have been attained by the plaintiff himself by the time he filed this suit. For it seems clear to me that a clear manifestation of his right as owner is traceable to the year 2006 when he put up a building there. He filed this suit some seven (7) years later, that is in 2013. The requisite period for adverse possession is 12 years. The plaintiff therefore is not an adverse possessor without the possession enjoyed by his late father. He clearly needed letters of administration. His own possession is not sufficient to make him an adverse possessor.

17. In my view, it is not necessary to consider anything else in this matter. Any suit concerning a claim belonging in or relating to an estate

of a deceased person becomes a non-starter if the requisite grant from Probate and Administration Court has not been obtained. This is what one gathers from the decided cases of NATHANIEL O. KHISA VS MARY KHISA NYANYI & 3 OTHERS (2013)eKLR, PETER KARANJA MWANGI VS JOSEPH KAMANDE & ANOTHERS: HCC NO 146 OF 2008, NYERI and TROUSTIC UNION INTERNATIONAL AND INGRID URSULA HEINZ VS MRS JANE MBEY and ALICE MBEYU CA NO 145 OF 1990.

18. The defect of the plaintiff's case herein is incurable and I hereby dismiss it with costs.

Dated and signed at Kericho this 8th day of July, 2020.

.....

A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 22nd day of July, 2020.

.....

A. OMOLLO

JUDGE