



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 65 OF 2015**

**JOSEPH OWINO OCHIENG.....PLAINTIFF**

**VERSUS**

**JOHN ODHIAMBO.....DEFENDANT**

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

1. The plaintiff Joseph Owino Ochieng by way of an amended originating summons dated 3<sup>rd</sup> April, 2019 prayed for determination of the following questions;

- 1) **Whether or not L.R BUNYALA/MUDEMBI/10 was an ancestral land?**
- 2) **Whether or not L.R BUNYALA/MUDEMBI/10 was originally allocated to Monicah Oyuyo mother of Leo Omwoki Ondusi and Clement Adongo Ondusi, grandmother to the applicant and the respondent?**
- 3) **Whether or not Clement Adongo, Agnes Agolla Adongo, Charles Ochieng Adongo, Leonard Omwoki occupied L.R BUNYALA/MUDEMBI/10 before Land Adjudication process in 1972 died and were buried on this land?**
- 4) **Whether or not Clement Adongo's family and Alloys Ochieng's family respected the portions occupied by each party since demarcation process to date?**
- 5) **Whether or not the applicant has been in quiet and uninterrupted occupation of L.R BUNYALA/MUDEMBI/10 since birth to date?**
- 6) **Whether or not the applicant is entitled to be registered as a proprietor of a portion in his occupation by way of adverse possession?**

And a judgment to be entered for him that;

- a) **Land parcel No. Bunyala/Mudembi/10 has been adversely possessed by the applicant for over 12 years.**
- c) **Costs of the suit.**

2. The plaintiff had sworn an affidavit dated 18/6/2015 in support of the originating summons. He deposed that his father and Agnes Adongo's children were born and grew up on the suit land. That Agnes had filed a complaint before the Land Disputes Tribunal which Tribunal decided in favour of the respondent. However, the decision of the tribunal was quashed on 31/7/2014 vide Busia HC J.R Misc. Application No. 2 of 2011. That the respondent proceeded to undertake succession proceedings and subsequently he became the registered owner through transmission. The applicant deposed that the respondent failed to disclose to the succession court that he was entitled to 1½ share of the suit land which they have openly and uninterruptedly used.

3. The defendant pleaded that he is the absolute registered proprietor having acquired the same from his father through succession cause No. 235 of 2010. That he is not related to the plaintiff and the plaintiff has no right or interest over L.R No. Bunyala/Mudembi/10. That the plaintiff has always used Bunyala/Mudembi/9 until 2010 when he trespassed on a portion of title No. 10. He denied the allegation that the plaintiff has been in quiet and uninterrupted occupation for a period of 12 years. That the plaintiff is not entitled to the reliefs sought.

4. After the pleadings closed, parties called oral evidence. The plaintiff called three (3) witnesses in support of his case while the defence called two. The plaintiff testifying as **PW1** stated that the suit title was allocated to his grandmother during adjudication in 1972. That the defendant's father who was born out of wedlock continued to live on the suit land through the intervention of the plaintiff's great

grandmother called Monica Oyuyo. That they have always respected the boundary marks showed to him by Monica Oyuyo. According to the plaintiff, the defendant lives on parcel No. 11.

5. In cross-examination, the plaintiff said that both his father Leonard Adongo and mother Elizabeth Achieng died without filing a claim over L.R No. 10. That he did not obtain letters of administration of the estate of his father or mother nor get letter of authority to bring a claim on behalf of his 3 siblings. **PW1** confirmed that his father and the defendants were not brothers. He knew L.R No. Bunyala/Mudembi/3207 which belongs to Charles Ochieng Adongo. That his (plaintiff) house is on plot No. 10 not 3207. That his parents were alive during adjudication but he did not understand why the suit title was registered in the name of the father to the defendant. The plaintiff was claiming the land pursuant to Luo customs (of inheriting it from his father).

6. Blasio Ochieng Augustino gave evidence as **PW2**. He is a retired farmer and said he knows both the plaintiff and the defendant. **PW2** said that he knows the plaintiff lives where his parents lived on parcel No. 10. According to **PW2**, the defendant lives on plot No. 11. He adopted his witness statement filed in court on 6/12/2016. That when family members discovered the mistake of title No. 10 registered in name of defendant's father they had, the dispute was resolved and boundary marks were planted separating Leo Omwoki's family and that of Clement Adongo Ondusi which boundaries have been maintained to date.

7. In cross-examination, **PW2** said Monica who is a grandmother of the plaintiff has no relations with the defendant. That in their place, children lay claim to lands owned by their parents. That as far as he knows, Monica was the owner of the suit land. That he was aware the plaintiff built his house on the suit land 10 years ago.

8. Charles Ochieng Adongo adopted his witness statement filed in court on 6/12/2016 as his evidence in chief. He stated that to his knowledge Bunyala/Mudembi/10 was meant for Monica Ondusi but Alloys Ochieng caused the records to read him alone through his father Leo Omwoki Ondusi who worked with the land adjudication officers. That upon discovery of this irregularity, they reported the matter to the clan elders. That the elders resolved that Adongo retains where his home is and Leo Omwoki retains where his son Alloys Ochieng had built on and that the elders planted a boundary. The witness added that his wives and son plus the two mothers of the plaintiff were all buried on the suit land.

9. During cross-examination, **PW3** stated that his mother Margaret Adongo had no land registered in her name. That the register for L.R No. 9 was opened on 2/10/1985 and has since subdivided it into 3 portions. He gave his brother Paul Adongo L.R No. 3206. **PW3** denied showing the plaintiff where to build on L.R No. 10. That he was present during the adjudication. He denied that Alloys Ochieng was on the suit land during adjudication. That none of the defendants' relatives challenged the plaintiff while he was building his house. This marked the close of the plaintiff's case.

10. The defence opened his case with his evidence on 11/6/2020. He stated that he lives on Bunyala/Mudembi/10 while the plaintiff lives on parcel No. 9. That no surveyor has been brought to confirm that the applicant lives on parcel No. 10. He adopted the contents of his replying affidavit which I have paraphrased herein above. In cross-examination, the defendant said they are neighbours with the plaintiff. **DW1** said he had no objection to the place where the plaintiff currently lives on as it is on a boundary between parcel No. 9 and 10.

11. Jacton Obondo Nanja testified as **DW2**. He also adopted his statement dated 14/6/2017 as his evidence in chief. **DW2** stated that he neighbours the suit plot and they are separated by a road. That the defendant inherited L.R No. 10 from his father while the plaintiff lives on parcel No. 3207 which was a subdivision of parcel No. 9. That it is the plaintiff's father pushing him to grab a portion of the suit parcel. This marked the close of the defence case.

12. Parties advocates filed brief written submissions. The applicant urged the court to enter judgment as prayed for in the plaint on account of the defendant's admission that he had no objection to the portion where the plaintiff lives/built on. The defendant on his part submitted that whereas the plaintiff's pleading is anchored on adverse possession, his evidence advanced a claim of customary trust. That Monica Oyuyo has never been the registered owner of the suit parcel. That the plaintiff has not proved the ingredients of adverse possession set out in **Kweyu Vs Omutut (1990) KLR 709**. Further that there is no expert evidence to show the actual position the plaintiff occupied. He urged the Court to dismiss the plaintiff's case with costs to him.

13. In my reading of the plaintiffs' pleadings it is both a claim of adverse possession and customary trust. His oral evidence endeavoured to demonstrate the existence of customary trust. This is gleaned from the plaintiff's witnesses evidence that the land was initially owned by his grandmother Monica Oyuyo who lived on the land together with the plaintiff's father called Leonard Omwoki. However, the Court is called to determine whether the plaintiff proved either of his two claims.

14. Starting with the claim of adverse possession pleaded, the plaintiff is claiming 1½ portion of Bunyala/Mudembi/10. He said that they have lived on the suit land uninterrupted for a period in excess of 12 years as he was born on the land. That they always respected the boundaries shown to them. The register for parcel No. 10 was opened on 2/10/1985. Time would therefore start running from this date (2/10/1985). The defendant on his part pleaded that the plaintiff always lived on parcel No. 9 and only moved in 2010 to build a boundary between parcel No. 9 and 10. That he had no objection to where the plaintiffs house is.

15. From the evidence of the plaintiff and his witnesses, it is stated that he lived and built his house on parcel No. 10. The size of land the plaintiff and his family occupied was given as 1½ of the whole land. The plaintiff stated that he was born and brought up on the land. His claim under adverse possession can only run when he disconnected from depending on his father i.e. upon attaining the age of majority. He did not give his date of birth. **PW3** alluded that the recent house built by the plaintiff was to replace the old one which collapsed. No mention/evidence was led on when the first house was built.

16. The burden of proof was upon the plaintiff to discharge that he had lived on the suit land openly and uninterrupted for a period in excess of 12 years. However, the plaintiff in my view failed to demonstrate that his occupation was in excess of 12 years for the reason stated that no indication was made when he delinked from his father and or grandmother to enable the Court count time. He also did not bring the suit on behalf of the estate of his father or grandmother so time for purposes of this case cannot be computed from when his father and

grandmother were on the land.

17. Is the plaintiff entitled to the suit land by way of customary trust? The plaintiff's evidence states that his grandmother and parents lived on the suit land and were indeed buried on it. His evidence on place of burial of his parents is corroborated with the evidence of PW3 who added that he also buried his two wives and a son on the suit parcel. Section 30(g) of the Registered Land Act Cap 300 provides thus;

**“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –**

**(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”**

18. Similar position was added in section 28 (b) of the Land Registration Act 2012 also provides thus;

**“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –**

**(b) trusts including customary trusts;”**

19. The law does acknowledge claims based on customary trusts. I hold that it is misleading for the defendant to submit that the plaintiff deviated from his pleadings by leading evidence for a claim based on customary trusts. In paragraph 1 – 3 of the Originating Summons refers to L.R No. Bunyala/Mudembi/10 being ancestral land and whether or not Clement Adongo, Agnes Agola, Charles Ochieng and Leonard Omwoki all occupied Bunyala/Mudembi/10 before the adjudication process and were buried on it. Besides stating that he is the absolute registered owner by way of transmission, the defendant did not lead evidence to suggest that Clement, Agnes, Charles and Leonard previously did not live on this land. He also did not controvert the averment that the plaintiff's parents and grandmother were all buried on the suit land.

20. It is the defendant who alleged that the plaintiff lives on parcel No. 9. He later on changed to say that the plaintiff is living on the boundary of plot No. 9 and 10. In my opinion and I so hold, the plaintiff having called evidence to support that he lives on parcel No. 10, he did not need a survey report to confirm that. If the defendant held otherwise, then the burden shifted on the defendant to prove that indeed the plaintiff is not living on parcel No. 10 as he alluded to.

21. Having established that his parents lived on a portion of parcel No. 10, I am in agreement with the plaintiff that he is entitled to claim the land utilised by his parents through customary practices. He did not need letters of administration to so claim. The registration of the defendant as owner thereof is subject to the existing customary rights of the plaintiff.

22. The Supreme Court in the case of *Isack M'wangi Kiebia Vs Isaaya Theuri & Ano (2018) eKLR* while pronouncing itself on the issue of customary trusts quoted the Court of Appeal in *Mbui Mukangu v. Gerald Mutwiri Mbui (2004) eKLR (O'kubasu, Githinji & Waki, JJA)* the Court in embracing the concept of a customary trust, stated:

*“It cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from possession and occupation of part of the registered land which strictly it (sic) may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act.”*

23. I conclude that the plaintiff is entitled to bring a claim for customary trust based on his occupation and the occupations by his parents and has proved his claim on a balance of probabilities. Accordingly, I enter judgement for him on the following:

**(a) That he is entitled to a portion of the suit title Bunyala/Mudembi/10 which he is in occupation of.**

**(b) The size of the portion awarded to be confirmed by the County Land Surveyor Busia County who is directed by the Court to visit the suit land to ascertain whether the portion occupied by the plaintiff is 1½ size of the entire land or otherwise. The cost be met by the plaintiff.**

**(c) The matter be mentioned on 26/11/2020 for the Court to make final Orders after report by County Land Surveyor is filed.**

**Judgement dated, signed and delivered at BUSIA this 24<sup>th</sup> day of September, 2020.**

**A. OMOLLO**

**JUDGE**