



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 36 OF 2016

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

AND

IN THE MATTER OF LR. BUKHAYO/MUNDIKA/349

IN THE MATTER OF LR. NO. BUKHAYO/MUNDIKA/351

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION

BETWEEN

1. MICHAEL RABARE RAMOYA

2. RAJAB IBRAHIN WESONGAAPPLICANTS

3. BRIAN OSINYA WANYAMA

-VERSUS -

STEPHEN OKOTA BARASA.....RESPONDENT

J U D G E M E N T

1. The 3 Applicants jointly sued the respondent laying claim by way of adverse possession to L. R. Bukhayo/Mundika/349 and a portion of Bukhayo/Mundika/351. The applicants are seeking for orders;

1. That the Respondent's right over L.R. No. Bukhayo/Mundika/349 and L.R. No. Bukhayo/Mundika/351 got extinguished by adverse possession upon expiry of 12 years from the time the Applicants came into possession that is from the year 1983, 1987 and 1981.

2. That L.R. No. Bukhayo/Mundika/351 be ordered sub-divided into 3 portions of 0.5 acres, 1.5 acres and 4.422 acres and the 1st and 2nd Applicants be ordered to get registration of 0.5 acres and 1.5 acres respectively while the 3rd Applicant be ordered to get registration of the whole of L.R. No. bukhayo/Mundika/349 measuring 1.1 Ha (2.717 acres).

3. That the respondent be ordered to execute all the relevant statutory documents required of him to facilitate transfer of the portions measuring 0.5 acres and 1.5 acres out of L.R. No. Bukhayo/Mundika/351 into the names of the 1st and 2nd applicants and that in default, the Deputy Registrar of the court do execute the same in place of the Respondent.

4. That the Respondent be ordered to execute all the relevant statutory documents required of him to facilitate transfer of the whole of L.R. No. Bukhayo/Mundika/349 into the names of the 3rd Applicant and that in default, the Deputy Registrar of the court do execute the same in place of the Respondent.

5. That the Respondent, his family members, servants, agents and those claiming through him be perpetually barred and or

injunctioned from disposing, taking, entering, using and or from in any way interfering with 1st and 2nd Applicants' portion measuring 0.5 acres and 1.5 acres respectively out of L.R. Bukhayo/Mundika/351 and the 3rd Applicant's portion being the whole of L.R No. Bukhayo/Mundika/349 measuring 1.1 Ha (2.717 acres).

6. That costs of this case be borne by the Respondent.

2. The facts in the Originating Summons were supported by the affidavits of each of the Applicants sworn on 19th April 2016. The 1st Applicant deposed that he bought 0.5 acres of land from L.R. Bukhayo/Mundika/351 from the late Mingili Orada in the year 1983. That he paid the entire purchase price and began using it immediately by digging a pit latrine and farming it. That it is now 30 years and the entire world knows the land belongs to him. The 2nd Applicant deposed that his father Ibrahim Barasa – deceased bought 1.5 acres out of Bukhayo/Mundika/351 from the Respondent in 1987. That the entire purchase price was paid and the Respondent put Ibrahim – deceased into physical possession. The 2nd Applicant deposed that his father proceeded to build his home and small scale farming. The 3rd Applicant deposed that his late father bought a parcel of land Bukhayo/Mundika/349 measuring 1.1 ha in the year 1981. That his late father, mother, step mother and siblings moved on to it and have been in actual possession of the said parcel for 35 years now.

3. The Respondent contested the claim by filing a replying affidavit sworn on 27th June 2016. He deposed that he is the administrator of estate of Mingili Orada who died on 11/2/1985 and Barasa Orada who died on 12/4/1976. That Mingili and Barasa were joint owners of L.R Nos Bukhayo/Mundika/349 and 351. The Respondent deposed that the applicants have no capacity to institute this suit. Secondly, he deposed that neither Barasa Orada nor Mingili Orada sold the applicants or any other person any portion of the suit parcels. He further denied selling any portion of the aforesaid lands to the applicants. The Respondent deposed that the applicants have never been in open or quite possession of any part of the suit parcels for a period exceeding 12 years as alleged or at all. That the applicants' claim is unclear, inconsistent and unsustainable in law. He urged the court to dismiss it with costs.

4. At the close of the pleadings, parties called oral evidence with the plaintiffs calling six (6) witnesses while the Respondent called two (2) witnesses. The 1st plaintiff testifying as **PW1** stated that he lives in Nambale. **PW1** said he knows the defendant as the son of the person who sold him the suit land. He adopted his witness statement dated 19/4/2016. **PW1** avers that he lives on the portion of the land he bought measuring $\frac{3}{4}$ acres and has never had a fracas with anyone. He continued that when he bought the suit land, the Respondent was living in Mumias. **PW1** added that they never went to the Land Control Board because tracing the defendant was difficult. Later on they agreed as co-plaintiffs to buy land for the defendant to live on. The witness relied on the documents attached to his affidavit and the list dated 28/11/2019 in support of his case.

5. In cross-examination by Mr. Fwaya learned counsel for the defendant, **PW1** answered that he purchased $\frac{3}{4}$ acre L.R No. 351 in November 1981 from Mingili Orada. That his copy of the sale agreement was taken away from him by the area chief and at the time of purchase, Barasa Orada was deceased. That the Succession Court directed them to file this case to determine the size of land he had bought but no survey exercise has been undertaken. That he knows the boundaries of the land sold to him. **PW1** concluded that they live on parcel 351 with the family of Barasa Ibrahim (2nd Applicant's family). In re-examination, **PW1** stated that the senior chief took the agreement from him saying he was going to use it to resolve the dispute. That he reported him to the Divisional Officer but until now, he has never received the agreement back.

6. Rajab Ibrahim Wesonga (2nd Plaintiff) testifying as **PW2** stated that it is the defendant who sold his father land measuring $1\frac{1}{2}$ acres in 1987. That they have lived on the suit portion from 1987 to date. **PW2** added that when his father died, the defendant did not raise any issues and **PW2**'s father was buried on this portion. He continued that in the succession proceedings, the defendant acknowledged them as buyers.

7. During cross-examination, **PW2** conceded that he did not have a sale agreement. That he is a neighbour to the 1st and 3rd plaintiffs. **PW2** admitted that when the defendant sold them land in 1987, the registered owners were both deceased and the defendant was not the administrator of their estate. That he called a private surveyor to ascertain their size although he did not have his report. **PW2** did not know who was using the remainder of L.R 351.

8. The 3rd plaintiff testified as **PW3**. He stated that he entered the land in 1981 having purchased from the defendant's father. That they lived peacefully until they buried their father on 20/1/2001 when the defendant said he did not know them. He adopted his witness statement and supporting affidavit as his evidence.

9. In cross-examination, **PW3** said in 1981 he was 3 years old. That he was in court to claim land bought by his father. That he had not brought a surveyor to measure the land bought and the seller died before taking his father to the Land Control Board. He could not confirm if his father bought land the same time as the 1st and 2nd plaintiffs. He also did not know the sizes occupied by the 1st and 2nd plaintiffs.

10. Irene Barasa who is the mother to the 2nd plaintiff testified as **PW4**. She corroborated **PW2**'s evidence that the defendant sold land to her husband and they are living on it. In cross-examination; **PW4** said she was born in 1962 and got married in 1982. That at the time of her marriage her husband had sired the 2nd plaintiff by a different woman. She avers that she was present when her late husband bought the land. That they had a sale agreement which she gave to the chief after the death of her husband in December 2011. The witness knew the portion sold to them was $1\frac{1}{2}$ acres. That they have 4 houses on the land.

11. Afrikanus Osinya Mwenge was the plaintiffs' second last witness. He stated that he knew both the plaintiffs and the defendant as they all live in Mabale. He came to corroborate the plaintiffs evidence that they had bought land L.R No. 5201 for the defendant. **PW5** added the defendant lives on that land to date and produced the sale agreement as **Pex 9**. In cross-examination, the witness said the sale agreement did not state the plot number nor the identity cards of the people transacting. That the 3 plaintiffs paid the agreed purchase price of Kshs.14,000.

12. **PW6** Dismas Egesa stated that he used to be a "Liguru" for Mabale and Mauko between the years 1982 – 1990 and know both parties herein as residents of Mabale. He adopted his witness statement dated 19/7/2016. **PW6** averred that Ibrahim Barasa bought land from the

defendant in 1987. He carried out the measurements and planted boundaries during the exercise in the presence of other *ligurus* and the assistant chief. That the portion sold to Ibrahim was the remaining portion and that the defendant lived in Mumias and has never lived on the suit lands.

13. In cross-examination, **PW6** said he does not live on L.R 351 and he did not know his parcel number. That he was present when the plaintiffs were buying land although he had forgotten the parcel numbers. That he was paid Kshs.100 for being a witness between Ibrahim Barasa and the defendant. That the defendant sold the whole land to Michael. That later on the defendant backtracked on his agreement and wanted a portion of the land he sold. **PW6** stated that a committee was formed and the chief decided he should get a share of the suit parcel. That it is a result of this decision that made the plaintiffs to buy the defendant alternative land. In re-examination, **PW6** said that when Ibrahim came to buy the suit land, the 1st plaintiff was already there. The plaintiffs closed their case at this stage.

14. The defendant opened his defence on 30/6/2020 by adopting the contents of his replying affidavit signed on 27/6/2016 together with the documents attached thereto as **Dex 1-9**. The defendant stated that he got land numbers Bukhayo/Mundika/349 and 351 through inheritance from his father after he took out letters of administration of his estate and the estate of Mingili Orada. That the plaintiffs filed objection in the Succession proceedings (**Dex 6, 7 and 8**) but the objection was dismissed. The witness said he had no information of sale by the previous registered owners. He averred that he left with his mother in 1962 and when he returned in 1994, he found the plaintiffs living on the suit land.

15. **DW1** continued that they had a case before the assistant chief but none of the plaintiffs produced any sale agreement. He concluded that he cannot give the applicants land because none of them had evidence of purchase. That on the ground, the 1st applicant uses 2 times 100 x 50 of a plot; 2nd plaintiff uses two plots of 100 x 50 each while the 3rd applicant uses ½ acre and he uses the remainder of the land.

16. In cross-examination, by J. V. Juma learned counsel for the plaintiffs, **DW1** stated that he has no clan relationship with the plaintiffs. That Barasa Orada died in 1976 while Mingili died in 1985. That he knew Rajab's (2nd plaintiff's) father because he found him on the land. He denied selling land to the 2nd applicant's father. He also denied the averment that the applicants bought him land where he currently lives. That he returned from Samia where he grew up and found the plaintiffs on the suit parcels. That he took steps to remove them through the *liguru* and later through the succession proceedings. **DW** admitted it is the plaintiffs who met the costs of the succession proceedings as he did not have money. He denied using the chief to get the sale agreements from the plaintiffs.

17. In re-examination **DW1** stated he never sold land to any of the applicants and that they have never shown him copies of their sale agreements. That he returned to the land in 1994 and found the applicants there. He did not know when they came to the land. That he has settled his wife on the unoccupied portion.

18. Ignatius Wabwire Muyaga testified as **DW2**. He stated that he is a cousin to the defendant's father. He stated further that he knew the 1st plaintiff but not the 2nd and 3rd plaintiffs. That the applicants have no relationship with Barasa and Mingili Orada. That the 3 never purchased the suit parcels and it is the defendants who is entitled to the two parcels through inheritance.

19. In cross-examination, **DW2** said he comes from Esigulu sub-location opposite Mabale sub-location opposite Mabale sub-location while the defendant comes from Abahami. He denied that Brian is son to the defendant's cousin. That he was present at the meeting before the assistant chief and none of the plaintiffs produced any sale agreements. That Michael was given land as a cobbler to do his business. In re-examination, **DW2** said the meeting before the chief was in relation to the land. He re-affirmed that he did not know the 2nd and 3rd plaintiffs neither did any of the plaintiffs have any family relations with them. This also marked the close of the defence case.

20. Each of the counsels filed their respective submissions. The plaintiffs re-hashed the evidence adduced by both sides submitting that the Respondent was aware that the suit parcels had been sold when in 1994 the applicants opted to buy him alternative land after the Respondent threatened to commit suicide. That the Respondent was reported to the authorities because he was not willing to provide title deeds to the applicants. It is the plaintiffs' submissions that their occupation has been quiet and uninterrupted for a period of more than 12 years and it is immaterial that they did not produce any sale agreement. In respect to the 2nd and 3rd plaintiffs not obtaining letters of grants of the estates of their fathers, they submit that these plaintiffs sued in their own rights and not on behalf of the estates of the deceased. The plaintiffs urged the court to find their claim as proved.

21. The defendant on his part submitted that the plaintiffs evidence is full of inconsistencies. For instance, the 1st plaintiff pleaded that he purchased 0.5 acres of L.R No. 351 but in his evidence stated that he bought ¾ acres. Secondly that the absence of the sale agreements shows the suit property was never bought from him nor his father. He submitted that in 1987 he was not the registered owner of the suit property and he had not taken out letters of administration therefore any purported sale by him amounted to intermeddling with the deceased property thus any such agreement is a nullity.

22. The defendant relied on the provisions of section 3(3) of the Law of Contract Act which requires any disposition in land to be in writing. Further that in light of the dismissal of the plaintiffs' objection in BSA HC P&A Cause No 394 and 395 of 2012 claiming purchaser's interests renders this suit *res judicata*. It is the defendant's further submissions that since the allegation of purchase was not proved, it is not clear when time in regard to adverse possession began to run. He also relied on the holding in ***Muchanga Investments Ltd Vs Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR*** that a claim for adverse possession cannot co-exist with a claim for purchaser's interest.

23. The defendant further relied in the holding in ***Mmbooni M'thaara Vs James Mbaka (2017) eKLR*** that **"there can never be an entry under a colour of right when the alleged agreement between the plaintiffs and the defendant has not collapsed."** According to the defendant the statutory period could only run from 2016 thus the plaintiffs are not entitled to the reliefs sought. Lastly, the defendant submitted that the 2nd and 3rd plaintiffs claim must fail for want of letters of administration of the estate of their deceased fathers. For these reasons, the defendant urged the court to dismiss the claim with costs because there is no proof of the ingredients of a claim for adverse possession.

24. From the pleadings, the evidence adduced and the submissions rendered, this court frames the following 3 questions as arising for determination;

- a. **Whether or not this suit is res judicata BSA HC P&A No. 394 & 395 of 2012.**
- b. **Whether or not the plaintiffs have proved the ingredients for a claim of adverse possession.**
- c. **Whether or not the 2nd and 3rd plaintiffs lacked capacity to sustain a claim in respect of the suit properties.**

25. Section 7 of the Civil Procedure Act Cap 21 sets out the rules upon which a suit can be declared res judicata. The defendant annexure S.O-6 is the affidavit to protest the confirmation of grant filed by the 1st plaintiff herein. In it, the 1st plaintiff deposed that he is a purchaser and the grant should not be confirmed unless he was included as a beneficiary. Annexure SO-8 is an affidavit in support of confirmation of grant to the defendant. In both affidavits, there was no pleading for a claim for adverse possession raised.

26. In any event, the High Court constituted as Probate & Administration does not have jurisdiction to determine a claim for adverse possession. Therefore, such a claim could not have been brought in the Succession pleadings/proceedings. In short I hold that there is no evidence adduced to support the averment that this suit is not res judicata BSA HC P&A Cause No. 394 and 395 of 2012 as intended under section 7 of the Civil Procedure Act.

27. Have the plaintiffs proved their case by establishing the ingredients of adverse possession? It is not in dispute that the 3 plaintiffs are each occupying respective portions of the two parcels of land. They each claim that they took possession after purchasing the same. One of the grounds the defendant challenges the claim is failure to produce copies of the sale agreements.

28. The plaintiffs in a claim for adverse possession is to demonstrate that his occupation of the land has dispossessed the registered owner thereof the intention he intended to put the land to use- see holding 3 in the case of *Wambugu Vs Njuguna (1983) KLR 172*.

29. All the plaintiffs have stated that their entry to the land was through purchase in the 1980s. The consent given to occupy the land through purchase is deemed to have expired on the lapse of six years from the date/year of such sale. Similarly, the validity or otherwise of the sale agreements would only arise in a claim for specific performance of the terms of such agreement which is not the issue before the court. The defendant submitted that in the absence of the sale agreements, it could not be ascertained when time began to run. However, in his evidence in chief, he stated that when he returned in 1994 he found the plaintiffs on the land.

30. In the case of *Joseph Kamau Gichuki (Suing as the administrator of the Estate of Gichuki Chege (Deceased) v James Gatheru Mukora & another [2019] eKLR*. Justice S. Okong'o held thus, **"Having considered the evidence adduced by the parties in totality, I am satisfied that the plaintiff has established on a balance of probabilities that the deceased took possession of the suit property in 1974 and remained in possession until his death in 1994. I am also satisfied that the developments on the suit property were carried out by the deceased. The plaintiff's claim over the suit property was not based on the agreements for sale between the deceased and Kariuki. The claim was based on adverse possession. In the circumstances, it is irrelevant whether the agreements for sale between the deceased and Kariuki were valid or not. The only relevant issues for the court's consideration are, whether the deceased took possession of the suit property, whether his possession was open, continuous and uninterrupted for the statutory period of 12 years and whether his possession was adverse to the interest of the registered owner of the property.**

31. It is not in doubt that the Respondent was not the administrator of the estate of the registered owners until 2016. However, time did not stop running in spite of the death of the vendors/registered owners. In the case of *Peter Mbiru Michuki Vs Samuel Mugo Michuki (2014) eKLR*, the Court of Appeal held that, **"The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the Limitation of Actions Act applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the Limitation of Actions Act applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run"**

The dicta in *Mwangi & another – v – Mwangi*, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In *Public Trustee - v - Wanduru*, (1984) KLR 314 at 324, it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land.

32. Further, section 16 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides as follows: -

"For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration."

33. The defendant stated that Mingili Orada-deceased did not have any child while he was the only child of Barasa Orada-deceased. Therefore, as the only person entitled to the suit parcels and having failed to remove the plaintiffs from the time he found them on the land in 1994 time definitely ran against him. Although he objected to the production of the minutes held before the Assistant Chief, the evidence adduced indicates that it is the plaintiffs who had reported him to the Assistant chief for refusing to give them title deeds. It is well settled in law that time stops to run on filing of a suit or when the registered owner takes back possession of the suit parcels. None of the two steps were taken by the defendant from 1994 to the year 2016 when this suit was filed; a period of 22 years.

34. The year for computation of time in this case can be taken as the dates when the plaintiffs stated they purchased the land and or in the alternative, the year 1994 when the defendant returned and found them in possession. In the Peter Mbiki Michuki case *supra*, the Court of Appeal stated thus, ***“On our part, we are of the view that there are four alternative timelines that could be used to compute when time began to run for purposes of the plaintiff’s claim for adverse possession. These are 1964, 1970, 1971 or 1978. The year 1964 is the year of the sale agreement between the parties and in this year the plaintiff took legal possession of the suit property. In 1970, the plaintiff constructed a house on the suit property and put his elder brother in actual physical possession and occupation. Subsequent to this year, the plaintiff continued to have actual as well as constructive possession of the suit.”***

35. Another issue that rises for proof of claim for adverse possession is whether or not the applicants have demonstrated that they have identifiable portions. Each of the plaintiffs stated the portions they are laying claim to. PW1 in his pleadings stated that he was in occupation of a portion measuring 0.5 of L.R No. 351. However, in his evidence he claimed to occupy $\frac{3}{4}$ acres. The 2nd plaintiff pleaded that his father bought 1.5 acres of L.R No. 351 and maintained so during the hearing. The 3rd plaintiff pleaded and stated that his father bought 1.1 ha of L.R Mundika/349. Essentially PW3 claimed the entire land as Mundika/349 which is given as measuring 1.1 ha.

36. Save for the 1st plaintiff who increased the size of the land he was claiming in evidence, each and every plaintiff was specific to the size of land they sought to be awarded. Thus they did not need a survey report to ascertain their sizes. It is the defendant who in his evidence before court gave smaller sizes to the as the portions the plaintiffs are entitled to. In my opinion and I so hold, that the burden then shifted to the defendant to provide evidence to disapprove that the plaintiffs are not entitled to the sizes pleaded and claimed which burden he did not discharge.

37. The last question is whether the 2nd and 3rd plaintiffs had capacity to bring this claim since they had not taken out letters of administration in respect of their deceased fathers’ estates. In their submissions, the 2nd and 3rd plaintiffs contended that they brought this suit in their own capacities and thus they did not need to take out any letters of administration. In the opening statement of the Originating Summons filed, it is pleaded thus, ***“Let Stephen Okota Barasa of Mabale, Busia County enter appearance within 15 days of service of this Summons upon him which is issued on the application of MICHAEL RABARE RAMONYA, RAJAB IBRAHIM WESONGA AND BRIAN OSINYA WANYAMA who claim to have acquired by way of adverse possession 0.5 acres and 1.5 acres out of L.R No. BUKHAYO/MUNDIKA/351 and the whole of BUKHAYO/MUNDIKA/349 measuring 1.1ha for determination.”***

38. From the wording of the pleadings filed, the 2nd and 3rd plaintiffs have not brought the claim on behalf of their father’s estate. The evidence adduced on record has also demonstrate that the 2nd and 3rd plaintiffs and their respective families have lived on the suit portions for time in excess of 12 years. The names of their fathers featured to show how they got entry into the portions they are now claiming and nothing more. Therefore, it is my considered opinion as I so hold that the 2nd and 3rd plaintiffs indeed had capacity to bring this suit by virtue of their occupation and use of the suit portions.

39. The upshot of the foregoing analysis is my conclusion that the plaintiffs have proved their case and enter judgement in their favour as prayed in the Originating Summons dated 19/4/2016. For clarity, since the 1st plaintiff did not amend his claim, the size of the land awarded to him is 0.5acres of L.R Bukhayo/Mundika/351 as pleaded. Costs of the suit is awarded to the plaintiffs.

Dated, signed and delivered at BUSIA this 29th day of October, 2020.

A. OMOLLO

JUDGE