



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. 170 OF 2017

NICHOLAS ONYANGO OKADO.....PLAINTIFF

- VERSUS -

BERNARD OUMA ONYANGO.....1ST DEFENDANT

JOAB OUMA.....2ND DEFENDANT

J U D G M E N T

1. By a plaint dated and filed on 12th October 2017, the Plaintiff instituted this suit against the Defendants. He pleads that he is the absolute registered owner of LR No. Bunyala/Bulemia/298. That the Defendants have without any justifiable reason and without the Plaintiff's consent entered the said property and commenced construction of a semi-permanent house thereon. The Plaintiff avers that the Defendants have also denied him access to his property thereby infringing on his proprietary rights and therefore seeks the following reliefs:

a. An order for permanent injunction against the Defendants by themselves, their servants, workers and agents from constructing, cultivating or in any other manner whatsoever interfering with the Plaintiff's LR No. Bunyala/Bulemia/298

b. An order of eviction of the Defendants from LR No. Bunyala/Bulemia/298

c. Costs of the suit and interest

2. The Defendants filed their defence and counterclaim on 14th November 2017. They stated that they have been in occupation of 3 acres' portion of the suit property since 14th March 1995 which portion the Plaintiff sold to their mother, Joyce Odhiambo Ouma on that date. Since then, the Defendants and their mother took possession of the 3 acres' portion with the full knowledge of the Plaintiff and his family. Consequently, they were owners of the 3 acres' portion by way of adverse possession having been resident therein for over 12 years. In their counterclaim, they prayed for:

a. The Plaintiff's suit be dismissed with costs

b. A declaration that the Plaintiff's title to 3 acres out of land parcel No. Bunyala/Bulemia/298 became extinguished upon expiry of 12 years from the time the Defendants went into possession from March 1995 and that they be declared as owners thereof by way of adverse possession.

c. Costs of the Counterclaim

3. The hearing of the main suit commenced on 19th February 2020 with two witnesses testifying on behalf of the Plaintiff. **PW1**, Nicholas Onyango Okado gave evidence that he knew the Defendants from birth. That Bunyala/Bulemia/298 is his property and he has a title deed for it. He produced the green card as P.ex1, a certificate of official search dated 5th October 2017 and a copy of the title as P.ex3. **PW1** continued that he was registered as the owner of the suit land on 10th February 1985 and he has sued the defendants because they are living on the property. **PW1** admitted that he sold land to the Defendant's mother, Joyce Ouma but she only made part payment of Kshs.42,500 leaving a balance of Kshs.7000 outstanding to date. **PW1** was adamant that Joyce cannot be given land whose consideration she had not completed paying nor can he give the defendants the land because he never sold it to them.

4. **PW1** narrated that they have not lived in peace because the defendants disrespect and abuse him and his family. For instance, the 1st Defendant was arrested and charged in court for assaulting **PW1**'s wife, Jacinta on the suit land. He was charged with destroying her crops which damage was assessed by an agricultural officer. **PW1** continued that sometime in 2018, the 1st Defendant had him arrested on

complaints that PW1's cows had eaten his maize crops in the field which case is still ongoing. That he filed this case because of the acrimony between them. He prayed to be granted the prayers listed in the plaint. As for the 2nd Defendant, PW1 stated that he moved out after the filing of this case.

5. On cross-examination, **PW1** confirmed that there was a balance of Kshs.7,000 which he did not refuse to accept as it was never settled. That he refused marking of the boundaries claimed by the Defendants as he had not sold to them land. PW1 gave evidence that there had been no problems between the parties prior to 2017. That he did not create a nuisance by blocking access roads. Further, that the 1st Defendant moved onto the property in 2015 while the 2nd Defendant started living thereon in 1997. That it was not true that the 1st Defendant has been in occupation of the suit land for over 12 years. He concluded that the 2nd Defendant and other siblings moved out after the filing of this suit.

6. Washington Odhiambo, a Deputy Court Administrator testified as **PW2**. He gave evidence that his duties entail overseeing registry operations for both the High Court and Chief Magistrate's Court. He presented BSA CMC criminal case file no.180B of 2017 where the 1st defendant was charged with assault and destruction of crops. That the matter proceeded to full trial with judgment being delivered on 18th July 2019 and the accused (1st defendant) was acquitted. That an appeal against the decision was preferred by the Office of the Director of Public Prosecutions vide appeal no.21 of 2019. **PW2** produced the charge sheet, proceedings and judgment as P.ex 4, 6 and 7 respectively.

7. Bernard Onyango Ouma, **DW1** was the sole witness on behalf of the defence. He adopted his statement dated 5th May 2018 as his evidence in chief. **DW1** stated that the 2nd Defendant gave him authority to testify on his behalf. He reiterated that the Plaintiff sold his mother 3 acres' portion of land and produced a copy of the translated sale agreement as D.ex1. That she took occupation of the land in 1995. **DW1** stated that the 2nd Defendant, Rajab was the first to build on the property while he (**DW1**) later built his thereon in 2004. Currently, Rajab has relocated but one of his wives still lives on the suit land.

8. On cross-examination **DW1** confirmed that his mother bought the land on 3rd April 1995 and died in 1996. At the time, they had not been to the Budalangi Land Control Board to get consent. He admitted that there was a Kshs.7,000 balance that he has not paid which was the source of the disagreements between himself and the Plaintiff culminating in the aforesaid criminal court cases. **DW1** gave evidence that they intended to pay the balance but the Plaintiff refused to accept it saying that he wanted to resolve a boundary dispute with a neighboring plot. The plaintiff promised that he would accept payment and give them title after he resolves the boundary dispute.

9. **DW1** narrated further that his brothers bought their own land and moved out of the disputed land. That he claims the portion purchased by his mother which he has used and lived on from 2004 to date. **DW1** admitted that he did not have letters of administration enabling him to represent his mother's estate. He however stated that he is currently using approximately 1½ acres portion of the suit land.

10. The hearing completed, the Plaintiff and Defendants filed their submissions on 1st September and 7th August 2020 respectively. I have read and considered the same as well as the parties' pleadings and the applicable law. The questions in issue are as follows:

- i. whether the Plaintiff is entitled to the injunctive and eviction orders sought against the Defendants
- ii. whether the Plaintiff's proprietary rights to the 3 acres' portion of the suit property claimed by the Defendant by way of adverse possession were extinguished as a result
- iii. whether the Defendants are entitled to the declaratory orders sought in their counterclaim
- iv. who shall bear costs of this suit

11. It is not in dispute that the Defendants got onto the property pursuant to the sale agreement executed between the Plaintiff and their deceased mother, Joyce Ouma. That the purchase price was not paid in full leaving a balance of Kshs.7,000 and that other modalities such as obtaining land control board consent were not undertaken rendering the disposition incomplete. The dispute is whether the Plaintiff is still entitled to the 3 acres' portion claimed by the Defendants for non-payment of the balance of the purchase price.

12. The plaintiff stated that he cannot give the defendants any portion of the suit title and he wants them to leave the land. The plaintiff gave two reasons for seeking to evict the defendants; first because the balance of the purchase was not paid and secondly that the defendants do not respect him. He however admits selling the land to their mother and admits further that the 2nd Defendant started living on the sold portion in 1997.

13. In the case of *Peter Mbiki Michuki vs Samuel Mugo Michuki (2014) eKLR* the Court of Appeal observed at par 36 of their judgment thus, **"It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. 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."**

14. The limitation of actions period for cases on contract is 6 years thus the plaintiff's claim for vacant possession premised on non-payment of the balance of the purchase price expired in May 2001 or 2002. Further under section 7 of the Limitation of Actions Act, a suit for recovery of land ought to be brought within twelve (12) years from the date when the cause of action accrued. In the instant case, the plaintiff is asking to be awarded the land after about 22 years from the date of their sale. It goes without saying that his claim is time barred. The

second ground of lack of respect and or abuse to his person by the defendants does not accord him any right in law to evict a person in occupation of land acquired whether by prescription or otherwise. The rights to evict the defendants can only arise if there is proof that the defendants have not acquired the land through prescription.

15. The ingredients to be proved in a claim for adverse possession are settled both in Statute and case law. In the case of *Mbira Vs Gachuhi (2002) 1EALR 137* it was held that;

“... a person who seeks to acquire title to land by method of adverse possession or the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious exclusive and adverse use by him or those under whom he claims for the statutory period without interruption”.

16. With regard to the Defendants' occupation the Plaintiff testified that the 1st Defendant moved in 2013 but on re-examination he switched that the 1st defendant occupied the land in 2015. The 1st Defendant on the other hand stated that he went to live on the land in 2004. The undisputed fact admitted by both PW1 and DW1 is that the 2nd Defendant lived on the 3 acres' portion from 1997. However, according to the Plaintiff he has since moved out this suit was filed thus breaking his stay. DW1 asserted that one of the 2nd Defendant's wives still lives on the property.

17. The Defendants in their pleadings and testimony claimed 3 acres out of the suit land. The sale agreement by which the Defendants came onto the property stipulates 3 acres. During cross-examination the 1st Defendant admitted to using only about 1½ acres. It is the 1st Defendant's case that he has been in continuous open and uninterrupted possession of his portion of the suit land since the year 2004. Their stay on the land for a period in excess of 12 years is corroborated by the date on the sale agreement and the plaintiff's admission that the 2nd defendant started living on the land in the year 1997.

18. However, the plaintiff's contention that the 1st came on the land whether in 2013 or 2015 was not corroborated. There is no evidence to suggest that the Plaintiff sought or retook possession prior to this case or that the Defendants at any time relinquished possession to the Plaintiff. The plaintiff relied on the criminal proceedings to demonstrate that the defendant's stay on the land was not peaceful. In cross-exam, he admitted that before the year 2017 they stayed in peace. The absence of peace thus started after the expiry of the 12 years. Further the criminal proceedings had nothing to do with the plaintiff's attempt to repossess the land. The charges preferred against the 1st defendant were for assault and destruction of cultivated produce.

19. Although the plaintiff avers that the 2nd defendant moved out after filing of this suit, the counter-claim was brought jointly and severally by the 1st and 2nd defendants. There is nothing on record to show that the 2nd defendant withdrew his claim. The 1st defendant in his evidence stated that Rajab (2nd Defendant) gave him authority to testify on his behalf. In cross-exam, DW1 stated that they are using the land shown to their mother. He added that he was claiming the portion purchased by his mother. The defence evidence was thus specific on the land he/they are claiming by way of adverse possession.

20. The time can be computed to have started running either in 1995, 1997 or 2004. It is clear that the Defendants have established that they have been in factual possession for well over 20 years. The fact that the 1st Defendant has built on the suit property is a demonstration of *animus possidendi*, (intention to possess) to the exclusion of the Plaintiff. The open continuous and hostile occupation by the 1st Defendant had not been broken from 2004 for a period in excess of 12 years.

21. Accordingly, I find that the Defendants have proved their counter-claim on a balance of probabilities and find that they are entitled to the 3 acres' portion by way of adverse possession. Consequently, judgment be and is hereby entered in the following terms:

a. The plaintiffs suit is dismissed for want of proof.

b. The defendants' counter-claim is allowed thus

i. A declaration is hereby made that the Plaintiff's rights over the 3 acres portions of L.R Bunyala/Bulemia/298 claimed by the Defendants has been extinguished by the operation of the law.

ii. An order that L.R Bunyala/Bulemia/298 be subdivided with the Defendants 3 acres portion to be registered in their joint names.

iii. An order is hereby made that the Plaintiff or in default the Deputy Registrar of this Court do execute all relevant documents to transfer the 3 acres portions in the names of the 1st Defendant.

c. Each party to meet their respective costs of the suit.

Judgment dated and signed at BUSIA this 29th day of October, 2020.

A. OMOLLO

JUDGE