



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL CASE NO. 28 OF 2007 (O.S)

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF L.R.NO.BUKHAYO/MUNDIKA/834

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSION

BETWEEN

PAMELLA NASIRUMBI OUMAAPPLICANT

VERSUS

LINUS ODUORI ORODI.....RESPONDENT

J U D G M E N T.

The applicant, **PAMELLA NASIRUMBI OUMA**, through M/S. Bogonko, Otanga & company advocates filed this suit against the Respondent, **LINUS ODUORI ORODI** through originating summons dated 9th October, 2007 for the following determinations;-

1. Whether the Applicant has been in open and notorious possession of two acres of land out of Bukhayo/Mundika/834 for a period exceeding 12 years.
2. Whether the Respondent's title to the two acres occupied by the Applicant has become extinguished upon the expiry of 12 years from the time the Applicant took possession of the land.
3. Whether Applicant has acquired title to the said two acres of land by virtue of adverse possession.
4. Whether the registration of the Respondent as owner of the two acres of land out of Bukhayo/Mundika/834 should be cancelled and the Applicant registered as the owner.
5. Who should pay cost of this suit.

The application is based on the supporting affidavit sworn by Pamela Nasirumbi Ouma on 9th October, 2007 and the annexures thereto including a copy of certificate of official search for Bukhayo/Mundika/834 showing that the land is 1.8 hectares and was registered in the names of Oduori Orodhi on 23rd March, 1971. It is also based on a further affidavit by the said Pamela sworn on 18th October, 2008 annexing a copy of a green card for land parcel Bukhayo/Mundika/834 containing similar

details to those in the certificate of official search annexed to the supporting affidavit.

The application is opposed by Linus Oduori Orod, who is the Respondent herein, through his affidavit sworn on 1st November, 2010.

During the hearing, the Applicant testified as PW1, and called her husband, who testified as PW 2. The Respondent testified as DW 1, and called his two sons, who testified as DW 2 and DW 3 while his wife testified as DW 4. Thereafter parties were given time to file written submissions but only the counsel for the Applicant filed theirs dated 19th July, 2013. The Respondent indicated he did not have any submissions to file when the matter was mentioned in court on 30th July, 2013.

Having heard all the parties and the witnesses and on perusing the written submission by the counsel for the plaintiff, the court finds following issues need to be determined.

1. Whether there was a land sale agreement between the Applicant and the Respondent and if so whether it has become void or is enforceable.
2. Whether the Applicant took possession of the portion of the land he was buying from the Respondent, and if so when.
3. Whether the Applicant has been in continuous possession of the two acres of land out of Bukhayo/Mundika/834, and if so for how long.
4. Whether title of the Respondent to the two acres occupied by the Applicant has become extinguished.
5. Whether the Applicant is entitled to be registered as the owner of the two acres of land under the principle of adverse possession.

The court having considered the contents of the pleadings, affidavits, testimonies of the witnesses and the submission by counsel find as follows:-

1. That the evidence availed before this court clearly shows that the Applicant and the Respondent entered into a land sale agreement on 26th November, 1988. The Respondent was selling the Applicant two acres of land out of Bukhayo/Mundika/834 for Kshs.13,000/=. On the date the agreement was entered, the Respondent acknowledged receiving Kshs.3,000/= leaving a balance of Kshs.10,000/=. Thereafter the husband to the Applicant, who testified as PW 2, paid the respondent Kshs. 10,000/= and a further Kshs.1,000/= was paid as school fees for the son of the Respondent. The total payments pursuant to the said sale agreement amounted to Kshs.14,000/=.
2. That upon execution of the Land Sale agreement, the Respondent put the Applicant into possession of a portion of land measuring two acres awaiting formal survey to be carried out later. The formal survey was done in the year 1993 and the boundary for the two acres confirmed. It is quite clear that the Respondent never applied for Land Control Board Consent to transfer the two acres of land out of Bukhayo/Mundika/834 to the Applicant and in terms of section 7 of the Land Control Act Cap 302 of the Laws of Kenya, the sale agreement became void at the expiry of six months from the date of the agreement. The Applicant could claim refund of the money paid to the Respondent but has instead filed this suit.
3. That the Respondent did not evict the Applicant from the two acres of land out of Bukhayo/Mundika/834 even after their land sale agreement became void. The Applicant's continued occupation of the two acres of land after six months from the date of the agreement became adverse against the title of the Respondent.
4. That the Land Sale agreement having been dated 26th November, 1988, the Respondent was expected to obtain a Land Control Board Consent on or before 26th May, 1989. From that date, time started running against the Respondent in favour of the Applicant for the purposes of adverse possession over the two acres of land out of Bukhayo/Mundika/834 which Applicant had taken possession of.
5. That there was no land sale agreement between PW 2 and the Respondent as no copy was availed before this court. That the Respondent had for reasons known to himself taken that the applicant was acting on behalf of PW 2 when they entered into the land sale agreement of 26th November,

1988. This was however clarified by PW 2 when he testified to the effect that the agreement was between his wife, who is the Applicant and the Respondent.
6. That from the time the Applicant took possession of the two acres of land, to the time the originating summons were filed, the only attempt the Respondent had made to retake possession of the land, was the filing of Busia PMCC. NO.375 of 2006 in which he sued Peter Ouma Nandebu who is the husband of the applicant. The suit was for eviction orders but during the hearing of this suit, the court was informed that the matter was still pending before the court.
 7. That from the 26th May, 1989 when the occupation by the Applicant of the two acres of land became adverse, to the year 2006 when Busia PMCC. 375 of 2006 was filed, a period of about 17 years had passed. In terms of section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya, the Respondent's title to the two acres occupied by the Applicant became extinguished at the expiry of 12 years from the time Applicant took possession as her possession of the Land had been continuous.

That having found as above, the court finds that the Applicant has proved her case against the Respondent on adverse possession over the two acres of land out of Bukhayo/Mundika/834 on a balance of probabilities. The court therefore orders as follows;-

- a. That the Respondent's title over that portion of land measuring two acres out of Bukhayo/Mundika/834, occupied by the Applicant, got extinguished by adverse possession upon the expiry of twelve years from 1989.
- b. That the Applicant has acquired title of the portion of land measuring two acres, and in her occupation out of Bukhayo/Mundika/834 by adverse possession.
- c. That the Respondent should transfer the portion of land measuring two acres and occupied by the Applicant, out of Bukhayo/Mundika/834, into the names of the Applicant and in default, the Deputy Registrar is herein authorized to execute all such papers to give effect to this order.
- d. That the Respondent will pay the cost of this suit.

S.M KIBUNJA JUDGE

Dated and Delivered at Busia this 2nd day of October 2013

In the presence of

Plaintiff/Applicant present

Defendant/Respondent present

Mr. Bogonko Advocate for Plaintiff/Applicant