



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 26 OF 2014 (O.S) (FORMERLY HCC 56 OF 2012)

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LR. NO. SAMIA/NAMBUKU-LUGALA/27

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION

BETWEEN

MAURINE NEKESA OKETCH.....APPLICANT

= VERSUS =

JAFET ONGENGO ENDALO.....RESPONDENT

J U D G E M E N T

1. The plaintiff took out Originating Summons dated 19th August 2012 against the defendant in respect of L.R Samia/Nambuku-Lugala/27. The plaintiff pleaded that she has been in occupation of the suit land for a period in excess of 12 years thus entitled to it by way of adverse possession. She prays to the Court to grant her Orders;

(a) That the Respondent's rights over LR. NO. SAMIA/NAMBUKU-LUGALA/27 got extinguished by adverse possession upon expiry of the 12 years from the date the applicant came into possession.

(b) That the Respondent be perpetually barred from taking and or using LR. NO. SAMIA/NAMBUKU-LUGALA/27.

(c) That the Applicant be registered as the proprietor of LR. NO. SAMIA/NAMBUKU-LUGALA/27.

(d) That the Respondent do execute all the documents to facilitate the transfer of LR. NO. SAMIA/NAMBUKU-LUGALA/27 into the name of the applicant and that in default the deputy registrar do execute the same in place of the Respondent.

(e) That the respondent do pay the costs of this case.

2. The suit was opposed by the defendant's replying affidavit sworn on 20th March 2013. The defendant denied that the plaintiff has been in peaceful, open and notorious possession of the suit land. He deposed that the plaintiff filed this suit to frustrate his rights over the suit land. It is the defence contention that this suit is *res judicata* Busia HC JR No. 18 of 2011. He urged the Court to dismiss the Originating Summons as it is unreliable and guilty of concealment of material facts.

3. The Plaintiff called the evidence of three (3) witnesses in support of her claim with the plaintiff testifying as **PW1**. She relied on her affidavit evidence sworn on 2/9/2013 and filed on 30/10/2013. The plaintiff stated that she is in actual possession of the whole of L.R No. Samia/Nambuku-Lugala/27 and has extensively developed the same without interruption of anybody else for a period over 12 years. That her relatives and friends including the Respondent acknowledges that the land belongs to her. **PW1** continued that she entered the suit land around 1997 before the demise of Charles Oketch Malingu. Therefore, it was disturbing to learn that the Respondent had registered himself as owner of the land in question.

4. In her oral evidence, **PW1** added that she has lived on the suit land since 1969 when she was born. That her grandfather Charles Oketch

had two children namely Cecilia and Juliana. It is her further evidence that in 2008, the chief came with some people to state that the defendant had sold the suit land. The witness produced a copy of the register for the suit title as **Pex 1**. In cross-examination, she said she was aware her mother Cecilia had sued the defendant before the Land Dispute Tribunal in case No. 23 of 2008 whose award was later quashed in Busia H.C. JR case No. 17 of 2009. She maintained that she was born and brought up on this land except for a period of one month when she got married in Buradi. **PW1** admitted that her mother called her from Buradi to go and stay with her grandfather and also look after him. She disagreed with her mother's statement before the tribunal that the suit land was given to the defendant by Charles Oketch.

5. Otimi Malingu Odonyo gave evidence as **PW2**. He relied on his affidavit evidence sworn on 2nd March 2015. He stated that Charles Oketch – deceased was his brother and owner of the suit land. That Charles was married to Monica & Nanjala Nafula. Nanjala bore Cecilia (mother to plaintiff). That the plaintiff has lived on the suit land since her birth. In the witness written statement, **PW2** stated that since Cecilia got married elsewhere, she allowed the plaintiff to stay on the suit land.

6. **PW2** added that he was shocked to see a stranger Japhet Endalo claiming ownership of this land. That Japhet ignored the outcome of the committee meeting and had his name registered on the piece of land. In cross-examination, **PW2** stated that he spoke the truth before the Tribunal and denied saying that the defendant was Oketch's son. **PW2** was aware that the plaintiff got married and stayed with her husband briefly before returning to the land. That she came back with one child and her husband and stayed with Oketch. According to **PW2**, the plaintiff got the other children while staying on the suit land. In re-examination, **PW2** stated that the tribunal ruled the land belonged to Cecilia. That the defendant does not belong to their clan. That he has not been shown any document by Oketch giving the defendant the suit land.

7. Josephine Makokha Odonyo testified as **PW3**. **PW3** stated that she knew the plaintiff but did not know the defendant. It is her evidence that the plaintiff is the one who lives on the suit land and has lived on it for 40 years without anyone disturbing her. In her written statement, **PW3** referred to the plaintiff as her grand-daughter within their clan set-up. It is her evidence that when she got married to Nelson Odonyo Malingu in 1961, she found the plaintiff's family living peacefully on the suit land.

8. **PW3** stated further that the plaintiff remained on the land after her mother got married elsewhere. The witness said she was perturbed that Japhet is claiming the land. She did not know how the defendant registered himself as the owner of the land. She urged the Court to revoke the defendant's title and have it registered in the plaintiffs' name. In cross-examination, **PW3** stated that her husband was a brother to Charles Oketch – the plaintiffs' grandfather. That she knew the plaintiff uses the parcel No. 27. That Cecilia (plaintiff's mother) is still alive and she had filed succession proceedings. That the case before the tribunal was between the defendant and the plaintiffs' family. In re-examination, **PW3** said the defendant has never sued the plaintiff. This marked the close of the plaintiffs' case.

9. The defendant testifying as **DW1** said he comes from Bwiri in Busia County and he knows the plaintiff. He denied taking any and belonging to the Plaintiff. **DW1** produced a copy of his title deed issued in 1996 as **Dex 1**. According to **DW1**, Charles Oketch was his father as he was a son to Naponyi who was Oketch's 3rd wife. The defendant states that he is using the suit land as he has planted trees and bananas on it. That the plaintiff was brought to the land by her mother Cecilia before filing of the case at the Land Disputes Tribunal.

10. According to **DW1**, the plaintiff only uses ½ acre of the land. He produced the proceedings in judicial review case No. 14 of 2009 as **Dex 2** and **3** and proceedings of the Land Dispute Trial case as **Dex 4** and **5**. The defendant stated that the plaintiff is not entitled to the whole land. In his written statement filed in court, **DW1** referred to the plaintiff as his niece. That he was the only one left at home after his two sisters Julia and Cecilia got married and that is why the land was transferred to his name. The defendant added that the plaintiffs' home is in Kakamega.

11. In cross-examination, **DW1** stated that his father had 3 wives and his mother was one of them. That they lived together on the suit land with the plaintiff's mother when they were young. **DW1** continued that he lived on the land until recently (20/10/2018). That his mother died in 2003 which was after the plaintiff was born. That his father Charles Oketch was sick only for a day before he died. He denied subdividing the land adding he has no land for her step sisters because they have land where they are married. In re-examination the witness said the plaintiff lives in her grandfather's house and she has not build on the land.

12. Mary Kanoti testifying as **DW2** stated that she calls the plaintiff as a grand-daughter in the customary sense as she is not the mother of Cecilia Nanjala. As per **DW2**'s view, the land belongs to the defendant who acquired it from his father. That the plaintiff came to live in the house of the defendant's father after his death in the year 2003. **DW2** said the plaintiff should get land where she is married. **DW2** admitted that the plaintiff cultivates ½ acre of the suit land and has lived there for many years.

13. Patrick Ouma Ogulla gave his evidence as **DW3**. That he is a resident of Lugale and he does not know the plaintiff. That the suit land belonged to the defendants' father. According to **DW3**, the plaintiff was born and brought up in Sigalame. He stated further that the plaintiff got married in Bukwamba and only came to live on the land after the death of the defendant's father. The witness continued in his written statement that Charles Oketch was a brother to his father Ogolla Malingu. **DW3** denied that the plaintiff has been in peaceful and interrupted possession of the suit land.

14. In cross-examination, **DW3** said he did not know the name of the plaintiffs' husband nor have evidence of her marriage. That the defendant lived on the disputed land with his father but he is not living there now. **DW3** admitted that the plaintiff has lived in the home of the defendant's father since 2003. That the plaintiff is the daughter of defendant's step sister.

15. The Land Registrar gave evidence as **DW4**. He stated that the suit land Samia/Nambuku-Lugala/27 got registered in the defendants' name on 30th May 1996 as entry No. 4. That he got it from Charles Oketch Alingu. The witness produced the register as **Dex 6**. In cross-examination, **DW4** confirmed that he had a copy of the application of Land Control Board consent as well as the letter of consent which he said was produced in evidence. However, the witness did not have a copy of the transfer but averred that the land cannot change hands without an executed transfer form. That in the application for consent, the consideration was indicated as “**gifted and purchase price of Kshs.20,000**”. With this evidence marked the close of the defence case.

16. Parties thereafter filed their rival submissions which I have the opportunity of reading. It is not in dispute that the defendant is the registered owner of the suit title Samia/Nambuku-Lugala/27. The plaintiff is claiming ownership of the whole land by way of adverse possession which land according to the green card (Pex 1/Dex 6) is measuring 1.4 ha. It is settled in law that a claimant under the heading of adverse possession must prove actual possession which is uninterrupted for a period in excess of 12 years. The possession must be that which is evidence of dispossession the owner of the intention he intended to put the land for use. This position was rendered in the renowned case of *Wambugu Vs Njuguna (1982) KLR and Kweyu Vs Omuto (1990) ICLR. 709* thus, ***“By adverse possession is meant a possession which is hostile under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (colour of title is that which is a title in appearance but not in reality) Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of Law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely.*”**

These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on defacto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly & notoriously”

17. The question herein is whether the plaintiff has demonstrated that her possession was hostile? The plaintiff states that she was born in 1969 on this land and moved out briefly for one month when she got married before returning in 1997 to live with her grandfather. She added that she was called by her mother Cecilia to come live on the land to take care of her ailing grandfather. That all this time, the defendant never sued her for eviction. The plaintiff’s entry into the suit land was thus by permission. In the *Kweyu case supra*, the Court of Appeal stated that ***“Adverse possession and possession with permission cannot co-exist. Adverse possession does not start until the date of possession with permission (which usually follows a sale of land) expires”***.

18. The plaintiff’s evidence is to be weighed against the defence evidence which stated that the plaintiff did not live on this land until 2003 when she came to live in the house of the grandfather after the death of that grandfather (Charles Oketch). According to the defendant, his step sister who is the plaintiff mother got married in Kakamega where she lives therefore the plaintiff is not entitled to the suit land.

19. It is the plaintiff claim that she was born and brought up on the suit land. The inference is drawn from this evidence is that she was living on the suit land with the consent of her mother and grandfather Charles Oketch. At the time of plaintiff’s birth, the said Charles Oketch was the registered owner of the suit land. She therefore needed to demonstrate when her occupation became hostile to that of Charles Oketch – deceased and or the defendant.

20. Secondly, the plaintiff was under obligation to demonstrate that her occupation was active i.e. what she was using the land for which made the registered owner (defendant) to be dispossessed. She stated thus in her witness statement at paragraphs;

“3: That I am in actual possession of the whole of LR. No.

SAMIA/NAMBUKU-LUGALA/27 and I have extensively developed the same and using the same as my own peacefully, continuously and without any interruption from anybody else for a period of over 12 years.

“6: That the said land was demarcated on the ground and I took immediate possession thereof and planted crops herein.

21. Since the plaintiff is claiming the whole land, she was under a duty to prove use. Unfortunately, she did not disclose to court the nature of development she has put on the land. Otimi Malingu Odonyo who gave evidence as PW2 stated at paragraph 6 of his statement thus; ***“That she used to stay with his grandfather Oketch Malingu before his demise and after his death she was surprised to see a stranger claiming ownership of the piece of land.”*** It was therefore not made clear whether the plaintiff built her own structures on the suit land or she was living in the house built by Charles Oketch – deceased.

22. On the other hand, the defendant stated that he has planted trees and bananas on the land and the plaintiff is only cultivating the unused part which is only ½ acre. The defendant did not dispute that the plaintiff came to live in his father’s house since 2003 and that she has been cultivating the ½ acre portion of the suit land. In light of the evidence presented, it is my considered opinion and I so hold that the plaintiff has not satisfactorily demonstrated

(1) When her occupation became hostile to that of the defendant.

(2) That she is utilising the whole parcel of land No. Samia/Nambuku-Lugala/27 as she pleaded.

23. The Court however notes that the defendant had no objection to the plaintiff’s possession of ½ acre portion of the suit land.

24. I am therefore persuaded to find that for the plaintiff that she is entitled to a portion of Samia/Nambuku-Lugala/27 measuring ½ acre on admission by the defendant. Accordingly, I enter judgement in her favour;

(1) For the said ½ acre portion only.

(2) An order of permanent injunction is issued against the defendant barring him from interfering with the plaintiffs’ ½ acre.

(3) The defendant to execute all the relevant documents to facilitate the transfer of the ½ acre portion to be carved out of L.R No. Samia/Nambuku-Lugala/27 into the plaintiff's name and in default, the deputy registrar of this court do execute the same in place of the Respondent.

(4) Each party to meet costs of the case.

Dated, signed and delivered at BUSIA this 17th day of November, 2020.

A. OMOLLO

JUDGE