



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 39 OF 2016

JOHN ODHIAMBO KOITA.....PLAINTIFF

= VERSUS =

GEORGE ODUORI ORAW.....DEFENDANT

J U D G M E N T

1. By Originating Summons dated 15/4/2016 and filed on 22/4/2016, the Applicant – **JOHN ODHIAMBO KOITA** – claimed ownership of land parcel No. BUKHAYO/BUGENGI/2365 under the doctrine of adverse possession. The claim is against the Respondent – **GEORGE ODUORI ORAW** – who is the registered owner.

2. The Respondent was served but he neither entered appearance nor filed a response. An affidavit of service filed on 24/2/2017 shows that one Joseph Orata Kweyu served the Respondent on 5/10/2016 at his home at Emaseno Village, Matayos Division, Busia County. The Respondent even signed the Original Summons and the signed copy is part of the court records.

3. As there was no response from the Respondent, the court handled the Originating Summons as a simple application. There was therefore no taking of directions as is usually done when the sued party is opposing.

4. From both the application and the submissions filed, it is clear that the Applicant and the Respondent entered into a land sale agreement for purchase of all that land known as BUKHAYO/BUGENGI/2365. There is on record an agreement dated 24/3/2001. The Applicant is shown to have first paid 20,000/= with a balance of a similar amount agreed to be paid upon transfer of the land to the Applicant. The purchase price was 40,000. The Applicant went into possession immediately he paid the first 20,000/=.

5. The Respondent didn't transfer the land to the Applicant. In spite of this however, the Applicant paid the remaining balance on 2/2/2002. It appears clear that the Applicant put up his house on the land and started cultivation. From the year 2001 to date, he has used the land as his own to the exclusion of the Respondent and everyone else. The Applicant's counsel, Mr. Otanga, submitted, *inter alia*, that the Applicant has met the conditions necessary for him to be declared an adverse possessor.

6. The Applicant's possession, occupation, and/or use of the land is said to have been open, exclusive, continuous, and as of right for over 12 years. The case of **KOINANGE INVESTMENTS & DEVELOPMENT COMPANY LIMITED Vs IAN KAHU NGETHE & 3 others: [2015] eKLR: HCC: MISC. APPLICATION No. 278 of 2015 (O.S.)** and **NGINGE KAARA Vs GICHOBHI KAARA & Another [1997] eKLR** were cited for guidance.

7. In this application the court was invited to determine the following questions:

(1) Whether the Applicant has been in possession of BUKHAYO/BUGENGI/2365 for a period exceeding 12 years.

(2) Whether the Respondent's title to BUKHAYO/BUGENGI/2365 became extinguished upon expiry of 12 years from 24/3/2001 – when the Applicant went into possession of the land.

(3) Whether the Applicant has now acquired title to the said land by virtue of adverse possession.

(4) Whether the registration of the Respondent as owner of BUKHAYO/BUGENGI/2365 should be cancelled and the Applicant be registered as the owner in this place.

(5) Who should pay the costs of the case?

8. The matter is not controverted. And from what has been availed, it seems clear that the Applicant went into possession, occupation, and use of the land immediately he made a sale agreement with the Respondent. The Applicant says he lives on the land. He started living there in the year 2001. The Respondent has never interfered with him. He averred that he has lived on the land openly, peacefully, and without interruption all along. The cases cited by the Applicant's counsel are useful for guidance.

9. I may add that the decided case of **WAMBUGU Vs NJUGUNA [1983] KLR 172** sheds even clearer light on the issue of adverse possession. In the case, the court expressed itself as follows in the relevant part:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats the interests of the claimant are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it”

The Court continued:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years”.

10. Wambugu's case (supra) has been cited with approval in several cases including **JOHNSON NEHONDO Vs CHRISTOPHER NASHISAKO & Another: CA No. 161/2012, KISUMU** and **ALBERT FRED EKIRAPA Vs NYONGESA SIRARI & 5 others: CA No. 87/2015, KISUMU**. In **WANYANCHA GIBITI & 3 others Vs WAIGOGI NYAHILI SINDA: CA No. 4 of 2013, KISUMU**, the court held that for a claim of adverse possession to be successful, it must be adequate in continuity, in publicity, and in extent as against the registered owner.

11. In this matter, it is clear that the Applicant entered the land through permissive arrangement with the proprietor. He built on the land and started living and farming on it. The Applicant seems to take the position that time started running in his favour on 24/3/2001 when he entered the land. The court has a different view. And the view is different because it is clear that the Applicant entered the land with permission. Records show that the Applicant paid the final balance on 2/2/2002. In the courts view, the process of transferring the land to the Applicant should have started immediately. But it didn't. The Respondent seems to have changed his mind.

12. Section 8 of the Land Control Act (cap 302) enjoins that consent from Land Control Board should be obtained within six (6) months of entering or making an agreement failing which the transaction becomes void, unless the court otherwise extends the period. In this matter, the transaction must have become void 6 months from 24/3/2001 when the agreement was entered into. That would take us to sometimes in late September 2001. That is time the Applicant's possession of the land became adverse. It is clear that from then on, that possession has been adverse all along. The Respondent discontinued his possession when he allowed the Applicant to possess the land. He has never tried to assert it again. It appears clear that the Applicant's possession has been open, continuous, exclusive and uninterrupted all along. The court agrees that the Applicant has become an adverse possessor.

13. From the foregoing, it is clear, or should be, that the court's answer to the questions posed in the Originating Summons are as follows:

Question 1: Yes, the Applicant has been in possession for a period exceeding 12 years.

Question 2: Yes, the Applicant's title has become extinguished but not from 24/3/2001 but 12 years from sometimes in late September 2001.

Question 3: Yes, the Applicant has acquired title by adverse possession.

Question 4: Yes, the Respondent's title should be cancelled and replaced with the Applicant's title.

Question 5: It is the Respondent who should pay the costs of the suit.

14. The court was asked to make the following orders:

(i) That the Respondent's rights over BUKHAYO/BUGENGI/2365 got extinguished by adverse possession upon expiry of 12 years from the date the Applicant came into possession on 24/3/2001.

(ii) That the Respondent be perpetually barred from taking or using BUKHAYO/BUGENGI/2365.

(iii) That the Applicant be registered as the proprietor of BUKHAYO/BUGENGI/2365.

(iv) That the Respondent do execute all the documents to facilitate transfer of BUKHAYO/BUGENGI/2365 into the names of the Applicant and that in default the Deputy Registrar of this honourable Court do execute the same in place of the Respondent.

15. All the above orders are granted. But the time factor for the first order is late September 2001 and not 24/3/2001. Additionally, an order is granted that the Respondent pays the costs of the suit.

Dated, signed and delivered at Busia this 22nd day of January, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel for Plaintiff: Present

Counsel for Defendant: Absent

Count Assistant: Nelson Odame