



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 20 OF 2014

AGRIPINA NEKESA WAFULA..... PLAINTIFF

= VERSUS =

VINCENT WESONGA OSIMATA.....DEFENDANT

J U D G M E N T

1. The Plaintiff in this suit – **AGRIPINA NEKESA WAFULA** – commenced this suit as Applicant vide an Originating Summons dated 16/1/2012 and filed on 17/1/2012. The suit is against the Defendant – **VINCENT WESONGA OSIMATA** – who was Respondent in the same summons. In the suit the Plaintiff is laying claim of ownership of a portion of land parcel No. BUKHAYO/MUNDIKA/329. The ownership claim is based on adverse possession.

2. The court was invited to determine the following:

1. Whether or not the Respondent/Defendant sold land to the Applicant's late husband in 1997.
2. Whether or not the Applicant together with her late husband took possession of the said piece of land in 1997.
3. Whether or not the Applicant with the help of the late husband planted Siola trees on the suit land.
4. Whether or not the Applicant has continuously and peacefully remained in possession of the suit land for a period of 12 years uninterrupted.
5. Whether or not title in the suit land in favour of the Respondent has been extinguished by operation of law.
6. Whether or not the Applicant has acquired title to the suit land by operation of law.
7. Whether or not there should be an order of this court that L.R. BUKHAYO/MUNDIKA/329 be registered in favour of the Applicant on ground that she is now entitled to it by reason of adverse possession.
8. Whether or not the Defendant should be condemned to pay costs.

3. In the supporting affidavit that came with the Originating Summons, the Plaintiff averred, *inter alia*, that her late husband – **GEORGE ALBERT WANDERA WAMBONGO** – bought a portion of land measuring 0.75 acres at a price of 59,000/= to be excised from L.R. BUKHAYO/MUNDIKA/329 (also referred to as “suit land”). After purchase, the Plaintiff and her late husband went into possession and started cultivation. They also planted some trees. In the course of time, the Plaintiff demanded additional money, which was paid.

4. The Plaintiff annexed various agreements – first one dated 13/4/1991 for Kshs.20,000, a second one dated 28/8/1991 for 8,000, a third one dated 20/4/1992 for 10,000/=, and a final one, which is the fourth, dated 11/6/1992 for 10,000/= - showing the various payments that were made to the Defendant.

5. The Plaintiff's late husband passed on in 1997 but the Plaintiff has continued in possession of the suit land to date. Her possession was said to have been continuous and uninterrupted for over 12 years. That being the case, she has acquired her portion by adverse possession and the Defendant's title over that portion therefore has become extinguished by operation of the law. She therefore wants to become the registered owner of that portion.

6. The Respondent responded via a replying affidavit dated 18/7/2012 filed here on the same date. In the affidavit, the Respondent talked of having agreed to sell 1½ plots from the suit land to the Plaintiff's late husband at a price of 75,000/=. He was paid 48,000/= leaving a balance of 27,000/=. The purchaser then died in 1997 leaving the balance unpaid.

7. According to the Respondent, the Plaintiff's late husband neither occupied nor developed the suit land. He said also that he never entered into any agreement with the Plaintiff. Further, the Respondent faulted the Plaintiff for laying claim to the entitlement of her deceased husband without first obtaining probate letters. He termed as false and forged the agreements availed by the Plaintiff. He also complained that the Plaintiff has placed a caution on the suit land and asked for its removal.

8. The court started hearing the matter on 19/7/2016. The Plaintiff's side called two witnesses: The Plaintiff herself as PW1 and one VINCENT OKUMU WAMBONGO as PW2. These two witnesses were clear that the Plaintiff's late husband was buying land from the Defendant sometime in 1991. After purchase, the Plaintiff and her late husband went into possession and use of the land. The husband then passed on in 1997 but the Plaintiff has been using the land to date.

9. PW2 in particular made reference to his own written statement dated 16/1/2012, which he adopted as his evidence. He stated clearly in the statement that the Plaintiff has been using the suit land. She has planted Siola trees there and has been growing food crops. He also stated he was aware that the full purchase price was paid but the Defendant refused to go to Land Control Board so that the process of transfer could begin.

10. The defence side called three witnesses: The Defendant himself as DW1, one PETRONILLA MAKOKHA WANDERA as DW2 and FREDRICK WANDERA OKELLO as DW3.

11. DW1 talked of having transacted to sell land to Plaintiff's late husband in 1992. He was selling one plot at 50,000/=. The money was paid but the husband asked to be allowed to buy more. Then a portion was added and the price was 25,000/=. Of this money, the husband undertook to pay 10,000/= at first. He sent the money to the Plaintiff for payment but the Plaintiff paid 9,000/= only. The balance has never been paid. This witness showed no written agreement. He said the agreement was destroyed in house fire. During cross-examination; this witness admitted the Plaintiff uses the land and has so used it since 1992. DW2 on the other hand talked of the Plaintiff's late husband, who was also her own husband, buying the land from DW1. She could not however recall the size of the land or the price. Like DW1, DW2 admitted during cross-examination that the Plaintiff has been using the land. The last witness – DW3 – said the purchaser was his father. He admitted also that the Plaintiff has been using the land.

12. Hearing over, written submissions were filed. The Plaintiff's submissions were filed on 6/2/2018. It was submitted, *inter alia*, that adverse possession requires open, notorious, exclusive, continuous and/or uninterrupted possession of claimed land for a period exceeding 12 years. Such possession must be hostile to the ownership interests of the registered owner. The Plaintiff was said to have demonstrated all this and is therefore entitled to become the registered owner of the claimed portion.

13. The Defendants submissions were filed on 29/1/2018. He submitted, *inter alia*, that indeed there was a land sale transaction between himself and the Plaintiff's late husband. He was selling 1½ plots from the suit land. The sale price was kshs.75,000/= of which Kshs.48,000 was paid leaving a balance of 27,000/=. The Plaintiff's late husband died without completing payment. It was emphasised that the sale was between the Defendant and the Plaintiff's late husband, not the Plaintiff herself. The agreements the Plaintiff availed were said to be a forgery.

14. The Defendant submitted also that the Plaintiff has not had continuous and peaceful possession of the suit land. It was stated that the Defendant has had occasion to report her to the area assistant-chief and she was even summoned several times but refused to honour the summons. The Defendant took the position that his title has never been extinguished by operation of law as alleged as the purchase price has never been fully paid. The Plaintiff he said, has never had quiet, peaceful and uninterrupted possession. Ultimately, it was submitted that adverse possession was not proved. The court was urged to dismiss the case.

15. I have considered the case as filed, the evidence given, and the rival submission. It is clear there was a land sale transaction between the Plaintiff's late husband and the Defendant. The exact details of how the transaction took place or even the purchase price are not clear but it appears to me that the Plaintiff was more consistent in what she told the court. But I think the more crucial thing is not to make a finding whether the sale was complete or not. Both sides are agreed that there was a sale transaction and it is clear to me that possession of the land by the Plaintiff and her late husband came as a result of that transaction. The crucial issue here is adverse possession, not sale.

16. By Plaintiff's account, she and her late husband started using the land sometimes in 1992. Then the husband died in 1997 and left the plaintiff using the land. She has been using the land to date. By admission of the Defendant himself and his witnesses, the Plaintiff is still using the Land. The Defendant submitted that the use or possession has not been peaceful and continuous. The Plaintiff on the other hand maintains that it has been peaceful and continuous all along.

17. But it appears to me that initially, possession of the suit land was with permission from the Defendant himself. The Plaintiff's late husband was buying the land. He was allowed to use it and he started using it with the Plaintiff. He then passed on in 1997 and left the Plaintiff using it. If, as the Defendant alleges, all the purchase price had not been paid, one wonders why he tolerated the Plaintiff's continued use of the land yet she was not the one he was in agreement with. Nothing shows that the Defendant ever used that portion. It is clear that the Plaintiff continued using the suit land as her own from the time her husband passed on. That was way back in 1997. By the time this suit was filed in 2012, it is clear that Plaintiff had used the land for over 12 years.

18. The Defendant would have us believe that some reports he made to the assistant chief interrupted the running of time or interrupted the continuity of possession. With respect, that is not very much so. Interruption occurs when the owner decisively asserts his rights of ownership or when his right of ownership is admitted by the adverse possessor. An assertion of ownership right by the registered owner is deemed effective and conclusive when such owner institutes legal proceedings or makes effective entry into the land. Mere reports to the assistant chief which are not followed by a binding resolution of the dispute cannot be said to constitute interruption of the running of time.

(See case of **GITHU Vs NDEETE: [1984] KLR 776**).

19. In adverse possession, occupation, though necessary in some circumstances, is not always an indispensable requirement. The key requirement in claims of adverse possession is exclusive physical control of the land and that largely depends on the circumstances of each case, the nature of the land, and the manner in which the land of that type is commonly used or utilised (see **POWELL Vs McFARLANE: [1977] 38 P & Cr. 452**).

20. The case of **Wambugu Vs Njuguna [1983] KLR 172**, gives a particularly clear insight as to what proof of adverse possession would entail. In the case, it was held, *inter alia*, that the general principle is that until the contrary is proved, possession in law follows the right to possess. And in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his rights to the land either **by being dispossessed of it** or **by having discontinued his possession**. Dispossession of the owner that defeats his title consist in acts which shows the adverse possessor as owner and which are without permission or approval of the registered owner.

21. In this matter, the Plaintiff's husband died in 1997. The Defendant says the purchase price had not all been paid. And knowing the state of affairs to be such, he nevertheless condoned the continued use of the suit land by the plaintiff. The Plaintiff herself continued using the land as her own. The Defendant is not shown to have resisted the use at all. What this means is that he had discontinued his possession. It is clear though that the Plaintiff does not occupy the land. Her possession is through exclusive use and control. She seems to reside elsewhere.

22. The Defendant's alleged report of the matter to the area assistant chief or even the letters form the same chief summoning the plaintiff for a dispute cannot be said to amount to interruption of peaceable possession. It is clear that no dispute resolution followed from such attempts and the Defendant did not take any other decisive action. It is clear therefore that from 1997 to the time of filing this suit, the Plaintiff's continued use or cultivation of the suit land as owner clearly ran contrary to the rights of the plaintiff as registered owner. Such use or cultivation was not on the basis of a lease or license. And it was clearly without the owner's approval.

23. In my view, the Plaintiff has demonstrated adverse possession. The Plaintiff failed to assert his rights for far too long. My findings are that the Plaintiff has continuously and peacefully possessed the land for over 12 years and that possession is clearly adverse to the Defendant's rights of ownership. The Defendant's rights of ownership therefore are found to have become extinguished by operation of law. In simple terms, the Plaintiff is found to be an adverse possessor for the portion of the land that was being sold by Defendant to her late husband, which is also the land she has been using or cultivating. On the issue of costs, I think it is only fair that each side should bear its own costs. The Defendant has lost the land. I think it is too much to condemn him to pay costs. It is clear that my answers to issues 2, 3, 4, 5, 6 and 7 in the Originating Summons are in the affirmative. No prayers for any orders however were made in the Originating Summons. I think it would be churlish or presumptuous to make them. I let the matter rest at that.

Dated, signed and delivered at Busia this 18th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Present

Counsel for Plaintiff: Absent

Counsel for Defendant: Absent

Court Assistant: Nelson Odame