



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 87 OF 2017 (O.S)

JOSEPH ITEBA ETYANG

VINCENT ASOKA

ANGELINE ATENGE ETEBA

(Suing on behalf of Okumu Nyongesa Makari)

LAWRENCE AMONI AMUYA.....PLAINTIFFS

= VERSUS =

PATRICK EUNYASAT.....DEFENDANT

J U D G E M E N T

1. This suit was instituted on 28th April 2017, by the Plaintiffs – **JOSEPH ITEBA ETYANG, VINCENT ASOKA, ANGELINE ATENGE ETEBA and LAWRENCE AMONI AMUYA** – against Defendant – **PATRICK EUNYASAT** vide an Originating Summons dated 20th March 2017. The Plaintiffs claim 3½ acres, 5 acres, 2½ acres and 2 acres respectively of the land known as **L.R TESO/APOKOR/811** or the resultant subdivisions **L.R TESO/APOKOR/1956 to 1963** by way of adverse possession.

2. The Court has been invited to determine the following questions:

- i. Whether the Plaintiffs purchased the said portions
- ii. Whether the Plaintiffs took possession and have been in open, uninterrupted, occupation/use thereof to date or for a period of over 12 years
- iii. Whether the Plaintiffs have acquired the land by operation of the law or adverse possession
- iv. Whether the Defendant holds the suit properties in trust for the Plaintiffs.

3. Further to the questions enumerated above the Plaintiffs pray inter alia for the following orders:

- i. That the Defendant's interest/rights in a total of 12¾ acres **SOUTH TESO/APOKOR/811, 156 to 1963** have extinguished by operation of the law and he holds the land in trust for the Plaintiffs.
- ii. That the Plaintiffs have acquired a total of 12¾ acres portion **S. TESO/APOKOR/811, 1956 to 1963** in the circumstance.
- iii. That portions measuring 3¼ acres, 5 acres, 2½ acres and 2 acres of the Land Parcel **S. TESO/APOKOR/811, 1956 to 1963** used by the Plaintiffs respectively be hived off and transferred to the Plaintiffs.
- iv. That the Defendant signs all relevant subdivisions and transfer documents accordingly, in default the Deputy Registrar of the Honourable Court be authorized to sign such documents on the Defendant's behalf.

v. Costs be borne by the Defendant.

4. The 1st Plaintiff, **Joseph Itebe Etiang** deponed that he purchased 3 acres out of **LR SOUTH TESO/APOKOR/1958** from the Defendant on 22nd January 2000 at Kshs 75,000. He then purchased a further quarter acre from the aforementioned property at Kshs. 8000 and took vacant possession of the entire 3¼ acre parcel. He then extensively developed it by building 4 houses and planting trees and crops thereon. The Defendant initially followed procedure in furtherance of the sale by causing the said portion to be surveyed. The Defendant then applied and obtained Land Control Board consent for the subdivision of the property into parcels **LR S.TESO/APOKOR/ 2920** and **2912** and the consent to transfer 2912 to the 1st Plaintiff. However, from that point, the Defendant declined to avail further documents necessary for completion of the sale. The 1st Plaintiff deponed further that the Defendant has never interfered with or interrupted the use and occupation of the 3¼ acre property he purchased.

5. The 2nd Plaintiff in his Supporting Affidavit deponed that he purchased 4 acres out of **LR/SOUTH TESO/1958** from the Defendant at Kshs 100,000 on 3rd February 2000. He then purchased a further 1 acre out of the said property on 17th July 2004 for Kshs.28,500. Having paid the full purchase price, the 2nd Plaintiff took vacant possession of the said parcels, built 5 houses and planted several trees and crops thereon. He further depones that the Defendant applied and obtained the Land Control Board's consent to subdivide the land but became evasive on the issue of transfer of the 2nd Plaintiff's portion. He claims to have had peaceful, open and uninterrupted possession of the land for over 12 years.

6. The 3rd Plaintiff filed suit against the Defendant in her capacity as the Administratrix of the Estate of Okumu Nyongesa Makari. She depones that she is the deceased's widow. The deceased purchased 2½ acres out of **SOUTH TESO/APOKOR/1958** sometime in 2001 for a consideration of Kshs. 62,500. Surveyors marked off the said portion and the Defendant gave the deceased vacant possession thereof but since then the Defendant was evasive on the issue of transfer. The 3rd Plaintiff and the deceased developed the parcel extensively by building houses, planting trees and cultivating crops. Moreover, the deceased was buried on the property. The 3rd Plaintiff avers to have been in open, peaceful and quiet occupation of the land from 2001.

7. The 4th Plaintiff stated that he bought 2 acres of **LR SOUTH TESO/ APOKOR/1958** from the Defendant sometime in 2004 at Kshs.66,000. The Defendant then invited surveyors who carved off and marked his portion of land. Subsequently, he obtained the Land Control Board's consent to subdivide and transfer the portion but failed to effect the transfer. The 4th Plaintiff deponed further that he was given vacant possession of the suit property by the Defendant and that he does not reside on the land but has cultivated and grown trees on it. He avers that he has had quiet possession of the property for over 12 years.

8. According to the 1st Plaintiff the succession process and subsequent subdivision was undertaken in disregard of the Plaintiffs' entitlement to their property which is the whole of **MARACHI/ELUKONGO/2942** and part of **MARACHI/ELUKONGO/2943**. The Plaintiffs admit that they do not have any claim to **MARACHI/ELUKONGO/2941** and that they have stayed on the suit property for 45 years. In all that time they have never received any demand to vacate the suit property from the Defendants.

9. The hearing of the matter proceeded on 21st March 2018. The Defendant hardly participated in the proceedings herein and did not appear in Court on the hearing date. The hearing was therefore undefended. Nine (9) witnesses testified. The Plaintiff's presented their evidence as PW 1 – 4. Their testimony was in consonance with the version of events presented in their pleadings.

10. **SYLVESTER OMUSE NAMADI**, PW 5 stated that he is a village elder and was a witness when the 4th Plaintiff bought his portion of **SOUTH TESO/APOKOR/1958** from the Defendant. He confirmed that the 4th Plaintiff currently cultivates the land and that the 1st, 2nd 3rd and 4th Plaintiffs are all neighbours living peacefully on the suit property. **PETER OPOLO OKEMER**, PW 8 also witnessed the said transaction. **CHRIS SAKAYA OTWANI**, PW 6 was a witness to the sale between the Defendant and the 1st Plaintiff. **BASIL SIKUKU OTWOMA**, PW7 witnessed the sale of land between the Defendant and the late Okumu Nyongesa (represented by the 3rd Plaintiff) and **CLEMENT ONYAIN**, PW9 witnessed the sale of land between the Defendant and the 2nd Plaintiff. All the aforementioned witnesses were clear that the Plaintiffs fully paid the purchase price relating to their portions.

11. The Plaintiffs produced the following exhibits as evidence in support of their case:

- a) P. Exh 1 – Green card, **SOUTH TESO/APOKOR/1958**.
- b) P. Exh 2(a) – 1st Plaintiff's Land Sale Agreement dated 22nd January 2000.
- c) P. Exh 2 (b) – 1st Plaintiff's Land Sale Agreement dated 28th May 2006.
- d) P. Exh 3 – Application for Land Control Board Consent dated 1st March 2000.
- e) P. Exh 4 – Consent.
- f) P. Exh 5(a) – 2nd Plaintiff's Land Sale Agreement dated 3rd February 2000.
- g) P. Exh 5(b) – 2nd Plaintiff's Land Sale Agreement dated 13th January 2001.
- h) P. Exh 6 – Application for Land Control Board Consent.

- i) P. Exh 7 – Consent dated 15th December 2016.
- j) P. Exh 8 – Limited Grant of Letters of Administration ad Litem dated issued on 1st December 2016.
- k) P. Exh 9 – 3rd Plaintiff’s Land Sale Agreement dated 19th December 2006.
- l) P. Exh 10 – 4th Plaintiff’s Land Sale Agreement dated 22nd January 2005.

12. Counsel for the Plaintiffs closed his case and opted not to file submissions. Since the Defendant did not appear the Plaintiffs’ case remains uncontroverted. I have considered the Plaintiffs’ pleadings and the applicable law. From the Plaintiffs’ pleadings and testimony, a clear pattern reveals itself. The Plaintiffs at different times bought various portions of land from the Defendant who would initially follow procedure only to renege on the sale agreements at the final stages of completion. The said agreements were witnessed accordingly with PW 5 – 9 presenting testimony that corroborated that of the Plaintiffs. The Plaintiffs who are neighbours have without a doubt proved that they all bought land from the Defendant on various dates ranging from 2001 to 2004 and that they were given vacant possession of their respective parcels. The 12 year requirement has been fulfilled.

13. The law on Adverse possession is well settled as provided by Sections 13 and 38 of the Limitation of Actions Act. Section 13 of the Act underscores the essential requirement of possession of the land. It is trite law that he who asserts must prove. The Court of Appeal in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi [2018] eKLR** observed thus;

“...It therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the Defendant herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)”

14. The Plaintiffs have not only been in open possession of the suit properties, but have also extensively developed the same demonstrating their intent to fully own their parcels. The 3rd Plaintiff specifically gave evidence that her deceased husband is buried on her 2½ acre parcel. In **KWEYU VERSUS OMUTUT [1990] KLR 709**, the Court of Appeal quoted by the Court in **M’mbaoni M’thaara v James Mbaka [2017] eKLR**; Gicheru JA, as he then was, stated as follows:

“...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 de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile 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 and notoriously.”

15. The Plaintiffs have proven their case on a balance of probabilities. Their entry upon the suit property was with the permission of the Defendant and efforts were made at the Defendant’s behest to have the parcels registered and the records regularized. The facts presented before court show clearly that the requirements of adverse possession have been met in this case. The Plaintiffs’ claim has merit and questions a, b, c and d in the Originating Summons dated 20th March 2017 are all answered in the positive. Orders (i) to (v) therein are granted accordingly.

Dated, signed and delivered at Busia this 29th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs: Present

Defendant: Present

Counsel of Plaintiffs: Present

Counsel of Defendant: Present

Court Assistant: Nelson Odame