



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 19 OF 2017

JAMES CHARLES NAKHWANGA OSOGO.....1ST PLAINTIFF

ALPHONCE ALI OJIAMBO

SYLVESTER OKHUBEDO OJIAMBO

JANE ODHIGA OTIATO As Administrators of the estate of

SILVANUS OJIAMBO OTIATO.....2ND PLAINTIFFS

VERSUS

SYLVESTER OGUNYA KECHULADEFENDANT

J U D G M E N T

1. This suit was filed here on 1/2/2017 vide an Originating Summons dated 23/1/2017. At the time, the Plaintiffs – **JAMES CHARLES NAKHWANGA, ALPHONCE ALI OJIAMBO, SYLVESTER OKHUBEDO OJIAMBO** and **JANE ODHIGA OTIATO** - were the applicants while the Defendant – **SYLVESTER OGUNYA KECHULA** – was the respondent. The dispute between the parties relate to land parcel No. BUNYALA/BULEMIA/535 (“suit land hereafter”), currently registered in the name of the Defendant but claimed by the Plaintiffs as adverse possessors.

2. The Plaintiffs would wish the court to determine the following questions:

- (a) Whether the applicants (now Plaintiffs) have been in open, quiet, notorious possession of 2.8Ha each out of L.R. BUNYALA/BULEMIA/35 for a period exceeding 12 years.
- (b) Whether the respondent’s (now Defendant’s) title to L.R. No. BUNYALA/BULEMIA/535 became extinguished upon expiry of 12 years from the time the applicants went into possession of the land “i.e.” August 2000 and 2nd February, 1988.
- (c) Whether the applicants have now acquired title to the said $\frac{2}{3}$ of the land by virtue of adverse possession.
- (d) Whether the registration of the late JOHN KETSULA and MUKONO KETSULA and the respondent being administrator of the estate as owner of $\frac{2}{3}$ of L.R. BUNYALA/BULEMIA/535 should be cancelled and the 1st Applicant be registered as owner of $\frac{1}{3}$ of L.R. No. BUNYALA/BULEMIA/535.
- (e) Whether the registration of the late JOHN KETSULA and MUKONO KETSULA and the respondent being the administrator of the estate as owner of $\frac{2}{3}$ of L.R. BUNYALA/BULEMIA/535 should be cancelled and the 2nd applicants be registered jointly as owners of the other $\frac{1}{3}$ of L.R. No. BUNYALA/BULEMIA/535.
- (f) Who should pay costs of the suit?

3. If the questions posed are determined in their favour the Plaintiffs want the following orders:

(1) That the respondent's right over L.R. BUNYALA/BULEMIA/535 got extinguished by adverse possession upon expiry of 12 years from the time the applicants came into possession, that is from 2000 and 1988 respectively.

(2) That L.R. No. BUNYALA/BULEMIA/535 be ordered subdivided into 3 equal portions with 1st Applicant being registered as owner of $\frac{1}{3}$ share while the 2nd Applicants being registered as joint owners of $\frac{1}{3}$ shares with the remaining $\frac{1}{3}$ share going to JOSEPH OKHUBEBO.

(3) That the respondent be ordered to execute all the relevant statutory documents required of him to facilitate the transfer of the portions measuring 2.8Ha each out of L.R. No. BUNYALA/BULEMIA/535 in default the Deputy Registrar of the court to execute the same in place of the respondent.

(4) That the respondent, his family members, servants, agents, and those claiming through him be permanently barred, restrained or enjoined from disposing, charging, taking, entering, using, or in any other way interfering with the applicants portions out of L.R. No. BUNYALA/BULEMIA/535 measuring 2.8Ha each.

(5) That the costs of this case be borne by the respondent.

4. The application came with two supporting affidavits, one by SYLVESTER OKHUBEDO OJIAMBO representing the second group of Plaintiffs and another by JAMES CHARLES NAKHWANGA OSOGO as 1st Plaintiff. The first Plaintiff bought his portion from one PAUL OSIGO KETSULA who had come to own the land from other KETSULAS in the lineage. The original owner of the land was infact JOHN KETSULA alias YOHANA KECHULA BENDE. The time of purchase is stated to be 1996. After that, there was a succession cause filed – Succession Cause No. 85 of 1996 – facilitated by 1st Plaintiff in order to ensure transfer. And then there was an unsuccessful attempt to obtain consent from the area Land Control Board. The seller then died and the 1st Plaintiff himself became sick. All this seems to have stalled the intended transfer.

5. For the other Plaintiffs, their late father bought the portion they are claiming. Then their mother went into possession and started cultivation. From copies of the agreement availed, purchase seems to have taken place sometimes in 1988.

6. The court heard the matter on 19/2/2018. The 1st Plaintiff testified as PW1. He adopted his supporting affidavit that came with the application as his evidence. He reiterated that he bought the land from one PAUL OSIGO KETSULA who died in Uganda before transferring the land to him. This witness said he still cultivates his portion. He also clarified that the other Plaintiffs are two sons and step mother respectively. They all trace their ownership to SILVANUS OJIAMBO OTIATO who was father to the two sons and husband to the step mother of the two sons.

7. SYLVESTER OKHUBEDO OJIAMBO, one of the other Plaintiffs, testified as PW2 and like PW1, adopted his supporting affidavit as evidence.

8. Counsel for Plaintiffs filed submissions on 2/3/2018. The submissions contain some history of the ownership of the land and also highlighted the Plaintiffs connection to the land. It was submitted that the Plaintiffs have proved their case.

9. I have considered the pleadings, evidence, and submissions. The Defendant didn't oppose the matter. Records show that he was served various times. He was, for instance, served on 5/7/2017 by PETER NANJALA ODWORI at his place of work at JOMO KENYATTA INTERNATIONAL AIRPORT. He was again served with hearing notice at the same place on 30/8/2017. Yet again, he was served with a mention notice at EMBAKASI, NAIROBI on 13/12/2017. The last service, which was for hearing, was done on 7/2/2018 at the Defendant's place of work in Nairobi. All this is clear from affidavits of service filed here on 21/11/2017, 28/1/2018, and 19/2/2018.

10. The 2nd Plaintiffs in this matter made one fatal omission namely: They did not avail the grant to show or prove that they are administrators of the estate of the late SILVANUS OJIAMBO OTIATO. Yet they are suing in that capacity. This is a serious omission and it dis-entitles the 2nd Plaintiffs from what they are seeking at this stage. Court of this country have always refused to allow pleadings in matters where grants to represent estates of deceased persons are necessary but have not been availed or demonstrated to have been obtained.

11. In **NATHANIEL O. KHISA Vs MARY KHISA NYANYI & 3 others [2013] eKLR** the court struck out the suit because the Plaintiff had not obtained letters of administration. In **PETER KARANJA MWANGI Vs JOSEPH KAMANDE & another HCC No. 146/2008, NYERI**, Serгон J upheld a preliminary objection on grounds, *inter alia*, that the Plaintiff had not obtained a grant. The entire suit and all applications in it were struck out. And in **TROUSTIK UNION INTERNATIONAL AND INGRID URSULA HEINZ Vs MRS JANE MBEYU & MRS ALICE MBEYU, Court of Appeal: CA No. 145/1990** the court observed thus: **“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception”**.

12. I think I have made the position clear. I do not want to delve into the merits of the 2nd Plaintiffs case. They have not availed to me any letters of administration. Their claim is incompetent and I hereby strike it out.

13. I now come to the 1st Plaintiffs claim. He showed well that he bought his portion of land but the seller died before transferring it to him. He however still possesses the land. The Defendant is not shown to have tried at all to remove him from the land. In **MURIGI Vs KAMBI & Another: HCC No. 33 of 2002 (OS)**, GBM Kariuki J (as he then was) observed as follows:

“where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser

openly occupy the land for a continuous and un-interrupted period of not less than twelve years the trespasser is entitled to apply under Section 38 to be registered as the proprietor of the land. This is what the doctrine of adverse possession means”.

14. Adverse possession consists in hostile negation of the title of the true owner. A party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*” that is, peaceful, open, and continuous. The possession must be adequate in continuity, in publicity and in extent. It should also be actual, visible and exclusive over the statutory period (please see the case of **WANYANCHA GIBITI & 2 others Vs WAIGOGI NYAHIRI SINDA: Court of Appeal: CA No. 4/2013, Kisumu**).

15. It seems to me that the 1st Plaintiff has been using the portion he bought in a manner consistent with the tenets of adverse possession. The Defendant has refused or neglected to come forward to oppose the claim. For the 1st Plaintiff therefore, the answer to questions (a), (b), (c), and (d) is **YES**. Question (e) does not relate to 1st Plaintiff and does not therefore attract an answer. As for question (f) the answer is that the Defendant should pay the costs of the suit.

16. In light of the answers I have already given, the following orders are granted in favour of 1st Plaintiff relating to his portion only:

Prayers 1, 2, 3, 4, and 5.

For the avoidance of doubt, where the said prayers are expressly stated to relate to 2nd Plaintiffs – ALPHONCE ALI OJIAMBO, SYLSVESTER OKHUBEDO OJIAMBO, JANE ODHIGA OTIATO – they do not apply to them in this judgment and are actually not granted in their favour. The same position applies to one JOSEPH OKHUBEDO who was only introduced in prayer 2 and was never made part of this case. Nothing is granted in his favour.

Dated, signed and delivered at Busia this 28th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff: Absent

2nd Plaintiffs: Absent

Defendant: Absent

Counsel for the Plaintiffs: Present

Counsel for the Defendant: Absent

Court Assistant: Nelson Odame