



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 102 OF 2014 (FORMERLY HCC NO. 33/2012)

HENDRIKA MWAMBO.....PLAINTIFF

= VERSUS =

PAUL OKELLO GAUNYA.....DEFENDANT

J U D G E M E N T

1. The Plaintiff in this matter – **HENDRIKA MWAMBO** – initially filed this suit here on 9/5/2012 vide an Originating Summons dated 19/4/2012. The suit is against the Defendant – **PAUL OKELLO GAUNYA**. The Originating Summons was later amended and filed in court on 21/3/2018. The bone of contention between the parties relates to ownership of land parcels No. BUNYALA/BULEMIA/549 and BUNYALA/BULEMIA/841 (“disputed parcels” hereafter). The Defendant is the registered owner of the suit parcels but the Plaintiff claims ownership as an adverse possessor.

2. In the suit, the court is invited to make a determination of the following issues:

- 1) Whether or not the suit parcels of land BUNYALA/BULEMIA/549 and L.R. BUNYALA/BULEMIA/841 belonged to the late SIMON OUMA OMUMIA before land adjudication.
- 2) Whether or not the Plaintiff is the legal and equitable owner of the suit parcels of land.
- 3) Whether or not the Plaintiff acquired legal title and ownership of the suit parcels of land.
- 4) Whether or not the late Maaka Omumia held the said parcel of land in trust for the late Simon Ouma Omumia and the Plaintiff.
- 5) Whether or not the Defendant held the suit parcels of land in trust for the Plaintiff and the late Simon Omumia.
- 6) Whether or not the Plaintiff has been in adverse possession of the suit parcels of land for a period of over twelve (12) years.
- 7) Whether or not the Defendant’s title has been extinguished by operation of law.
- 8) Whether or not the Plaintiff has acquired title to the said parcels of land by adverse possession.
- 9) Whether or not the Defendant should be condemned to pay costs.

3. The Plaintiff wishes that determination of the issues raised will be in her favour and if that happens, she prays for the following:

- 1) A declaration that the Applicant (herself, that is) has been in occupation for over 12 years and has acquired adverse possessory rights and the Land Registrar be ordered to make entry to that effect.
- 2) Costs of the suit.

4. The narrative that emerges from the supporting affidavit accompanying the Originating Summons is that the Plaintiff’s late father – SIMON OUMA OMUMIA – was a brother to Defendant’s late father – MAAKA OMUMIA. Both were owners of different parcels of land but the Plaintiff’s late father pre-deceased the Defendant’s father. The Plaintiff’s father is said to have died in 1954 long before the onset of

land adjudication in the area. The families of the two were cultivating different parcels of land and although the Defendant's late father became the registered owner of the disputed parcels, the understanding was that the family of the Plaintiff's late father would continue to own the two parcels. That is the state of affairs that existed during the lifetime of the Defendant's late father, who passed on in 1997.

5. But things started unravelling after the death of the Defendant's father. Sometimes in 2010 the Defendant stopped the Plaintiff from using the disputed parcels of land. It was shortly after that that the Plaintiff carried out a search at the land's office and discovered that the Defendant had become the registered owner of the disputed parcels.

6. The Plaintiff stated that she and the rest of her late father's family have been in possession of the disputed parcels for over 30 years and have all along known the disputed parcels as their own. According to them, the Defendant's title has lapsed by operation of the law.

7. The Defendant made two responses viz: a replying affidavit filed on 6/6/2018 and a further replying affidavit filed on 5/11/2018. According to the Defendant, the Plaintiff's suit is based on falsehoods and cannot stand. He said that he followed due process in order to become the owner of the disputed parcels. The disputed parcels were said to have been a subject matter of past disputes between the parties. The Plaintiff lost in the dispute. This suit was said to be *res-judicata*.

8. The court started hearing the matter on 30/6/2015. The Plaintiff testified as PW1 and called two other witnesses – ANGELA OUMA BARASA (PW2) and PATRICK ONYANGO MAKI (PW3). The Plaintiff's evidence was in general accord with what she stated in the supporting affidavit that came with the Originating Summons. The evidence of the plaintiff's two witnesses was essentially of reinforcing value to the Plaintiff's evidence, particularly concerning use and/or cultivation of the disputed parcels and the history surrounding it. The two were clear that the Plaintiff, her sisters, and their mother had used and/or cultivated the land for a long time. The cross-examination done to the Plaintiff and her witnesses focussed mainly on whether the Plaintiff was using the disputed parcels at the time of giving evidence (30/6/2015). They all seemed to be in agreement that the Plaintiff was no longer using the land as the Defendant had stopped such use.

9. The Defendant testified on 6/11/2018. He said he got the two parcels of land from his late father – JOSEPH MAAKA OMUMIA. He adopted as evidence his replying affidavit filed on 6/6/2012, his written statement styled as evidence affidavit dated 25/3/2013, and further replying affidavit filed on 5/11/2018. He showed copies of land register showing that he became owner of the disputed parcels on 27/11/1990. The register also shows that his late father gifted him the disputed parcels.

10. According to the Defendant, the Plaintiff does not occupy the disputed parcels and it is not true that her late mother bequeathed them to her. He agreed that the Plaintiff's mother was using the disputed parcels but that happened with his permission after the mother made a request for such use. The Defendant also made reference to the past dispute over the land and said that he won the dispute. Cross-examination of the Defendant by counsel for the Plaintiff focussed abt on the family history, with admission being made by the Defendant that his own father and the Plaintiff's father were brothers. The Plaintiff's father however, is said to have died before owning any land. The Defendant's father then got to own not only the disputed parcels but also two others. It also came out during cross-examination that one of the disputed parcels – parcel No. 538 – has since been sub-divided into several other parcels.

11. After hearing, both sides filed written submissions. The Plaintiff's submissions were filed on 10/1/2019. The submissions were brief, with the Plaintiff being said to be entitled to ownership by virtue of exclusive use and permanent occupation.

12. The Defendant's submissions were filed on 24/1/2019. It was pointed out that the Plaintiff filed this suit after she had already been evicted from the land and **“was therefore not in active occupation thereof”**. The Plaintiff was faulted for not disclosing in her pleadings or in court **“when she had taken possession of the suit lands herein for the computation of the period of adverse possession”**.

13. The decided case of **KWEYU Vs OMUTO CA Civil Appeal No. 8 of 1990** was cited to emphasize the need to prove facts so that the court can draw legal inferences from them. In this matter itself the Plaintiff was said not to have proved facts relating to adverse possession. It was emphasized too that the Plaintiff is not in occupation. The court was urged to dismiss the Plaintiff's case.

14. I have considered the pleadings, evidence, and rival submissions. The Plaintiffs possession is said to span over 30-year period. Part of this period, which is the major part, comprised use and/or cultivation together with her late mother. The other period, which is the shorter one, was after her mother's death in year 2007.

15. The Defendant averred that the plaintiff's late mother asked him for permission to use the land for cultivation and he allowed it. The Plaintiff did not make effort to controvert this averment. It is an averment that was made in the Plaintiff's written response and repeated in Defendant's oral evidence in court. The Plaintiff's counsel however passed it over in silence. This is one weak aspect of the Plaintiff's case. And this is so because adverse possession is always inconsistent with permissive use of the land.

16. The Plaintiff's counsel pointed out another weakness namely: Failure to state clearly when time for adverse possession started to run. As I have observed already, the longer part of the period said to constitute adverse possession was when the Plaintiff's mother was still alive. The plaintiff's counsel needed to make it clear whether or not her claim accrued after her mother's death in the year 2007. This needed to be clarified because it is possible to argue that the Plaintiff's use and cultivation of the disputed parcels when her mother was still alive arose from, or through, any presumed or actual rights that her mother may have enjoyed. The court needed to be told whether the Plaintiff enjoyed rights as an adverse possessor when her mother was still alive. And if she could, it was necessary to point out when such rights first accrued. This was never made clear.

17. Further, the very real character of adverse possession enjoyed by the Plaintiff needed to be brought out in the Plaintiffs' case. There are many kinds of possession. There can be licensed or leased possession for instance. Adverse possession has its own character. I am minded here to refer to the instructive words of **KJ RUMTOMJI BOOK “Law of Limitation and Adverse Possession” Volume II, 5th Edition, at Pages 1366 and 1367** where the author brings out such character as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, un-interrupted, notorious exclusive and continuous. When such possession is continued for the requisite period (12 years) it confer an indefeasible title upon the possessor”.

The author continued: **“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”.**

18. In this matter, the Plaintiff emphasized the period of possession and its exclusive nature. She did not bring out the other aspects of adverse possession in order to emphasize its true character. It should be borne in mind that many other kinds of possession can also be long and exclusive. But such other kinds of possession would hardly qualify to be hostile, open, continuous, notorious and/or with a claim of title.

19. In my considered view, the Plaintiff set out to prove adverse possession but did not sufficiently demonstrate entitlement to ownership under it. She mentioned trust but did not pursue that aspect of her case. I therefore decline to determine any of the issues raised by the Plaintiff in her favour.

20. The upshot is that the Plaintiff’s case fails and is hereby dismissed. As regards costs, I hold that this is a delicate family affair. Let each side bear its own costs.

Dated, signed and delivered at Busia this 30th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Absent

Court Assistant: Nelson Odame