



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 2 OF 2018 (O.S)

JACINTA AKUMU ONGOMBE

SEBASTIAN OKELLO WANGOMBE

GODFREY WANGOMBE.....APPLICANTS

VERSUS

CHRISPINUS ODHIAMBO MINGILI

PETRONILA OKWERO

DANIEL ONYANGO ODUORI..... RESPONDENTS

RULING

1. This suit was instituted on 16th January 2018, by the Applicants – **JACINTA AKUMU ONGOMBE, SEBASTIAN OKELLO WANGOMBE and GODFREY WANGOMBE** – against Respondents – **CHRISPINUS ODHIAMBO MINGILI, PETRONILA OKWERO and DANIEL ONYANGO ODUORI** - vide an Originating Summons dated 10th January 2018. The Applicants claim the whole of **L.R MARACHI/ELUKONGO/2942** measuring **2.48 ha** and **1.88 acres** of **L.R MARACHI/ELUKONGO/2943** by way of adverse possession. The properties are said to be subdivisions of **L.R MARACHI/ELUKONGO/1348** measuring 15.5 acres.

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

i. Whether the Applicants have been in open, quiet and notorious possession of a parcel of land measuring 8 acres out of **L.R MARACHI/ELUKONGO/1348** measuring 15.5 acres and now subdivided into **L.R MARACHI/ELUKONGO/2941** measuring 2ha, **MARACHI/ELUKONGO/2942** measuring 2.98ha and **MARACHI/ELUKONGO/2943** measuring 1.42ha for a period exceeding 12 years.

ii. Whether the Respondents' title to 8 acres out of **MARACHI/ ELUKONGO/1348** now known as **MARACHI/ELUKONGO/2942** measuring 6.12 acres and 2 acres out of **MARACHI/ELUKONGO/2943** became extinguished upon the expiry of 12 years from the time the Applicant went onto possession of the said 8 acres of land in 1972

iii. Whether the Applicants have now acquired title to the said 8 acres of land by virtue of adverse possession.

iv. Whether the registration of **PETRONILA OKWERO** as trustee for **JULIUS JUMA** and **DENIS ODUORI ONYANGO** as owner of **L.R MARACHI/ELUKONGO/2942** measuring 6.12 acres should be cancelled and the Applicants ordered to be registered as owners of the same.

v. Whether the registration of **DANIEL ONYANGO ODUORI** as owner of **L.R MARACHI/ELUKONGO/2943** measuring 3.5 acres should be cancelled and the Applicants ordered to be registered as owners of 1.88 acres thereof.

vi. Who should pay the costs of the suit?

3. Further to the questions enumerated above the applicants pray, *interalia*, for the following orders:

i. The Respondents be ordered to execute all necessary statutory documents to facilitate the transfer of **MARACHI/ELUKONGO/2942** and 1.88 acres of **MARACHI/ELUKONGO/2943** into the names of the Applicants and that in default the Deputy Registrar of the Court to execute the same in place of the Respondents

ii. A permanent injunction/ inhibition barring the Respondents and any other parties acting in their stead from interfering with the enjoyment of the aforestated properties.

4. The 1st Applicant, **Jacinta Akumu Ongombe** in her supporting affidavit depones that her late husband, **Dominic Ongombe** bought 8 acres out of **LR. MARACHI/ELUKONGO/1348** from the late **Mingili Auma** in 1972. They immediately took possession and settled on the said property with their children. Dominic Ongombe passed on in 1981 and Mingili Auma also died on 1983 before transferring the land to the 1st Applicant. Mingili Auma was survived by a son, Gabriel Onyango Mingili who died in 2002. It then came to her attention that the 1st Respondent had taken out a Grant of Letters of Administration of the Estate of Mingili Auma and subdivided the whole of **LR MARACHI/ELUKONGO/1348** into three portions being, **MARACHI/ELUKONGO/2941, 2942** and **2943**.

5. According to the 1st Applicant the succession process and subsequent subdivision was undertaken in disregard of the Applicants' entitlement to their property which is the whole of **MARACHI/ELUKONGO/2942** and part of **MARACHI/ELUKONGO/2943**. The Applicants 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 Respondents.

6. The Respondents filed their responses to the Application on 8th May 2018. The 1st Respondent deponed that he is a son of the 2nd Respondent and the 3rd Respondent is a purchaser of part of their property. He admitted that he knew the Applicants. He claimed that they lived on only ½ an acre of the original property **MARACHI/ELUKONGO/1348** with the permission of his late grandfather. According to the 1st Respondent permission was withdrawn and the Applicants were required to leave the said portion belonging to the 2nd and 3rd Respondents. The 2nd and 3rd Applicants consequently left the suit property but the 1st Applicant has refused to do so to date. The 1st Respondent deponed further that the original property ceased to exist post-subdivision and that the Applicants hold no legitimate entitlement to the same as nobody from the late Mingili Auma's family has ever sold the suit property save for the portion sold to the 3rd Respondent.

7. The 2nd Respondent on the other hand stated that she is the daughter in law of the late Mingili Auma. She resides on **MARACHI/ELUKONGO/2942** which she holds on trust for her sons and has been utilizing the said property without interference throughout her marriage. The 3rd Respondent deponed that he purchased **MARACHI/ELUKONGO/2943** and has been in open, continuous and uninterrupted occupation of the same from 2001.

8. The Court record reflects that the Respondents appeared in Court only once on 25th October 2018 when the matter was mentioned for the purpose of taking directions. They did not appear on subsequent court dates. The Applicants were then directed to canvass the Application by way of written submissions. The submissions were filed on 18th February 2019. I have considered the submissions as filed, the parties' pleadings and the Applicable law. In their submissions the Applicants have reiterated the substance of their pleadings.

9. More specifically, it was submitted, much in the fashion of what is stated in the application, that the Applicant's late husband – DOMNIC ONGOMBE – bought eight (8) acres from the late MINGILI AUMA. The eight (8) acres were part of Land parcel **MARACHI/ELUKONGO/1348**. The land was then registered in the name of the late Mingili and the Applicant's late husband and his family moved in to possess and occupy the land after purchase. The purchase took place in 1972. The Applicant's late husband died nine years later – 1981 – and was buried on the land. The seller died in the year 1983 and was survived by a son – GABRIEL ONYANGO MINGILI, who died in the year 2002.

10. The Respondents then applied for letters of administration and left out the Applicants from the process. What followed was sub-division of Parcel No. 1348 into several other parcels – **MARACHI/ELUKONGO/2941, 2942** and **2943**, with the Applicant's portion falling entirely in Parcel No. **2942** and partly in parcel No. **2943**. The Applicants claim is squarely situate in these two parcels.

11. On 4/2/2019, this matter came up in court and the Respondents, though served, did not appear. Counsel for the Applicants also told the court that the Respondents had not responded to the Originating Summons. The court had a quick look into the records. It found an affidavit of service filed that same morning (4/2/2019) detailing how the Respondents were served. At the time, the court did not notice the Respondents response to the Originating Summons all filed on 8/5/2018. Noting that the Respondents were not in court on that day, and inadvertently thinking there were no responses on record from the Respondents, the court opted to treat the Originating Summons as an ordinary application and directed the Applicants counsel to file submissions to dispose of it.

12. It appears to me very clear that the position taken on 4/2/2019 was wrong. The Respondents had already made responses whose contents I had the benefit of reading when the file was later brought to chambers. This is not a matter that can be disposed of as earlier envisaged. It would be unfair to the Respondents to ignore the responses made by them. The intimation by the Applicant's counsel to court that the Respondents had not filed responses was wrong and misleading. Had the true picture become immediately apparent to the court on 4/2/2019, another date would have been given to the Applicant, with a directive that the Respondents be served. The Applicant would only possibly have been awarded costs of the day.

13. I would hesitate to find for the Applicants in this matter in the prevailing circumstances. The Respondents are entitled to a hearing. They are not shown to be notorious in failing to appear in court. The matter is still in its early stages. I therefore decline to grant the prayers sought at this stage. Let the matter be prepared for hearing so that ultimately, a judgement on the merits can be made. Costs in the cause.

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

A. K. KANIARU

JUDGE

In the Presence of:

Applicants: Present

Respondents: Absent

Counsel of Applicants: Present

Counsel of Respondents: Absent

Court Assistant: Nelson Odame