



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 398 OF 2017**

**(Formerly Kisii HCCC (O.S.) NO 358 OF 2013)**

**MAROA MAROA NYAMBOHA.....PLAINTIFF**

**VERSUS**

**CHARLES ONYANCHA.....DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated 21<sup>st</sup> August 2013 and filed on 22<sup>nd</sup> August 2013, the applicant (the plaintiff) namely **MAROA MAROA NYAMBOHA** through Kerario Marwa & company Advocates, has sued the respondent (the defendant), **CHARLES ONYANCHA** for the following principal orders;

***a) That this Honourable Court do declare that the plaintiff has acquired ADVERSE POSSESSION of all that parcel of land known as BUKIRA BUHIRINGERA/178 measuring 19.5 hectares or thereabout ( the suit land) having been in uninterrupted occupation and or possession of the said portion for over 12 years since January 1989 to August 2013.***

***b) That this Honourable Court be pleased to order that the plaintiff be registered as proprietor of the suit land.***

***c) That this Honourable Court do issue a permanent injunction restraining the defendant from interfering with the plaintiff's occupation and enjoyment of the suit land.***

2. The originating summons is anchored on the plaintiff's supporting affidavit sworn on even date and on the following two (2) grounds;

***a) That the plaintiff has been in uninterrupted occupation of the suit land for over 12 years.***

***b) That the said occupation by the plaintiff of the suit land has been open, and known to the respondent.***

3. Briefly, the plaintiff claimed that the defendant has been the registered proprietor of the suit land since January 1989 as shown on a copy of green card marked "MMN1" (PExhibit1). That even prior to the registration of the defendant as the proprietor of the suit land, the plaintiff was staying with his family thereon. That the plaintiff has established a homestead on the suit land and that the defendant has never occupied even a portion of the land. That the plaintiff's use and occupation of the whole of the suit land has been open, uninterrupted and definite for a period exceeding twelve (12) years hence precipitating the instant suit.

4. The plaintiff (PW1) relied on PExhibit 1 in his testimony in support of his claim. He called his two (2) witnesses namely JONES NYAMBOHA, the Chief Bukira North Location (PW2) and his son, FRANCIS MARWA (PW3) to reinforce his case.

5. In his replying affidavit sworn on 24<sup>th</sup> June, 2015 and filed on 25<sup>th</sup> June 2015, the defendant through Jackson Omwenga and company Advocates, the defendant termed the plaintiff's claim false, frivolous and meant to mislead the court. He averred, inter alia, that he bought the suit land from Zefenia Aduda N Otueyo on 14<sup>th</sup> December 1989. That he is the legal and registered owner of the suit land which he leased to South Nyanza Sugar Company Ltd on 5<sup>th</sup> August 2013 and his account number is 550711 thereof.

6. The defendant (DW1) stated that the plaintiff has never built, lived and stepped on the suit land. That sometimes in the year 2009, the sons of the plaintiff namely John Marwa and Francis Marwa, trespassed into the suit land and damaged property claiming that the suit land belonged to their father. That the defendant lodged a complaint with the police. The said sons of the plaintiff were arrested and charged in Kehancha SRM'S court Criminal case number 1223 of 2009. That the plaintiff was also charged in Migori RM'S court Criminal Case number 413 of 1990.

7. DW1 relied on copies of title deed issued on 15<sup>th</sup> January 1990 and a copy of certificate of official search dated 16<sup>th</sup> June 2015, marked as “CO1” (PEXhibits 1 and 2 respectively), a copy of contract dated 5<sup>th</sup> August 2013 marked as “CO2” (PEXhibit 3), copies of bonds marked as “CO3” (PEXhibit 4), a copy of judgment in Kehancha’s SRM’S court criminal case number 1223 of 2009 marked as “CO4” (PEXhibit 5), and a copy of charge sheet against the plaintiff and his sons (PEXhibit 6). He also relied on copies of memorandum of sale of land dated 14<sup>th</sup> November 1989, consent of the Land Control Board and transfer of the suit land from Zefenia Aduda N Otueyo to the defendant (PEXhibits 7, 8 and 9 respectively).

8. The defendant (DW1) called two (2) witnesses; his cousin NYABARO ONDITI (DW2) and IBRAHIM OGERO NYANKABARIA (DW3), to fortify his claim.

9. On 25<sup>th</sup> June 2015, the court (Okongo J) sitting at Kisii Environment and Land Court gave directions in this suit. On 29<sup>th</sup> March 2017, the suit was transferred to this court for hearing and determination.

10. Learned counsel for the plaintiff filed submissions dated 28<sup>th</sup> November, 2018 whereby he urged the court to find that the plaintiff has established a case for adverse possession against the defendant and in favour of the plaintiff. That the plaintiff has been in possession of the suit land from 1990 to 2009. That the defendant has never evicted him therefrom. That by the time the plaintiff and his sons were arrested, title to the suit land had been extinguished by effluxion of time.

11. Learned counsel for the defendant filed submissions dated 1<sup>st</sup> February 2019. Reference therein was made to the orders sought in the originating summons and identification of two issues for determination namely whether the plaintiff has acquired title to the suit land by adverse possession and whether the plaintiff is in possession of the whole of the suit land. Counsel submitted that the plaintiff has not been in continuous, uninterrupted occupation of the suit land for over 12 years. That PW1 testified that he lives on a different piece of land and that he has not tendered any evidence to support the alleged possession. To buttress his submissions, counsel cited authorities including **Kipkeeter Arap Marisin –vs- Paul Kipkurui Kurgat (2005) eKLR and Ruth Wangari Kanyagia – vs- Josephine Muthoni Kinyanjui (2017)eKLR.**

12. I have examined the pleadings, evidence and submissions in the instant matter. The Court of Appeal decision in **Galaxy Paints Company Ltd v Falcon Grounds Limited (2000)EA 385** is quite instructive on the issues for determination in a suit. Thus, the issues are as elucidated in the case of **Wilson Kazungu Katana & 101 others v Salim Abdallah Bakshwein & another (2015) eKLR** whereby the Court of Appeal held that the doctrine of adverse possession dictates that;

*a) The land in question be registered in the name other than the applicant.*

*b) The applicant is in open and exclusive possession of the land in adverse manner to the title of the owner.*

*c) The applicant has been in peaceful occupation of the suit land for a period in excess of twelve (12) years having dispossessed the owner or discontinued the possession of the owner.*

13. On the first dictate, PW1 averred at paragraph 2 of his affidavit in support of his originating summons that DW1 is the registered proprietor of the suit land since 1969 as revealed in the green card (PEXhibit 1). He testified in examination in chief, inter alia, that;

***“I claim title to the suit land, LR number Bukira/Buhiringera/178 registered in the name of the defendant, Charles Onyancha. It is approximately 19.5 hectares. It was registered in his name in the year 1989.”*** (Emphasis added)

14. PW3 also stated that the suit land is registered in the name of DW1. To that extent, he fortified the evidence of PW1.

15. According to DW1, the suit land is registered in his own name. DW2 and DW3 did confirm the testimony of DW1 in material aspects regarding registration of the suit land.

16. In the case of **Wainaina –v- Murai and others (1976-80) IKLR 283 at 289** and 290, it was held that the land in question was registered under The **Registered Land Act (Cap 300)** and that the plaintiff had been in adverse possession of the same for more than twelve years and therefore entitled to the suit land. Bearing in mind the definition of the term proprietor under **section 2 of the Land Registration Act, 2016 (2012)**, it is quite evident from PEXhibit 1 and DEXhibit 1 that the suit land is not registered in the name of PW1 but in the name of DW1 herein.

17. As regards the second and third dictates, PW1 relied on PEXhibit 1 and testified that he has stayed on the suit land since 1969. That in the year 1990, he was arrested over the land and charged of forcible detainer **contrary to section 91 of the Penal Code (Cap 63)** but the case was dismissed and he returned to the suit land.

18. During cross examination, PW1 stated that he lives on a different parcel of land and not on the suit land. That he only cultivates the suit land.

19. PW2, a step brother of PW1 stated that PW1 lives on the suit land. On cross examination, PW2 contradicted his own testimony in chief and he stated that:-

***“I have been chief of Bukira North location since 1997 to date. PW1 is my step brother. He lives on my father’s land. He does not reside on the suit land...”***

20. PW2 also contradicted the evidence of PW1 on the occupation of the suit land. He stated that PW1 lives on the land.
21. PW3 testified that PW1 has cultivated maize, millet and potatoes on the suit land since 1976. That DW1 also cultivates ten (10) acres of the suit land and only planted sugarcane thereon for one season.
22. DW1 emphatically stated that PW1 has trespassed on the suit land. DW2 and DW3 confirmed that they cultivated the land for and on behalf of DW1. That PW1 is a trespasser thereon.
23. It was the evidence of PW1 that one Aduda and Zablon Mwitwa arrested him over the suit land and he was charged but acquitted by court. DW1 did confirm that Aduda sold the suit land to him on 14<sup>th</sup> November 1989. So, DW1 asserted his title to the suit land which had the effect of stopping time from running for purposes of adverse possession.
24. PW1 admitted that he was arrested over the suit land in 1990. He told the court that DW1 was registered as proprietor of the suit in 1989.
25. It follows that the filing of a complaint or case against the plaintiff over the suit land by the registered proprietor(DW1) through one Aduda, would stop time from running for purposes of section 38 of the Limitation of Actions Act (Cap 22); see also **Ndatho –v- Itumo and 2 others (2002) 2KLR 637.**
26. Moreover, it must be noted that possession of the suit land must be unbroken. There must be no endeavour to interrupt it; see the decision of Miles J in **Wanyoike Gathure –vs- Beverly (1965) EA 514,518 and 519.**
27. It is not clear whether PW1 is asserting title to the suit land in terms of the whole or a portion of it as he testified that DW1 cultivated sugarcane on ten (10) acres of the suit land. In the case of **Muthuita v Wanoe and 2 others (2008) IKLR (G & F) 1024** which applied the decision in **Gatimu Kinguru –vs- Muya Gathamgi (1976-80) IKLR 317,** the court held that it is essential that adverse possession should be of the whole or a defined portion of land.
28. This court is aware that rights and registrations of land in dispute can be challenged on grounds including adverse possession; see **Tayebali Adamji Alibhai v Abdulhussein Adamji Alibhai (1938) 5 EACA** which was applied in the case of **Kimani Ruchine –vs- Swift Rutherford and Company Limited (1980) KLR 10.**
29. It is trite law that rights and interests previously vested in a group, family or individual under African customary law are not extinguished upon registration of trust land; see the Supreme Court of Kenya decision in **Isack M’Inanga Kiebia –v- Isaaya Theuri M’Lintari and another (2018) eKLR**
30. Be that as it may, PW1 has been at pains to prove that he has been in open, uninterrupted, adequate, continuous, exclusive physical possession of the suit land and in adverse manner to the title of DW1 as held in **Kazungu Katana case (supra).** It is evident that he has even failed to establish that he is a trustee or has overriding interests thereon as envisaged under **sections 25 (1) (b) and 28(b) of the Land Registration Act ,2016 (2012)** and as laid down in **Kiebia case (supra).**
31. In a nutshell, the plaintiff has failed to show that he has been in exclusive, peaceful uninterrupted possession of the suit land for over twelve (12) years; see **Salim –vs- Boyd (1971)EA 55.** He has failed to prove his entire case against the defendant on a balance of probability.
32. The upshot is that the plaintiff’s case be and is hereby dismissed with costs to the defendant.
33. It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 24<sup>th</sup> day of JULY 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Oguttu Mboya holding brief for Kerario Marwa learned counsel for the plaintiff- Present

Tom Maurice – Court Assistant