



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 128 OF 2014 (O.S)**

**PAUL OCHWACHI OUMA.....PLAINTIFF**

**VERSUS**

**OHONGO OCHAYE NALUO (Administrator of the  
Estate of the Late OCHAYE ODWOLI)**

**JOHN OKELLO ODWORI.....DEFENDANTS**

**JACKSON SHIDA KHAOTO**

**J U D G M E N T**

1. This land claim was instituted on 18<sup>th</sup> June 2014, by the Plaintiff - **PAUL OCHWACHI OUMA** – against the Defendants - **OHONGO OCHAYE NALUO, JOHN OKELLO ODWORI** - and - **JACKSON SHIDA KHAOTO** - vide an Originating Summons dated 17<sup>th</sup> June 2014. The Originating Summons was then amended on 15<sup>th</sup> February 2017. The Plaintiff claims ownership of two parcels of land known as **L.R Nos BUNYALA/BUKOMA/647** and **BUNYALA/BUKOMA/656** by way of adverse possession.

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

(i) Whether the Applicant has been in open, quiet and notorious possession of the whole of **L.R No. BUNYALA/BUKOMA/647** measuring 1.1 ha and **BUNYALA/BUKOMA/656** measuring 0.44ha for a period exceeding 12 years.

(ii) Whether the Respondents' titles to the aforesated properties became extinguished upon the expiry of 12 years from the time the Applicant went into possession of the land namely the year 1943.

(iii) Whether the Applicant has acquired title to the properties by way of adverse possession.

(iv) Whether the registration of the Respondents as owners of the whole of **BUNYALA/BUKOMA/647** and **BUNYALA/BUKOMA/656** should be cancelled for the Applicant to be registered as the owner of the said properties.

(v) Who should pay costs of the suit.

3. The Plaintiff further prayed for orders that the suit properties be registered in his name and that the Defendants be ordered to execute all documents necessary to facilitate the registration of the properties in his name, failure to which the Deputy Registrar of the Court be authorized to execute the same. He also prayed for a permanent injunction against the Defendants barring them from interfering with the properties.

4. The Originating Summons was supported by an Affidavit sworn by the Plaintiff. As per his affidavit and oral testimony, the Plaintiff stated that he has resided on the suit properties together with his family since 1943 to the exclusion of all. His father and grandfather were interred thereon and he lived peacefully until 2011 when the Defendants and their relatives began interfering with the properties. The Plaintiff asserted that he is a member of the third generation of his family now living on the properties. His father inherited the same from his grandfather and settled the Plaintiff's mother on **BUNYALA/BUKOMA/647** while his step-mother was settled on **BUNYALA/BUKOMA/656** currently inhabited by his step-brother, one **NICHOLAS OUMA**. However, when the Defendants petitioned

for a Grant of Letters of Administration for the estate of their late grandfather, they included the suit properties yet the Plaintiff and his family had been residing on the same for over 70 years, a fact that they did not disclose in the succession proceedings. He avers that the Defendants' late grandfather distributed land situated elsewhere among them before his demise and their land did not include the suit properties. They have never resided on the properties and consequently have no valid claim to them.

5. The Application is opposed vide the Replying Affidavit sworn on 9<sup>th</sup> July 2014 and deponed by the 3<sup>rd</sup> Defendant, **JACKSON SHIDA KHAOTO** in his own right and on behalf of his co-defendants. He deponed that the Plaintiff had no claim to **Parcel No. BUNYALA/BUKOMA/647** as he forcefully entered upon the property upon the demise of the Defendants' parents when they were young vulnerable and defenceless orphans. He stated further that the Plaintiff has been using force and intimidation tactics to retain possession of the property. When that proved ineffective he moved to Court vide the Budalangi Land Tribunal Case No. 4 of 2011, Kakamega Provincial Land Disputes Tribunal No. 72 of 2011 and finally the High Court Civil Appeal No. 1 of 2012. After losing all those cases, the Plaintiff filed an objection in their High Court Succession Case No. 315 of 2011 but was unsuccessful each time. Despite the foregoing developments the Plaintiff continues to use force and intimidation to hold onto a portion of **BUNYALA/BUKOMA/647**.

6. With regard to Parcel No. **BUNYALA/BUKOMA/656**, the 3<sup>rd</sup> Defendant asserts that neither the Plaintiff nor his brother, **NICHOLAS BULUMA OUMA** have ever been in occupation of the property. The said property was initially owned by **KHAOTO** and **ODUOLI MAHULO**, and later inherited by **OCHAYE ODWORI**, **OKELLO ODWORI** and **AGUNDA WERE**. In fact, the said **NICHOLAS** occupies **BUNYALA/BUKOMA/802** and 305. **BUNYALA/BUKOMA/802**, the Plaintiff's and Nicholas' rightful inheritance is registered in their father's name but the Plaintiff being dissatisfied with the said parcel forcefully settled on **BUNYALA/BUKOMA/647** and instructed his brother to settle on **BUNYALA/BUKOMA/802**. The 3<sup>rd</sup> Defendant contends that the Plaintiff bases his claim on the properties on transitory migratory trends practiced in the past. The Plaintiff and his brother belong to the Abasibinga clan while the Defendants allegedly belong to the Abanyekera clan. Culturally therefore, there is no way the Plaintiff and his brother could have acquired any proprietary rights over the properties.

7. The hearing of the case kicked off on 26<sup>th</sup> September 2017. The Plaintiff was the sole witness in support of his case. He testified that the suit properties he claims were actually one property with a road passing in between separating it into two portions. He asserted that the Defendants' grandfather and his father were closely related and belonged to the same clan. He asserted that all Defendants lived in different areas from the suit properties. They then came to the suit properties in 2011. He allowed the 3<sup>rd</sup> Defendant to settle on **BUNYALA/BUKOMA/656** after consulting elders. The 1<sup>st</sup> Defendant however forcefully entered upon **BUNYALA/BUKOMA/647** where the Plaintiff had settled. Both parcels had homes and were in use by the Plaintiff and his family.

8. On cross examination, the Plaintiff admitted that he had no written authority to urge the case on behalf of his brother and his other adult relatives who were living on the properties. Moreover, the properties were not registered in his name during adjudication in 1972. He was an adult at the time living with his family on the land. They were registered in the names of **OKELLO ODUOR** who was the father of the 2<sup>nd</sup> Defendant and **AGUNDA WERE**. The Plaintiff admitted further that the property registered in his own father's name during adjudication was **BUNYALA/BUKOMA/802** yet he still claimed that they belong to his parents. Notably, it was revealed that the Plaintiff used to run a kiosk on the road where the suit properties were situate **with the permission of the registered owners**. The Plaintiff also stated that there were many other people apart from himself who also lived on both **BUNYALA/BUKOMA/647** and 656.

9. Three witnesses testified on behalf of the Defence **JOSEPH OLUOCH WANJALA**, DW 1, stated that he was born in 1935 and was from the Abanyekera clan. He has lived in the area and known the Plaintiff since they were children. DW 1 resided in the area when adjudication was done in 1972. He is the first registered owner of **BUNYALA/BUKOMA/660**. DW 1 confirmed that the Plaintiff's father, **OUMA ANYUMBA** was the registered owner of **BUNYALA/BUKOMA/802** where he intended to settle his family. The Plaintiff lived with his father. Sometime in 1983, the Plaintiff with the permission of the 1<sup>st</sup> Defendant's father opened an eatery on **BUNYALA/BUKOMA/647**. He then put up a bar without permission resulting in friction between himself and the 1<sup>st</sup> Defendant's further. When asked to vacate, the Plaintiff ignored him prompting the 1<sup>st</sup> Defendant's father to report the matter to the area chief. Unfortunately, he died before the dispute was resolved. The Plaintiff then took advantage of the situation and moved onto the upper part of the property where the bar was located.

10. DW 1's testimony was corroborated and echoed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who testified as DWs 2 and 3. They stated that they were cousins. DW 2 **BUNYALA/BUKOMA/647** was registered in the name of his late father which he inherited while DW 3 is the registered owner of **BUNYALA/BUKOMA/656** vide the High Court Succession Case No. 325 of 2009. DW 3 stated that the Plaintiff has never occupied **BUNYALA/BUKOMA/656** and that his late father is interred thereon, about 50 metres from his house. It was further confirmed that DW 2, the Plaintiff and members of his extended family live on **BUNYALA/BUKOMA/647**, with the Plaintiff occupying a portion less than 1 acre in size. This existence has been acrimonious with parties seeking redress from the local authorities as well as Port Victoria Police Station on myriad wrangles. The Defendants lived on the properties from birth and denied that they lived elsewhere at any other time.

11. With the hearing completed, parties filed written submissions. The Plaintiff's submissions were filed on 1<sup>st</sup> November 2018. In his brief submissions Counsel for the Plaintiff reiterated the Plaintiff's version of events and prayed on the Court's sympathies to find in the Plaintiff's favour as he was 83 years old and had been living on the suit properties for over 75 years. The Defendant's submissions were filed on 24<sup>th</sup> January 2014. After revisiting the facts presented by both sides, they relied on the case of **Kweyu vs Omuto (1990) KLR 709** to the effect that in deciding cases of adverse possession the Court's primary role is to draw legal inferences from proved facts. Counsel for the Defendants also cited the case of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR** where Kuloba J. set out requirements for proving a case of adverse possession.

12. I have read the pleadings and considered the parties' testimony, submissions and the applicable law. 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 Vs 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 Vs Berverly (1965) EA 514, 519, per Miles J.)”

13. Further, In **Kweyu Vs Omuto (supra)**, 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.”

14. The Plaintiff was the sole witness in support of his case. He did not present any evidence showing that he had any colour of right or title to the properties made in good faith and on this aspect I am in agreement with the Defendants. The Plaintiff admitted that the properties were registered in the names of the Defendants’ grandfathers during adjudication and he did not lay claim to them yet he was an adult at the time supposedly living thereon. He also admitted that his father was the owner of BUNYALA/BUKOMA/802, a fact that has been corroborated by the Defence witnesses.

15. Moreover, the Plaintiff has not clearly presented the dimensions of the property that he has been in occupation of. He claims to be entitled to BUNYALA/BUKOMA/656 yet he has been in possession of only a portion of BUNYALA/BUKOMA/647. As per his own testimony and that of the Defence Witnesses he has been living on 647 together with the 1<sup>st</sup> Defendant and other families. He therefore has not had exclusive use of the property. With regard to BUNYALA/BUKOMA/656, it was DW 3’s assertion that he became the registered proprietor of the property in 2010. The Certificate of Official search pertaining to the property shows that he it was registered in his name on 10<sup>th</sup> August 2010. This suit was instituted in 2014 against the 3<sup>rd</sup> Defendant in his own right, not as a personal representative. It is apparent that the statutory 12 year pre-requisite had not been attained.

16. The manner in which the Plaintiff entered upon BUNYALA/BUKOMA/647 also cast doubt on his case. The Plaintiff admitted that his entry upon the suit properties was with the permission of the owners of the property, OKELLO ODUOLI and AGUNDA WERE who allowed him to operate an eatery. Permissive use of the property negates the notion of adverse possession. A person who occupies another person’s land with that other persons’ consent cannot be said to be in adverse possession. The Plaintiff ought to prove that he entered the suit property more or less as a trespasser as opposed to an entry with the consent of the owner. This was the position taken by the Court of Appeal case of **Ramco Investment Limited Vs Uni-Drive Theatre Limited (2018) eKLR**. I agree with the Defendants that the Plaintiff was under duty to demonstrate when his possession ceased to be permissive and became adverse.

17. The Plaintiffs’ claim lacks merit. He has not proved adverse possession. His claim therefore must fail and I hereby dismiss it with costs to the Defendants.

**Dated, signed and delivered at Busia this 12<sup>th</sup> day September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Present

1<sup>st</sup> Defendant: Present

2<sup>nd</sup> Defendant: Present

3<sup>rd</sup> Defendant: Present

Counsel of Plaintiff: Present

Counsel of Defendants: Present

CA: Nelson Odame