



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 209 OF 2014

JOYCE AKINYI ODUOR.....PLAINTIFF

= VERSUS =

OSWAGA SIKOYO.....1ST DEFENDANT

FREDRICK BULIMA NDETA.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff – **JOYCE AKINYI ODUOR** – filed this suit on 3/12/2014 as an Applicant vide an Originating Summons of even date. She sued two people – **OSWAGA SIKOYO** and **FREDRICK BULIMA NDETA** – as Respondents. These two people are now the Defendants. At the time, she claimed to be an adverse possessor of land parcels Nos L.R. SAMIA/BUKANGALA “A”/570 and LR No. SAMIA/BUKANGALA “A”/571. In the summons, the court is expressly invited to determine issues but no issues are put forth for determination. Instead, prayers are made. The prayers are as follows:

1. That That the Applicant JOYCE AKINYI ODUOR be declared the absolute owner of parcel No. L.R. No. SAMIA/BUKANGALA “A”/570 and SAMIA/BUKANGALA “A”/571.
2. That the Respondents OSWAGA SIKHOYO and FREDRICK BULIMA NDETA be ordered to execute all documents of transfer in respect of land parcel No. SAMIA/BUKANGALA “A”/570 and SAMIA/BUKANGALA “A”/571 in favour of the Applicant failure of which the Deputy Registrar of this honourable court be empowered to execute the same on behalf of the respondents enabling the Land Registrar, Busia County, to register the suit parcels mentioned in the name of the Applicant.
3. That the Respondents, their agents, servants and/or any other person claiming through them be ordered to give vacant possession of the suit land.
4. That the Respondents, their agents, servants and/or workers be restrained by an order of injunction from interfering with the said parcels of land and/or continuing to alienate and/or further subdivision.
5. That the honourable court do grant such and/or further orders as it may deem fit and just to grant.
6. That the costs of this application be awarded to the Applicants.

2. In the supporting affidavit that came with the application the Plaintiff deposed, *inter alia*, that she has been living on the two parcels of land since 1969; that she has been doing business on the land peacefully and uninterruptedly all along; that the Respondents fraudulently became the registered owners of the two parcels of land; that her children are buried on the land; and that she has been in actual possession for over 12 years.

3. It is only the 2nd Defendant – FREDRICK BULIMA NDETA – who responded to the suit. The 1st Defendant is said to have been dead even at the time he was being sued. He was the Plaintiff’s father in law. The response of the 2nd Defendant is contained in a replying affidavit filed on 26/2/2015. The focus of the 2nd Defendant is parcel No. 571 about which he deposed, *inter alia*, that one PATRICK MANGOLI OJARA, its owner then, sold to NEHEMIA AINEA NDETA, with the 2nd Defendant himself and the Plaintiff’s husband, JOHN ODUOR WANDERA, being witnesses to the sale agreement. The Plaintiff was said to be living on land parcel No. 570 owned by the 1st Defendant who is her father in law.

4. The purchaser of parcel No. 571 later transferred the land to 2nd Defendant, who subsequently put up a school there. According to 2nd Defendant, parcel No. 571 is distinct and separate from parcel No. 570. The Plaintiff and the family of her late father in law - **OSWAGO SIKHOYO** - are said to live and/or occupy parcel No. 570 only. And a road is said to separate parcel No. 570 and parcel No. 571.
5. The hearing of this suit started on 3/5/2017. The Plaintiff gave her testimony as PW1 and said, *inter alia*, that the land she claims was originally SAMIA/BUKANGALA "A"/338 and was owned by her father in law – **JOHN OSWAGO** – who died in 1981. At the time of giving testimony, the Plaintiff said her husband was alive but very sick. It was her evidence that parcel no. 338 was subdivided into parcels No. 570 and 571 without her knowledge. She said that the two parcels of land are, or should be, her own as she has lived there since 1969. Her dead children are buried there. She said further that the 2nd Defendant got title to the land in the year 2013 and proceeded to put up a school there. She asked the court to remove the 2nd Defendant from the land.
6. PW2 is the Plaintiff's sister-in-law. She said that the Plaintiff has lived on the land (whether parcel No. 570 or 571 is not clear) since 1969. During cross-examination however, this witness said that a road separates where the Plaintiff lives and where the 2nd Defendant has put up a school. She was clear too that the Plaintiff has never lived where the school is.
7. Alfonse Buyu Ojwang testified as PW3 and said, *inter alia*, that the Plaintiff is his cousin. He said too that the Plaintiff has lived on the land since 1969. The last witness on the Plaintiff's side was PW5 – **JUSTUS OKELLO ODUORI** – who talked of having lived on parcel No. 571 for the last 32 years with PW1, who is his mother. But when asked during cross-examination about the exact location of parcel numbers 570 and 571, he responded that he could not tell where they are located as he has only seen them on papers. He also said that they do not use the land where the 2nd Defendant's school is located.
8. The 2nd Defendant testified as DW1 on 4/10/2017. He said he got to know the two parcels of land on 3/3/2009 when his brother – **NEHEMIA AINEA NDETA** – bought one of them – parcel No. 571 – from **PATRICK MANGOLI OJARA**. He witnessed the sale. Ainea later transferred the land to him and he put up a school on it. The Plaintiff's husband is also said to have witnessed the sale. The Plaintiff is said to be living on parcel No. 570, which is separated from parcel No. 571 by a big road.
9. PATRICK MANGOLI OJARA, the alleged seller of parcel No. 571 to 2nd Defendants brother, testified as DW2. He talked of having bought the land in 1977 and he then sold it later to 2nd Defendant's brother. He said the Plaintiff has never lived on parcel No. 571 and has never cultivated it. The person who transferred the land to 2nd Defendant, and to whom the same land had been sold by DW2, testified as DW3. He confirmed buying the land from DW2 and then transferring it to the 2nd Defendant.
10. After hearing, both sides filed written submissions. The Plaintiff's submissions were filed on 28/8/2018. It was submitted that the Plaintiff has lived on the two parcels of land since 1969. She has her home there and has been cultivating without interference. Her dead children are buried on the land. The subdivision of the land as it existed originally was without her knowledge and/or consent. According to the Plaintiff, adverse possession is proved. She has lived on the land since 1969 and has been in actual, open, and uninterrupted possession. The court was urged to grant the prayers sought.
11. The 2nd Defendant's submissions were filed on 20/6/2018. According to him, the Plaintiff and her family live on parcel No. 570, which is different from his land – parcel No. 571. He submitted too that he has developed parcel no. 571 extensively with full knowledge of the Plaintiff's husband and without any objection by the Plaintiff. It was submitted that the Plaintiff cannot become an adverse possessor of land that she has never possessed. The court was asked to dismiss the Plaintiff's case with costs.
12. I have considered the pleadings, evidence, and rival submissions. The Originating Summons as filed has serious flaws and/or shortcomings. It is, to begin with, without issues for determination. The Plaintiff went straight to prayers and left out the questions or issues which the court needed to address to find out if she is an adverse possessor. It is such issues or questions which bring out the true character or nature of the Plaintiff's case and it is upon determination of such issues in Plaintiff's favour that the prayers sought are granted.
13. But that is not the only flaw. The Plaintiff sued a dead person. That dead person is 1st Defendant who, by her own account, died in 1981. It is difficult to understand how a person represented by counsel can sue a dead person. The counsel tried to cure the anomaly by withdrawing the 1st Defendant on 2/12/2015 but if one looks at his submissions, it is clear he is speaking against both the 1st and 2nd Defendants. Further still, the application was not premised on any grounds. The Plaintiff made her prayers and then went straight to the supporting affidavit. Had the grounds been spelt out, the issues for determination could reasonably be inferred from the substance of the application.
14. It seems to me also that when the case against the 1st Defendant was withdrawn, the Originating Summons needed to be amended so that the prayers sought could speak to parcel No. 571 only owned by the 2nd Defendant. The 1st Defendant owned parcel No. 570 and the withdrawal of the case against him meant that that parcel of land was no longer in dispute. Yet the prayers as sought speak to the two parcels of land. If granted as sought, the prayers would affect also parcel No. 570 which is no longer in dispute.
15. In the Originating Summons (see para 5 of the supporting affidavit) the Plaintiff alleged that the two parcels of land were **"fraudulently registered in the names of the respondents"**. The provisions of Order 2 rule 10(1) requires that particulars of fraud be given where fraud is alleged. This was not done here. Originating Summons is a pleading like any other and the particulars needed to be given.
16. From all this, it is clear that the Plaintiff's case was handled in a very casual and/or perfunctory manner. The overall result is a compromise in its quality. The approach taken is clearly unhelpful.
17. But it is still necessary to consider the other aspects of the case. It seems to me that the Plaintiff entered the original parcel of land – then said to be SAMIA/BUKANGALA "A"/338 – through permissive arrangements. She was married to JOHN ODUOR WANDERA who was

son of the owner and in that capacity therefore was allowed and/or permitted to be on the land. Question is: When did permission end so that adverse possession could begin. It is trite that permissive possession and adverse possession cannot co-exist. The Plaintiff was claiming the land even against the original owner. She needed to make it clear when her possession became adverse both against that owner (who is 1st Defendant) and the 2nd Defendant. She did not, and this again does not serve her as well.

18. The evidence given by the Plaintiff's witnesses did not also help her. PW2 is shown saying during cross-examination **"The Plaintiff lives on her portion. She has never lived where the school is"**. PW3, the Plaintiff own son, is also shown saying during cross-examination **"yes, we do not use the land where the school is"**. It should be remembered that the 2nd Defendant's position is that he has put up a school on parcel No. 571. He said that the plaintiff lives on parcel No. 570. The Plaintiff needed to show that she is in actual, open, hostile and uninterrupted possession of parcel No. 571. She did not show it. Instead, the evidence available, both from her side and the 2nd Defendant's side shows that it is the 2nd Defendant who is in possession and use. As the 2nd Defendant pointed out in his submissions **"The Applicant cannot adversely possess a parcel of land that she has never occupied or possessed."**

19. The Plaintiff's own husband is clearly shown to be a witness to the sale agreement that ultimately led to the transfer of land to 2nd Defendant. The Plaintiff came to the land courtesy of that husband. She now leaves out the husband in her claim of ownership in an apparently ingenious plan to get the land back. As she filed the suit, her husband was alive. Ingenuity aside, it is difficult in real life that the Plaintiff can claim the land in her own right. The land was evidently sold by her father in law. She did not object. The 2nd Defendant later on put up a school. She did not object. She then turns around belatedly to say she is an adverse possessor against both her father-in-law and the 2nd Defendant. I think she is being too clever by half. The court should be able to see through her devious stratagem and reject it. And I hereby reject it.

20. The upshot is that when all is considered, the Plaintiff's case is one without merits. It is therefore not proved to the required standards and I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 10th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the 1st Defendant: Present

Counsel for the 2nd Defendant: Present

CA: Nelson Odame