



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 41 OF 2014 (FORMERLY HCC NO. 65 OF 2012)

OWOKO OMONDI.....PLAINTIFF

VERSUS

KEVINA AKUMU NYONGESA.....1ST DEFENDANT

PHILIBERT VINCENT ORAMISI.....2ND DEFENDANT

J U D G E M E N T

1. By an Originating Summons dated 30/8/2012 and filed on 7/9/2012, the Applicant (“Plaintiff” hereafter) – **OWOKO OMONDI** – sued the Respondent (1st Defendant” hereafter) claiming ownership by adverse possession of a portion of land measuring three acres from land parcel No. L.R. S. TESO/ANGOROMO/5942. The Plaintiff pleaded that he bought that portion from the 1st Defendant’s husband – **WENZELOUS NYONGESA UYALA** – who died without having effected transfer to him. The 1st Defendant is the legal representative of her late husband. The Originating Summons was later amended and re-filed on 30/10/2013. The amendment brought on board another party – **PHILIBERT VINCENT ORAMISI (2nd Defendant)** – and introduced new dimensions to the case namely:

(a) Land parcel No. L.R. S.TESO/ANGOROMO/5942 had subsequently been subdivided into land parcels No. L.R. S. TESO/ANGOROMO/8445, 8446 and 8447.

(b) The new party – **PHILIBERT VINCENT ORAMISI** – (now “2nd Defendant” in this suit) had become the new owner of land parcel No. L.R. S.TESO/ANGOROMO/8446.

2. In the court file, there are two replying affidavits by the 1st Defendant: one filed on 6/2/2013 and dated the same while another was filed on 3/7/2013 and is dated 1/7/2013. In the earlier affidavit, the 1st Defendant agreed that the Plaintiff had bought land from her late husband but she said the husband later changed his mind and asked to refund the purchase money. In the latter affidavit, she denied the sale and averred that the Plaintiff was only allowed to put up a hut on the land by her late husband, which hut he put up. The hut however collapsed later, courtesy of age and vagaries of nature.

3. In the earlier affidavit also, the 1st Defendant had denied that the Plaintiff had put up a structure on the land. In the latter affidavit, she turns around and concedes to the Plaintiff having put up a hut.

4. During hearing, the Plaintiff made it clear that he acquired the land through purchase. The purchase, he testified, took place in 1981 and the purchase price was 4,600/=. He paid for the land in two instalments. He availed the agreement as exhibit No. 1. The Plaintiff’s further evidence is that he went into possession after paying. He has lived on the land since, is cultivating it, and has buried some of his dead children and grandchildren on it. His occupation and/or possession has been peaceful, continuous, open and with knowledge of the 1st Defendant. The 2nd Defendant was said to have come on the scene much later, infact during the pendency of this case in court. According to the Plaintiff, he is an adverse possessor against both the 1st and 2nd Defendants and the court should declare him so and grant him the orders prayed for.

5. Two other witnesses – **JOSEPH OWINGA ONYACH (PW2)** and **LAWRENCE ODHIAMBO AYIEKO (PW3)** – testified, *inter alia*, that they are Plaintiff’s neighbours and have always known him as owner of the land he is claiming. There was a fourth witness – **CHRISTINE AWINO OWOKO (PW4)** – who is the Plaintiff’s wife. She testified, *inter alia*, to witnessing the land purchase. She also vouched for the fact of occupation of the land by the Plaintiff, herself, and family members. This is clear form her written statement dated 31/3/2014 in which she also averred that they have constructed houses, planted trees and some crops on the land.

6. The 1st Defendant never testified in this matter. At the time of defence hearing, the evidence of 2nd Defendant was taken and it was hoped

then that the 1st Defendant would testify later. That never happened and counsel for Defendants, Mr. Jumba, had to close defence case on 10/5/2017 due to inability to call the 1st Defendant to testify. Later on however, Jumba filed an application to re-open the case in order to call the 1st Defendant to testify. That application was allowed by consent of both sides on 11/7/2017. It was hoped then that the 1st Defendant would come to testify. She never came, and the court decided not to wait for her any longer. It closed her case on 18/9/2017.

7. The 2nd Defendant on his part never filed a response to the suit. He was merely content with filing a written statement. That statement is dated 11/7/2014 and he averred he was a purchaser without notice of prior conflict over the land. He testified on 2/2/2017 and said, inter alia, that he purchased his portion of land from 1st Defendant, went through all the legal processes, and subdivision was done. He then became the registered owner of land parcel No. L.R. S.TESO/ANGOROM0/8446. He however said that he is not using the land as a caution has been placed on it.

8. Both sides filed written submissions. The Plaintiff's submissions were filed on 23/5/2017. After giving an overview of the case, the Plaintiff submitted that he had demonstrated his purchase of the land and his subsequent occupation and/or possession since 1981. He submitted that his occupation and/or possession has been adverse, open and un-interrupted for all that period. He asked to be granted the orders he is praying for.

9. The Defendants submissions were filed on 16/11/2017. The submissions do not address the issues raised in the suit. The defence focused on trying to save the 2nd Defendant from costs. This is perhaps proposed after realizing that the defence case is weak, with 1st Defendant not having testified and the 2nd Defendant not having filed a response to the suit.

10. I have considered the pleadings, evidence, and rival submissions. The Plaintiff's case is without effective rebuttal from the defence. The 1st Defendant never testified. The 2nd Defendant omitted to respond to pleadings. All this makes the defence weak and/or ineffective.

11. The Plaintiff on the other hand build up a credible case. He was able to demonstrate purchase, show occupation and/or possession, demonstrate the notoriety, openness, and continuity of his possession, and generally displaced the defence averment to the contrary. The 1st Defendant responses to the case casts doubts as to her honesty. To her, the Plaintiff bought the land but then again he did not buy it. To her too, the Plaintiff built on the land but again did not. It is clear too that the 1st Defendant subdivided the land when this case was still pending and went ahead to sell a portion to 2nd Defendant.

12. The 2nd Defendant himself would have us believe that he is an innocent buyer for value without notice of any conflict or dispute. It is hard for the court to believe this. It is clear that the Plaintiff is already on the land. He has built there and has also cultivated. A little effort on the part of the 2nd Defendant would have made him establish this. Besides, the land has had previous disputes around it, one of which is fairly local as the land Dispute Tribunal of the area at the time is the one that handled it. A simple enquiry from neighbours around or from local administration would most likely have revealed this information to the 2nd Defendant. But the 2nd Defendant was contented with dealing with 1st Defendant. Things were mis-represented to him; he parted with his money; and now is apparently surprised that someone else is claiming ownership of the land sold to him. Pity to him. He failed to exercise caution.

13. In this matter, the Plaintiff has shown that he has been in possession and occupation of three acres of parcel No. 5942 for over thirty years. That possession has been exclusive and as of right all that time. It is clear to me that the Plaintiff uses the land as of right: NEC VI, NEC CLAM, NEC PRECARIO (no force, no secrecy, no evasion). The occupation has been uninterrupted and with knowledge of the 1st Defendant.

14. I think the 1st Defendant was trying to complicate matters for the Plaintiff by subdividing the land and selling a portion of it to the 2nd Defendant. But the watchful eye of the law can easily see through the 1st Defendant's stratagem. The law is clear: the entry of the 2nd Defendant into the scene does not stop time for adverse possession from running. Simply put, the 2nd Defendant cannot displace an adverse possessor.

15. There is a Court of Appeal case – **KINYUA Vs SIMON GITURA RUMURI: CA No. 265 of 2005, NYERI** – with some facts similar to this one. In that case the land in dispute was NYAKI/GIAKI/KIHURINE/299 measuring 12 acres. The Plaintiff claimed a portion measuring 8 acres. He had occupied the portion between 1972 to 2003. He had undertaken substantial developments on it and had a homestead there. His occupation was uninterrupted and/or continuous. The Plaintiff sought to be registered as an adverse possessor. The High Court agreed and allowed it. The Defendant appealed. The appeal was dismissed. The court of appeal agreed with the findings of the High Court.

16. From the above case, it is clear that for a claim of adverse possession to be proved, it must be shown that there has been open, peaceful but unpermitted possession of the claimed land for a period of 12 years or more. The right relates to only that portion of land that is not only possessed but also in which some positive act – like building on or developing the land – has been done by the adverse possessor.

17. In the case at hand here, the Plaintiff has built on the land. He has planted trees and is also cultivating. And he has had the land unchallenged for over 12 years. His possession has been peaceful, open, un-interrupted and well-known (or notorious, if you like). In simple terms, the Plaintiff is an adverse possessor.

18. Both the initial Originating Summons and the amended Originating Summons that came later posed several questions for the court to determine and/or answer. I decided to avoid mentioning the questions at the beginning of this judgement in order to set them out at the appropriate time and give the answers. This is the appropriate time and here follows the questions and the answers:

(a) Whether the Applicant (Plaintiff) purchased 3 acres portion of L.R. S.TESO/ANGOROMO/8445, 8446, and 8447 created from

S.TESO/ANGOROMO/5942 part of formerly land parcel No. S. TESO/ANGOROMO/587 from Wenzelous Nyongesa Uyala, the husband of 1st Respondent (1st Defendant).

Answer: Yes he did. Evidence is on record both from Plaintiff in his testimony and in the sale agreement availed. The 1st Defendant herself accepted the fact of sale in her first response to the case before resiling from this position in a latter response. And that latter response was not said to replace the 1st response.

(b) Whether the Applicant (Plaintiff) took possession of the 3 acres and has been in open, peaceful, uninterrupted, adverse possession/occupation/use to date, a period of over 12 years.

Answer: Yes, the Plaintiff took possession as stated.

This judgement is clear as to how that came about.

(c) Whether the Applicant (Plaintiff) has acquired the 3 acres aforesaid by adverse possession/operation of the law.

Answer: He has acquired the land as an adverse possessor. He has demonstrated that he is an adverse possessor and has been so for longer than the 12 years required by law.

(d) Whether the Respondents (Defendants) hold 3 acres comprised in L.R. S.TESO/ANGORO/8445, 8446, 8447 created from S. TESO/ANGOROMO/5942 in trust for the Applicant (Plaintiff).

Answer: Yes, they do. The 3 acres belong to the

Plaintiff as an adverse possessor. The two Respondents (Defendants) hold the land in trust for the Plaintiff.

19. In light of the above, I make a findings that the Plaintiff's claim is well established on a balance of probabilities. I therefore grant prayers (i), (ii), (iii) and (iv) as prayed for in the amended Originating Summons dated 20/8/2013 and filed on 30/10/2013.

Dated, signed and delivered at Busia this 19th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

Counsel of Plaintiff.....

Counsel of Defendants.....