



**REPUBLIC OF KENYA**

**IN The ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 342 OF 2013**

**ANZELIM NYENDE MAKUYI (Suing as the administrator of estate of**

**Arnest Omubofu Omukongolo).....PLAINTIFF**

**VERSUS**

**DAVID OYALO ANDATI .....1<sup>ST</sup> DEFENDANT**

**ALFRED MUSIKO TINDI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

This is an originating summons application of Anzelim Nyende Makuyi who claims to have acquired title to the whole of land parcel Butso/Esameyia/706 which gave rise to Butso/Esameyia/3745 and Butso/Esameyia/3446 by adverse possession and prescription for determination of the following questions:-

1. Whether the plaintiff has been in quiet, open, exclusive and continuous occupation of land parcel Butso/Esameyia/3745 and Butso/Esameyia/3446 by adverse possession for period of over 12 years peacefully and uninterrupted.
2. Whether the plaintiff, Anzelim Nyende Makuyi has acquired title to the land parcels No. Butso/Esameyia/3745 and Butso/Esameyia/3446 by operation of law to wit through adverse possession and prescription.
3. Whether the respondents' titles to the suit land have become extinguished by operation of law.
4. Whether the land parcels Butso/Esameyia/3745 and Butso/Esameyia/3446 registered in the names of David Oyalo Andati and Alfred Musiko Tindi be registered in the name of Anzelim Nyende Makuyi.
5. Whether the Respondent should be condemned to pay costs of this originating summons.

This originating summons is supported by the grounds set forth in the affidavit of Anzelim Nyende Makuyi. That he is the Applicant/Administrator of the estate of their deceased father one Omukongolo Omubofu Arnest copy of grant annexed hereto marked as "ANMI". That the land parcel Butso/Esameyia/706 belonged to their late father who died in 28<sup>th</sup> April 1994 and his remains were interred therein peacefully without any complain from any person whatsoever. That together with his brothers, Robert Otundo Omukongolo and Testerio Omukongolo they have established homes and they have been staying and utilizing the whole of land parcel Butso/Esameyia/706 for 40 years peacefully without interruption of any person to date. That when he carried out an official search for their late father's land parcel Butso/Esameyia/706 for the purposes of filing a succession cause, he discovered that the land had been closed on sub division of Butso/Esameyia/3745 and Butso/Esameyia/3446, copy of the official search marked as "ANM2". That the said land parcels Butso/Esameyia/3745 and Butso/Esameyia/3446 are now registered in the names of David Oyalo Andati and Alfred Musiko Tindi respectively. That he then moved and lodged caution of these land parcels to protect their interest as beneficiaries as they have developed and utilized the same and they have no other land to go to, copies of the official searches marked as "ANM3". That the respondents have never resided on this suit land. That having been in peaceful occupation and enjoying the use of the suit land parcels for a period exceeding 12 years he has acquired good title to the suit land by way of adverse possession and the same should be ordered to be transferred into his name as the administrator of estate of the deceased.

The plaintiff ANZELIM NYENDE MAKUYI filed this suit as the administrator of the estate of the late ARNEST OMUBOFU OMUKONGOLO claiming land parcels Butso/Esameyia/3745 and 3746 being land sub divisions arising from the original land parcel Butso/Esameyia/706.

The suit was filed on 21<sup>st</sup> November 2013 by way of originating summons dated 19<sup>th</sup> November, 2013 and supported by the affidavit sworn the same date. The suit is based on adverse possession seeking the court to determine the following questions.

1. Whether the plaintiff has been in quiet, open, exclusive and continuous occupation of the whole of the land parcels Butso/Esameyia/3745 and 3746 for a period of over 12 years.
2. Whether the plaintiff ANZELIM NYENDE MAKUYI has acquired title to the land parcels Butso/Esameyia/2746 by operation of law to wit through adverse possession and prescription.
3. Whether the Respondents titles to the suit parcels of land have extinguished by operation of law.
4. Whether the land parcels Butso/Esameyia/3845 and Butso/Esameyia/3746 registered in the names of DAVID OYALO ANDATI and ALFRED MUSIKO TINDI be all registered in the names of ANZELIM NYENDE MAKUYI
5. Whether the Respondents should be condemned to costs of this suit.

Land parcel Butso/Esameyia/3745 is registered in the names of DAVID OYALO ANDATI, the 1<sup>st</sup> respondent while land parcel Butso/Esameyia/3746 is registered in the names of the 2<sup>nd</sup> respondent, ALFRED MUSIKO TINDI as confirmed from the official searches to the supporting affidavit and marked ANM3. From the said searches it is confirmed that indeed the two parcels of land Butso/Esameyia/3745 and 3746 are sub divisions arising from the original land parcel Butso/Esameyia/706.

The plaintiff testified in court and produced a Grant ad-litem which gave him locus in filing this suit. He said he has peacefully lived on the said land for over 40 years and even his late father OMUKONGOLO OMUBOFU ARNEST was buried on this land original number Butso/Esameyia/706 and has extensively developed it. In his testimony he said the respondents have never even stepped on the said sub division numbers Butso/Esameyia/3745 and 3746. This testimony was confirmed by his witness PW2. The 2<sup>nd</sup> Respondent also confirmed from his testimony that he has never utilized the land and he does not even know how his name got registered in respect of land parcel Butso/Esameyia/3746 and as far as he is concerned the land is occupied by the plaintiff with his family members and he is not interested in the land. They submit that the plaintiff has proved his case on a balance of probabilities and the court should grant him the reliefs sought.

The 1<sup>st</sup> respondent did not come to testify to rebut the plaintiff's allegations. The plaintiff produced other documents as per the list of his documents from the local administration confirming that there was even a land dispute over the original land parcel Butso/Esameyia/706 between the family of the plaintiff and the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> respondent in his replying affidavit stated that, he has been given the full mandate and authority by the said 2<sup>nd</sup> respondent to reply the supporting affidavit of the originating summons herein. That originating summons plus its supporting affidavit, having been brought into this Court to misdirect, mislead, confuse, and block the course of justice for the issues raised into this originating summons were to be subject of objections in yet concluded succession cause number 134 of 2009 which was openly carried out by the 1<sup>st</sup> respondent and confirmed on 26<sup>th</sup> day of July 2011. That the applicants have not come into this Honourable Court with clean hands for the title in question land parcel No. Butso/Esameyia/706 ceased to belong to their late father in the year 1976, when the same land was transferred into the names of his late father Gabriel Andati by way of sale through transfer. That it is not true that the applicants herein can claim for adverse possession when their own father after 1<sup>st</sup> registration never occupied the said land for a period of twelve years and or at all before same was transferred into the names of his late father that for himself to acquire same title he went through the aforesaid succession cause.

DW2, the 2<sup>nd</sup> defendant testified in court and denied being the owner of the said land Butso/Esameyia/3746 in both his testimony and his Replying affidavit filed on 4/4/17. In his evidence states that the said land parcel is not known to him nor has he ever signed any transfer documents the land being transferred into his names neither does he own the land by way of just merely staying or utilizing the land. That is why the 1<sup>st</sup> defendant has never given him the title deed as he knows well that he never participated in the land transfer process. He came to learn with surprise that the lands records shows that he is the registered owner of Butso/Esameyia/3746 when he was served with court documents and upon inquiry from the 1<sup>st</sup> defendant how the land was transferred into his names without his knowledge, he started dodging him and he had to file the replying affidavit to defend myself.

The 2<sup>nd</sup> defendant submits that once he denied ownership in his replying affidavit, the burden of truth shifted to the 1<sup>st</sup> defendant to prove to the court that actually he signed the transfer documents voluntarily, attended the land control board as required by the law and that the land belongs to him. Failure of the 1<sup>st</sup> defendant to prove the above means that his name was only used by the 1<sup>st</sup> defendant to make his ends meet by denying the plaintiff their lawfully land which the 1<sup>st</sup> defendant, David Oyalo Andati was just to transfer into the plaintiffs names on behalf of the late Arnest Omukongolo's entire family when he did the succession of his father's estate a point which was well within his knowledge.

He further submit that it is the 1<sup>st</sup> defendant who caused the plaintiff to sue him in this matter when actually he has never known that he has a title deed in his name for land parcel Butso/Esameyia/3746 as per the land records nor does he stay on the said land and he has never seen the so called title deed for Butso/Esameyia/3746 which is in the custody of the 1<sup>st</sup> defendant as he has never come to court to defend himself. In view of the above, it is in the interest of justice for the court to find that he was not connected in any way to the fraud done by the 1<sup>st</sup> defendant in sub-dividing and transferring the plaintiff's land into his name and that the plaintiff only sued him as his name appears in the lands record as regards land parcel Butso/Esameyia/3746 a sub-division of the plaintiff's land parcel Butso/Esameyia/706. It is the 2<sup>nd</sup> defendant's submission that the court to proceed to grant the plaintiff's prayer 1 and order 1<sup>st</sup> defendant to surrender both the title deeds for Butso/Esameyia/3745 and 3746 which are in his custody for cancellation and the 1<sup>st</sup> defendant be also ordered to pay the plaintiff and the 2<sup>nd</sup> defendant the costs of this suit.

This court has carefully considered both the plaintiff's and the defendant's cases and the submissions herein. The plaintiff herein filed this

suit against the defendants in his capacity as the administrator of the estate of Arnest Omubofu Omukongolo (deceased) as per limited grant ad litem given to him vide high court succession cause No. 814 of 2010 seeking for:

1. An order for cancellation of the defendant's title deeds Butsotso/Esumeyia/3745 and Butsotso/Esumeyia/3746 as per the records at the lands office and the same reverts to its original No. Butsotso/Esumeyia/706 and in the names of Anzelim Nyende Makuyi as the administrator of the estate of Arnest Omubofu Omukongolo (deceased)
2. An order directing the defendants to surrender to the Land Registrar the title deeds for Butsotso/Esumeyia/3745 and Butsotso/Esumeyia/3746 which are in their possession for cancellation.
3. Costs of this suit.
4. Any further relief the court deems fit to grant.

It is a finding of fact that the deceased was the plaintiff's father and the beneficial owner of parcel Butsotso/Esumeyia/706 by virtue of having stayed peacefully on this land with other family members since they were born to date which is over 40 years. The second defendant was sued by the plaintiff as the owner of land parcel Butsotso/Esumeyia/3746 a sub-division of the original No. Butsotso/Esumeyia/706 as alleged by the plaintiff.

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of **Gerald Muriithi v Wamugunda Muriuki & Another (2010) Eklr** while referring to the case of **Wambugu v Njuguna (1983) KLR** page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.
3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

In applying these principles to the present case, it is a finding of fact in that the said land parcels Butsotso/Esumeyia/3745 and Butsotso/Esumeyia/3446 are now registered in the names of defendants David Oyalo A ndati and Alfred Musiko Tindi respectively. That he is the Applicant/Administrator of the estate of their deceased father one Omukongolo Omubofu Arnest copy of grant annexed PEx1. That the land parcel Butsotso/Esumeyia/706 belonged to their late father who died in 28<sup>th</sup> April 1994 and his remains were interred therein peacefully without any complain from any person whatsoever. That together with his brothers, Robert Otundo Omukongolo and Testerio Omukongolo they have established homes and they have been staying and utilizing the whole of land parcel Butsotso/Esumeyia/706 for 40 years peacefully without interruption of any person to date. That when he carried out an official search for their late father's land parcel Butsotso/Esumeyia/706 for the purposes of filing a succession cause, he discovered that the land had been closed on sub division of Butsotso/Esumeyia/3745 and Butsotso/Esumeyia/3446, copy of the official search marked as PEx 2. From the evidence adduced I find that the plaintiff and the other beneficiaries have developed and utilized the same. That the respondents have never resided on this suit land. That having been in peaceful occupation and enjoying the use of the suit land parcels for a period exceeding 12 years he has acquired good title to the suit land by way of adverse possession and the same should be ordered to be transferred into his name as the administrator of estate of the deceased. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order for cancellation of the defendants' title deeds Butsotso/Esumeyia/3745 and Butsotso/Esumeyia/3746 as per the records at the lands office and the same reverts to its original No. Butsotso/Esumeyia/706 and in the names of Anzelim Nyende Makuyi as the administrator of the estate of Arnest Omubofu Omukongolo (deceased)
2. An order directing the defendants to surrender to the Land Registrar the title deeds for Butsotso/Esumeyia/3745 and Butsotso/Esumeyia/3746 which are in their possession for cancellation.
3. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**