



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 47 OF 2017**

**ANDERSON NYAMAO.....1<sup>ST</sup> PLAINTIFF**

**JAMES KITOSHI NYAMAO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WYCLIFF NYAMAO ANCHING'A.....DEFENDANT**

**R U L I N G**

1. The applicants who are brothers and sons of the respondent on 22<sup>nd</sup> February 2017 instituted the instant originating summons seeking the following substantive orders:-

- a. THAT this Honourable court be pleased to declare that the applicants have the right of possession, prescription and occupation of the whole of that land parcel Bassi/Bogetaorio II/2415.**
- b. THAT this Honourable court be pleased to declare that the applicants are entitled to be registered as the proprietors of the whole of that land parcel described as Bassi/Bogetaorio II/2415 measuring 0.33 hectares.**

2. The originating summons (OS) is supported on the grounds set out on the face of the application and on the annexed affidavit sworn in support thereof by James Kitoshi Nyamao the 1<sup>st</sup> applicant herein. The applicants aver that their father the respondent herein settled them on land parcel **Bassi/Bogetaorio II/2415** in 2004 and that they have since occupied and built their homesteads thereon. They further aver that they have been utilizing the land exclusively while their elder brother has been in occupation and has been utilizing land parcel **Bassi/Bogetaorio II/3930**. The applicants claim they have acquired rights of ownership of the suit property by prescription and now wish to be declared as owners thereof and to be issued title to the land.

3. Pending the determination of the suit the plaintiffs on 11<sup>th</sup> July 2017 filed a notice of motion application seeking an order of injunction to restrain the respondent from demolishing their structures and/or evicting them from the suit land. The applicants alleged that the respondent had on 2<sup>nd</sup> July 2017 in the company of hired goons entered the suit land and demolished the house of the 1<sup>st</sup> plaintiff and also was intent on demolishing the 2<sup>nd</sup> defendant's house.

4. The court on 31<sup>st</sup> July 2017 issued a temporary injunction and directed an inter partes hearing of the application on 20<sup>th</sup> September 2017. On the 20<sup>th</sup> September 2017 the court considering the matter involved the father and his sons in line with Article 159 (2) (c) and Section 20 Environment and Land Court Act felt that this was a matter where the parties could perhaps benefit from Alternative Dispute Resolution (ADR) and referred the matter for arbitration of the Area Chief. The court's order of reference was in the following terms:-

**“This is a matter that involves the father and his sons. The court feels that the local administration should be allowed an opportunity to arbitrate the matter with a view of reconciling the parties. Accordingly, I direct the local area chief to summon the parties with a view of arbitrating the dispute with assistance of the local elders. The chief to file a report in court within 90 days from today.”**

5. The chief filed his report in court on 22<sup>nd</sup> January 2018 and copies of the same was directed to be furnished to the parties. I have perused the report by the chief and the following facts emerge therefrom:-

- (i) That it is the respondent who purchased land parcel Bassi/ Bogetaorio II/2415 and the same is not ancestral land.**
- (ii) That the respondent had purchased land in Migori where he had settled the 1<sup>st</sup> plaintiff but the 1<sup>st</sup> plaintiff could not cope with the community there forcing the respondent to return him and settle him on part of land parcel 2415.**

**(iii) The 1<sup>st</sup> plaintiff once again could not fit within the community and for that reason the respondent has decided to relocate the plaintiffs to the ancestral land where the other siblings are.**

**(iv) The elders determined that the respondent's decision as the father of the plaintiffs should be respected and that he should be allowed to relocate his children to the ancestral land as he wishes.**

6. From the proceedings before the chief, it is apparent that the respondent is not rendering the plaintiffs destitute and/or landless. It is clear that he wants the plaintiff to relocate to the ancestral home. The father during his lifetime has a right to determine how and in what manner to deal with his assets. The situation would of course be different if he was not alive as his estate would be subject to succession proceedings and in that event the court would have to make a determination on the distribution of the estate.

7. Turning to the originating summons filed by the plaintiffs it is clear the plaintiffs are basing their claim on the doctrine of adverse possession as can be deduced from grounds (c), (d) and (e) set out on the body of the application thus:-

**(c) That the applicants have occupied the suit land unhindered since 2004.**

**(d) That the applicants have been in continuous and uninterrupted occupation and have gained adverse possession over the land for over 13 years.**

**(e) That the respondent has never occupied the suit land ever since.**

The plaintiffs do not dispute that land parcel **2415** is registered in their father's name and that it was their said father who put them in possession of the land. The entry onto the land was with the permission and authority of the respondent. Where the entry is with the permission and authority of the owner, the doctrine of adverse possession would be inapplicable. Besides, the plaintiffs would be entitled as beneficiaries of the respondent's estate to occupy and utilize any portion of his estate but cannot acquire title until the estate is administered upon the death of the respondent and/or the father voluntarily causes a portion or part thereof to be transferred out during his lifetime.

8. In the premises, the originating summons brought by the plaintiffs against their father is without doubt misconceived and there can be no basis to sustain the same. I order the same struck out but considering this is basically a family wrangle I make no order for costs and each party will bear their own costs.

9. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 22<sup>ND</sup> DAY of JUNE, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Abobo for the applicants

Defendant in person

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**