



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 73 OF 2015

WILLIAM OSAYO SIROKO.....1ST PLAINTIFF

ANASETI OUMA ADENYA.....2ND PLAINTIFF

= VERSUS =

EVERLINE ATIANGA WANYAMA.....DEFENDANT

J U D G M E N T

1. The two Plaintiffs – **WILLIAM OSAYO SIROKO** and **ANASETI OUMA ADENYA** – instituted this matter vide an Originating Summons initially filed on 20/7/2015 and dated 16/7/2015. That originating summons was amended and subsequently re-dated 4/9/2015 and re-filed on the same date. The two Plaintiffs are claiming portions of land parcel No. BUKHAYO/MUNDIKA/1057 as adverse possessors against the Defendant – **EVERLINE ATIANGA WANYAMA**. More specifically, **WILLIAM OSAYO SIROKO** is claiming half ($\frac{1}{2}$) acre while **ANASETI ATIANGA WANYAMA** is claiming one and a half ($1\frac{1}{2}$) acres.

2. The two Plaintiffs pleaded and testified that their entry into the land was through permissive arrangements with its deceased owner – **WANYAMA MACHOI MABWA**. They had purchased their respective portions – in 1978 for **WILLIAM** and 1977 for **ANASETI** – and were allowed to go into occupation and/or possession. They have been, they pleaded and testified, in such occupation and/or possession from the time of purchase to date. The original owner however died sometime in 1983 without having transferred their portions to them. The present Defendant is a daughter in law to that original owner, having been a wife to one of his sons who is also deceased. She is also the administrator of the estate of the original owner.

3. According to the two Plaintiffs, who testified as PW1 and PW2 respectively, they have been in continuous, open, uninterrupted and/or exclusive possession of their portions of land for over the twelve years required by law for one to become an adverse possessor. The court therefore is being invited to determine the following issues in their favour:

- 1) Whether the Plaintiffs have lived and have been in actual possession of part of Land Parcel BUKHAYO/MUNDIKA/1057 measuring approximately two acres since 1982, a period of over 30 years.
- 2) Whether the Plaintiffs should be declared the absolute owners of the two (2) acres of land on which they still reside and cultivate and over which they have been in actual, open, uninterrupted possession for a period of over 30 years.
- 3) Whether since the Plaintiffs have been in adverse possession of the two acres for a period of over 30 years, an order ought to be made that they be registered as the proprietors of the said portion of land as the title of the registered proprietor has been extinguished under the provisions of Sections 37 and 38 of Limitation of Actions Act.
- 4) Whether the Defendant ought to be ordered to regard all documents of transfer out of the title NO. BUKHAYO/MUNDIKA/1057 in favour of the Plaintiffs, failing which an authorised officer of this honourable court be empowered to execute the same in place of the Defendant.
- 5) Whether the Plaintiffs be awarded costs of this originating summons.
- 6) Whether the court has discretion to make any other or further suitable orders.

4. The Defendant responded vide a replying affidavit dated 19/8/2015 and filed on 20/8/2015. As can be appreciated from a cursory glance at the dates mentioned, the replying affidavit was responding to the initial originating summons. But it still counts in respect of the amended summons since it is clear that the Defendant filed a supplementary affidavit responding to the amended originating summons wherein she

expressly stated that she was relying on the contents of the replying affidavit.

5. To the Defendant, the alleged sale transactions between the original owner of the land and the Plaintiffs became null and void when the two purchasers failed to obtain the consents of Land Control Board within the required period. The Plaintiffs were faulted for trying to hide behind the concept of adverse possession to induce the court to rubber stamp illegal transactions of sale. It was denied that the Plaintiffs have been in quiet, peaceful and/or notorious possession as there having been cases running between the parties over the same piece of land. One such case is said to be P&A No. 162/2007, Busia, where the two Plaintiffs tried to object to grant of letters of administration to Defendant but were overruled in the resulting judgement.

6. The Defendant deposed that the Plaintiffs should have sued the original owner if they had a genuine claim. And having failed in their bid to stake a claim in the probate and administration cause – P&A 162/2007 – this suit itself is said to be *RES JUDICATA*. The defendant testified as DW1 on 17/7/2017 and reiterated generally what her written statement and replying affidavit contain.

7. The matter was canvassed by way of written submissions. Manwari for Plaintiffs filed two sets of submissions, the first on 25/7/2017 and another on 3/11/2017. The latter was done to supplement the former, and also in apparent response to Defendant's submissions. The Defendant's submissions were filed on 29/9/2017 by M/S Maloba, who appeared for her.

8. To Manwari, **“the facts of the case are clear, straightforward and largely uncontested”**. Manwari submitted, *inter alia*, that purchase was demonstrated, with Plaintiffs being shown to have been in possession of their respective portions since the time of such purchase. It was pointed out that the Defendant admitted during hearing that she found the Plaintiffs already in possession when she got married by the original owner's son in 1992. And on averments that the succession cause put paid to the Plaintiffs' claim, Manwari submitted that the judgement issued in that matter avoided the issue of ownership on grounds of jurisdiction and pointed to the parties the need to agitate the claim at a forum that has jurisdiction.

9. It was noted too that the Defendant had alleged that the sale agreements between the Plaintiffs and the original owner became null and void after the parties failed to obtain consent of Land Control Board within six (6) months from the date of agreement. Manwari submitted that the true position in law is that the Plaintiffs were licensees within the six months during which they were supposed to obtain the consent of Land Control Board. But the Plaintiffs continued stay on the land after that period was over became adverse to the interests of the owner as time had started running in their favour as adverse possessors.

10. Ultimately, submitted Manwari, both documentary and oral evidence availed support the Plaintiffs' claim.

11. The Defendant's submissions dwelt at length on the issue of purchase. The Plaintiffs were said not to have proved it as the sale agreements were not availed. Issue was also taken with the Plaintiffs failure to obtain Land Control Board consent within the required time. It was submitted that any agreement they may have had became null and void and the Plaintiffs only recourse was to claim the purchase money paid. And noting that the Plaintiffs were licensees on the land during the period that the relevant consents were supposed to be obtained from Land Control Board, the Defendant submitted that the Plaintiffs became trespassers when that period ended and continue to remain so to date. In the end, the Plaintiffs were also said to have failed to show that they held the land as their own to the total exclusion of the Defendant. The court was asked to dismiss the Plaintiffs' claim.

12. I have considered the pleadings, evidence, and submissions. Each side availed case law to back-up the various positions taken. The Plaintiffs cited **WAMBUGU Vs NJUGUNA [1983] KLR 171** to drive home the point that adverse possession occurs where a known owner of a piece of land is dispossessed of it or discontinues his possession. And where the adverse possessor alleges purchase as his initial reason for entry, time for adverse possession begins to run when the last instalment of the purchase price is paid. **GITHU Vs NDEETE [1984] KLR 776** was cited to show that mere change of ownership of land does not interrupt time for adverse possession. A point was also made in the case that adverse possession can apply to part only of land owned by a title holder. **LEONOLA NERIMA KARANI Vs WILLIAM WANYAMA NDEGE [2012] eKLR** was cited as a case that affirmed the holding in Wambugu's case (*supra*).

13. For the Defendant, case back-up comprised **AGNETA ATHIENO ONYANGO Vs GEOFFREY KUDODO & 2 others: ELC No. 11/2014, BUSIA** and **RATILAL GOVA SUMARIA & RELATED INDUSTRIES Vs ALLIED INDUSTRIES LIMITED [2007] eKLR** to illustrate the need for written agreement in contracts for sale of land. The cases of **KARIUKI Vs KARIUKI [1983] KLR 225** and **KARURI Vs GITURI & other: [1983] KLR 247** were meant to reinforce the position that land sale agreements became null and void where the requisite consents are not obtained from Land Control Board within the required period. It was pointed out that any money paid on the basis of such agreement is recoverable as a civil debt.

14. And as the Defendant has also argued that the alleged sale lacked legality, the cases of **FESTUS OGADA Vs HANS MOLLIN [2009] eKLR**, **STANDARD CHARTERED LIMITED Vs INTERCOM SERVICES LIMITED & 4 others: [2004] eKLR**, **SCOT Vs BROWN, DOERING Mc NAB & Co. [1892] 2 QB 724** and **KENYA PIPELINE COMPANY LIMITED Vs GLENCORE ENERGY (UK) LIMITED [2005] eKLR** were availed to emphasize that no person should be allowed by a court of law to benefit from illegality. And the Defendant sought to distinguish the applicability of Wambugu's case (*supra*) to this case on the ground that the Plaintiffs have not shown that they have held the land solely as their own to the exclusion of the Defendant. The Defendant was said to be staying on the land.

15. The facts of this case are not hard to establish. At the time of hearing, it emerged that the Plaintiffs went into possession of their portions of land in 1977 and 1978. The Defendant admitted that she found them on the land when she got married there in 1992. Her father-in-law is the one who had sold the land to the Plaintiffs. The father-in-law died in 1983, some nine years before she got married there. In all likelihood, this is somebody she did not know. She cannot therefore vouch for his dealings with people. The Defendant said she was born in 1973. When her father-in-law died, she was a 10-year old child and it appears clear that at the time of his death, the Plaintiffs, had they so wished, were ripe to make a claim for adverse possession against him.

16. It appears to me that no effort has ever been made to remove the Plaintiffs from the Land. The Defendant's counsel would have the court believe that the Probate and Administration Cause filed by the Defendant and the Land Disputes Tribunal Case that went on between the

parties stopped time for adverse possession from running. But counsel was wrong; dead wrong. The suit that can stop time from running is one filed by the owner of the land to eject or evict potential adverse possessors. The cases mentioned in this matter were not meant to serve that purpose and cannot therefore be said to have interrupted the running of time. Not every case stops the running of time.

17. The Defendant's counsel also took the position that the Plaintiffs were on the land as licensees. And therefore when time within which they were supposed to get Land Control Board consents expired, they became trespassers and should be treated as such. Indeed they became so. And from that point on, the owner of the land was supposed to take action against them but did not. But the Plaintiffs did not only become trespassers they became also potential adverse possessors. And it came to pass that the land owner passed on some thirteen or so years later, leaving the Plaintiffs in possession and occupation of the portions of land he was selling to them.

18. The Defendant's counsel is wrong to think that the Plaintiffs are only trespassers in the eye of the law. In a legal and technical sense, all adverse possessors are, or should be, trespassers. But they are a special kind of trespassers. They are tolerated by the land owners. Sometimes, they dispossess the land owner and get away with it. At other times, the land owner discontinues his possession in a manner construable as acceptance of their continued possession or occupation. And when that state of affairs continues for at least twelve years, the trespassers cease to be so in the eye of the law. They become adverse possessors. The title of the land owner becomes a mere paper. It loses all the legal attributes presumed in the owners favour and the adverse possessor becomes, on application to court, the new title holder.

19. The legal position was explained well by the High Court in the **MURIGU Vs KAMBI** and **Another: HCC No. 33 of 2002 (O.S)** where GBM Kariuki J. (as he then was) observed as follows:

“where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years the trespasser is entitled to apply under Section 38 to be registered as the proprietor of the land. This is what the doctrine of adverse possession means”.

The full purport and meaning of adverse possession is also captured well in Black's Law Dictionary, 8th Edition, 2009, P. 59 as follows:

“The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious”.

20. The Defendant tried to emphasize that what is illegal cannot become legal and urged the court not to allow the Plaintiffs to benefit from an illegality; the illegality here being trespass. There was attempted reliance on various cases law – **FESTUS OGADA Vs HANS MOLLIN [2009] eKLR**, **STANDARD CHARTERED BANK LIMITED Vs INTERCOME SERVICES LIMITED & 4 OTHERS [2004] eKLR**, **SCOT VS BROWN, DOERING MC NAB & CO [1982] 2 QBB 724** and **HOLMAN VS JOHNSON [1775-1802] ALL ER** – to drive home the point. The Defendant however fails to appreciate that adverse possession is an exception. All adverse possessors are legally and technically illegal possessors and occupiers of land owned by someone else. When they continue like that in a manner that can be said to be open, exclusive, hostile, notorious, and uninterrupted for at least 12 years, the illegality disappears.

21. Counsel for the Plaintiff on his part put to good use the decided cases of **WAMBUGU Vs NJUGUNA [1983] KLR 171**, **GITHU Vs NDEETE [1984] 776**, and **LEONOLA NERIMA KARANI Vs WILLIAM WANYAMA NDEGE [2012] eKLR** all of which explained and/or defined the various tenets of adverse possession and emphasized, in light of circumstances pertaining to each, what adverse possession is and what it is not.

22. In this particular case, it is well shown that the Plaintiffs have been on the portions of the land they bought long enough to be adverse possessors. Their entry was with the permission of the seller but that permission ended or fizzled out when the requisite period for procurement of consents from Land Control Board ended. Since then, their continued possession and/or occupation of the land was adverse the interests of the owner. The facts presented before court show clearly that the requirements of adverse possession have been met in this case. The claim of the Plaintiffs is therefore found meritorious and questions 1, 2, 3, 4, and 5 in the amended Originating Summons dated 4/9/2015 and filed on the same date are all answered in the positive. For the avoidance of doubt, the Plaintiff's claim is hereby allowed.

Dated, signed and delivered at Busia this 31st day of October, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff: Absent

2nd Plaintiff: Absent

Defendant: Absent

Counsel of Plaintiffs: Present

Counsel of Defendant: Present