



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 97 OF 2016 (OS)

SIMON WANG'ANYA BARASA (suing on his behalf and as Leg. Rep of the estate of

JEREMIAH MUKWANA BARASA.....APPLICANT

= VERSUS =

DENNIS MUMIA OMENDA.....RESPONDENT

J U D G M E N T

1. The Applicant in this matter – **SIMON WANG'ANYA BARASA** – instituted this suit on his own behalf and as legal representative of the estate of his late father – **JEREMIAH MUKWANA BARASA**. The suit is against the Respondent – **DENNIS MUMIA OMENDA** – and was instituted by way of an Originating Summons brought under Sections 7, 13, 37, and 38 of Limitations of Actions Act, Sections 28 and 30 of Land Registration Act, and Order 37 Rules 1, 2, 3 and 4 of the Civil Procedure Rules.

2. The court is called upon to determine the following issues:

(1) Whether the Applicant has been in open, physical and notorious possession and occupation of a portion of land measuring 2.0Ha already excised and demarcated from parcel no. BUKHAYO/LUPIDA/896 by virtue of adverse possession for a period exceeding twelve (12) years continuously, without interruption, peacefully and/or without force.

(2) Whether the Respondent's title to the demarcated portion of 2.0Ha from Land Parcel No. BUKHAYO/BUYOFU/896 and as described above became extinguished upon expiry of twelve (12) years from the time the Applicant went into occupation and/or possession of the said land.

(3) Whether the Applicant has now acquired title to the said portion measuring 2.0Ha of the said land by virtue of adverse possession.

(4) Whether the Respondent's father had set in motion the process to grant the Applicant his title deed to the purchased portion of 2.0Ha.

(5) Whether the Applicant should be registered as the proprietor of the said portion of land.

(6) Whether the Applicant had acquired ownership by prescription by the time the Respondent's father passed on.

(7) Whether the Respondent's title to the suit land was subject to the Applicant's overriding interest over the land under the Land Registration Act.

(8) Whether the Applicant has acquired ownership adversely as against successive proprietors of the suit land jointly and/or severally.

3. The Applicant anticipates that the issues will be answered or determined in the affirmative. He craves for the following orders after such determination:

(1) That the Applicant be and is hereby declared to have acquired ownership and title to a portion of land measuring 2.0Ha by virtue of adverse possession to be excised from Land Parcel BUKHAYO/BUYOFU/896.

(2) That the Respondent be ordered to sign all the necessary documents for consent for subdivision and transfer of 2.0Ha of land from parcel No. BUKHAYO/BUYOFU/896 to the Applicant and in default thereof the Deputy Registrar be empowered to sign on the Respondent's behalf.

(3) That the Respondent meet the costs of these proceedings.

4. When the matter was filed, records show that the Respondent was served by one Joseph Orata Kweyu on 9/3/2017 at or around 10 am at Khayo Secondary School. He is said to have accepted service but declined to sign, claiming he needed time to consult his counsel.

5. On a different occasion – specifically on 26/7/2018 – the Respondent was served yet again, this time with a mention notice, informing him that the matter was coming for mention on 30/7/2018 for purposes of taking directions. The venue of service was again at Khayo Secondary School. All these instances of service are vouched for vide affidavits of service dated 7/3/2018 and 30/7/2018, both of which form part of the court record.

6. The Respondent neither responded to the suit nor made an appearance in court. This being the position, and with the possibility of complexity in handling the issues considerably reduced, the court directed on 30/7/2018 that the matter be handled as an ordinary application. Counsel for the Applicant was directed to file written submissions. Such submissions were filed on 2/10/2018.

7. A clear narrative emerges both from the submissions and/or the supporting affidavit and annexures that accompanied the application. And the narrative is that the Respondent is the son of the late Ekwenyi Ekeya who was registered owner of the disputed land. The Respondent's late father sold a portion measuring 2.0Ha to the Applicant's late father. Both the seller and the purchaser died before or without concluding the process of transfer. In the meantime, the Applicant's late father had gone into possession of the purchased portion and had started cultivation and planting of trees. He later on started living on the land.

8. The process for eventual transfer had also started with sub-division and demarcation taking place. The resultant parcels of land were BUKHAYO/BUYOFU/1010 and BUKHAYO/BUYOFU/1011, with the purchaser intended to become the registered owner of parcel No. 1011. According to the Applicant, he has lived on the land since 7/6/1984 to date.

9. After the death of the Respondent's father, the Respondent filed a Succession matter in court. He included the Applicant as one of those entitled to part of the land but later changed his mind before conclusion of the proceedings. To buttress his claim, the Applicant availed the following documents:

(a) SWB – 1, which is a copy of the register of the disputed land.

(b) SWB – 2, 3, 4 which are copies forming part of succession proceedings in Succession Cause No. 121 of 2004, SRM's Court, BUSIA.

(c) SWB – 6, which are copies showing the process of transfer that the Respondent's father had started.

10. Counsel for the Respondent pointed out that the case remains uncontested. The Applicant, counsel continued, was placed on the disputed land by his own father. He has lived on the suit land from 7/6/1984 without interruption. He has, it was submitted, become an adverse possessor.

11. This matter is fairly straightforward. And it is mainly so because it is uncontested. It appears to me that the Applicant is still on the land and has been there since 1984. He has averred that his possession has been continuous, open, and notorious. It has also been peaceful and without force. Adverse possession consists in harmonious interplay of all these requirements. The minimum period of 12 years is adequately met. The nature of possession is satisfactory in terms of continuity, publicity and extent.

12. More crucial however is the fact that both the Respondent's father and the Respondent himself are shown to have discontinued their possession of the sold portion of the land since 1984. And the discontinued possession ran contemporaneously with the exclusive possession of the Applicant. In my view, the Applicant has lost his right to the sold or claimed portion through discontinued possession. That then entitles the Applicant to ownership under the Limitation of Actions act (cap 22). The cultivation, the planting of trees, and putting up of shelters to live in on the land are all acts inconsistent with the rights of the registered owner to enjoy the soil of the claimed portion. When such acts are demonstrated, they reinforce the claim of adverse possession (**see Ngati Farmers' Co-operative Society Limited Vs councillor John Ledidi & 15 others: CA No. 94 of 2004, NAKURU**)

13. It is useful to point that change of ownership of land occupied by another person under adverse possession does not interrupt the running of time for actualisation of adverse possession. (**See JOHNSON NEHONDO Vs CHRISTOPHER NASHISAKO & Another: CA No. 161 of 2012, KISUMU**). I make this observation because the land in dispute in the matter at hand was owned first by the Respondent's own father before the Respondent later came into the picture.

14. I now turn to issues 1 – 8 in the Originating Summons, which are also set out at paragraph 2 of this judgment. In light of what I have said heretofore, it is clear that the answers to these issues are in the affirmative.

15. Having answered the issues that way, and noting the orders asked for, it is clear that the orders are for granting. The orders are as set out at paragraph 3 of this judgement and I hereby grant all of them.

Dated, signed and delivered at Busia this 27th day of November, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondent: No Appearance

Court Assistant: Nelson Odame