



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. CASE NO. 200 OF 2015**

**EZEKIEL NDONG'A OBIERO.....PALINTIFF**

**VERSUS**

**PRIDE ENTERPRESES LIMITED.....DEFENDANT**

**JUDGMENT**

By his originating summons dated 5<sup>th</sup> August 2015 and filed herein on the same day, the Plaintiff (**EZEKIEL NDONG'A OBIERO**) sought the determination of the following questions:

- 1. Whether by virtue of having been in open peaceful and un-interrupted occupation of the land Parcel No. KISUMU/KORANDO/1978 for a period of over twelve (12) years, the Plaintiff is entitled to have the same registered in his name.**
- 2. Whether the Defendant ought to be ordered to transfer the said land into the name of the Plaintiff and failing which the Deputy Registrar of this court do sign such transfer documents in favour of the Plaintiff.**
- 3. Whether the defendant ought to be ordered to pay the costs of this suit.**
- 4. Who pays the costs of the suit and counterclaim.**

The Originating summons, as is required, was accompanied by the Plaintiff's supporting affidavit, the green card to the land parcel **No. KISUMU/KORANDO/178** and a photograph of the land among other documents. From the supporting affidavit, the Plaintiff's case is that he was born in 1949 and he is the only son of the late **KILLION OBIERO ODUAH** whose family have always been in peaceful continuous and un-interrupted occupation of the land parcel **No. KISUMU/KORANDO/1978** (the suit land) since time immemorial and that both his grandparents and parents were buried thereon. That it was only in 2014 that he observed that the defendant tried to fence it and upon making enquiries at the Lands Registry, he discovered that the suit land had first been registered in the names of one **PENINA ANNA OLUOCH** who transferred it to **VYATU LTD** and thereafter to **PRIDE ENTERPRISES** the defendant herein.

In opposing the originating summons, **NAVINCHANDRA SHAH** (the defendant's Director) swore a replying affidavit in which he deposed, inter alia that in 1994 **VYATU LTD** which is a sister company to the defendant purchased the suit land from **PENINA ANNA OLUOCH** at a consideration of Kshs. 120,000/= and has been paying the rates although his other relevant documents were destroyed when the premises in which they were kept were burnt during the Post-Election Violence. That the defendant has a caretaker who has been tilling and working on the suit land for the past six (6) years after it was surveyed and fenced and that the plaintiff has never used the suit land for anything. That if the plaintiff was on the suit land, he would have raised an issue when it was being surveyed. That the suit land is infact occupied by **WALTER AUM HONGO** and **PETER AUM** (deceased) and the plaintiff's claim to have been occupying it from time immemorial is a blatant untruth. That the plaintiff's father **KILLION OBIERO OBUDHO** was not buried on the suit land which was sold to the defendant by **VYATU LTD** in 2013 and a title deed was issued to it on 1<sup>st</sup> March 2013 and therefore the originating summons should be dismissed with costs. Annexed to the said replying affidavit are several documents a copy of the title deed to the suit land issued to **PENINA ANNA OLUOCH** on 21<sup>st</sup> June 1989, a copy of the title deed of same land issued to **VYATU LTD** on 20<sup>th</sup> September 2010, a copy of the title deed of the same land issued to the defendant on 1<sup>st</sup> March 2013, sale agreements, a valuation report, rate payments receipts, certificates of search and other documents. The defendant also annexed replying affidavits by **WALTER AUM HONGO, JACOB OWINO OKEMBA, PETER OKELLO HONGO, LINUS OTIENO OGOLA** and **PENINA ANNA OLUOCH**.

Apart from those replying and supporting affidavits, both the parties and their representatives filed further witness statements and directions having been taken on 23<sup>rd</sup> February 2017 before **KIBUNJA J**, the suit was placed before me for hearing on 1<sup>st</sup> November 2018 during the service week at the Kisumu Environment and Land Court.

The plaintiff adopted his supporting affidavit, witness statement and supporting documents as his evidence and called **SAMSON OUKO (PW2)** as his witness. He added that he has lived on the suit land since he was born some 67 years age and so did his late grandfather and father. That both his parents are buried on the suit land including his six children. That no one ever objected when he buried his father on the suit land after he died on 5<sup>th</sup> August 1989 and no one has ever stopped him or his family from utilizing the suit land.

His witness **SAMSON OUKO (PW2)** also adopted as his evidence his witness statement dated 15<sup>th</sup> November 2017 in which he has stated that the suit land was initially owned by **OBUDHO ABIRA** (deceased) before it was taken over by **KILLION OBIERO OBUDHO** the plaintiff's late father before the plaintiff took it over and has lived there for many years and even buried his parents and children on the said land.

**NAVINCHNDRA SHAH (DW1)** is a director of the defendant and he too adopted as his evidence his replying affidavit and the annexures hereto which I have already referred to above.

He called as the defendant's witnesses **JACOB OWINO OKEMBA (DW2)** **PENINA ANNA OLUOCH (DW3)** and **WALTER AUM HONGO (DW4)** who similarly adopted their statements as their evidence.

**JACOB OWINO OKEMBA's** statement is basically that **KILLION OBIERO OBUDHO** the plaintiff's late father owned the suit land which he sold to **PENINA ANNA OLUOCH (DW3)** and that only **WALTER AUM HONGO (DW4)** and **FREDRICK OGOLA AUM** live on the suit land. That the plaintiff has no home on the suit land and has never lived on it but resides elsewhere on another parcel of land.

**PENINA ANNA OLUOCH (DW3)** relied also on her statement dated 17<sup>th</sup> March 2017 and replying affidavit dated 1<sup>st</sup> September 2015 in which she states that she was registered as the proprietor of the suit land in 1978 and sold it to **VYATU LTD** in 1994. She states further that the plaintiff's late father **KILLION OBIERO OBUDHO** sold the land to her husband **JOHN ALBERT OLUOCH ODHIAMBO** but it was registered in her names. She denied that the said **KILLION OBIERO OBUDHO** was buried on the suit land or that the plaintiff lived thereon adding that the plaintiff may be mistaken about where he resides.

**WALTER AUM HONGO (DW4)** also stated that he lives on the suit land with his children and cousin **PETER AUM AKONGO** since 2009 adding that the plaintiff does not live on the suit land and has a home on another parcel of land.

At the end of the trial both **Ms ODHONG** counsel for the plaintiff and **MR. MAGANGA** for the defendant decided not to make any submissions.

I have considered the evidence by both parties. It is common ground that at the time of filing this suit on 5<sup>th</sup> August 2015, the defendant was and still is the registered proprietor of the suit land. Previously, it had been registered in the names of **PENINA ANNA OLUOCH (DW3)** on 21<sup>st</sup> June 1989 and thereafter in the names of **VYATU LTD** on 20<sup>th</sup> September 2010.

The plaintiff's claim is premised on adverse possession. He therefore is required to prove, as was held in **KASUVE V MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, that;

*“...he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”*

And in **KIMANI RUCHINE & ANOTHER V SWIFT RUTHERFORDS & CO. LTD & ANOTHER 1976-80 1 KLR 1500** the court stated as follows:

*“...the plaintiffs have to prove that they have used this land which they claim as of right. nec vic nec clam nec precario...The possession must be continuous. It must not be broken for any temporary purpose or by any temporary purpose or by any endeavors to interrupt it or by way of incurrent consideration.”*

The plaintiff's evidence is that he and his family have lived on the suit land from the time of his grandfather and that both his parents were buried there and that he is now aged 67 years having been born on the said land. That would be well in excess of the 12 years period provided for in law which entitles a party to claim land belonging to another person. What this court has to determine therefore is whether from the evidence on record, the plaintiff has met the threshold to be declared as having acquired by adverse possession the suit land

In support of his claim, the plaintiff testified that both his parents, his grandparents and his six children are buried on the suit land. He produced as part of his documentary evidence a photograph of the suit land and houses can be seen thereon. This was refuted by the defendant's witnesses **JACOB OKEMBA (DW2)**, **PENINA ANNA OLUOCH (DW3)** and **WALTER AUM HONGO (DW4)** who all said the plaintiff does not live on the suit land and instead lives on another parcel of land. However, none of them claimed ownership of the houses whose photographs was produced by the plaintiff nor deny that the said houses belong to the plaintiff and his family. Indeed **JACOB OWINO OKEMBA (DW2)** confirms in his statement dated 30<sup>th</sup> March 2017 that the plaintiff's father **KILLION OBIERO OBUDHO** previously owned the land. This is what he has said in paragraph two of the said statement;

*“I know the land parcel No. KISUMU/KORANDO/1978. I know that KILLION OBIERO OBUDHO the late father to EZEKIEL NDONG'A OBIERO owned a portion of the aforesaid parcel of land which he sold to the late MR. OLUOCH and registered in the name of PENINA ANNA OLUOCH the wife.”*

**PENINA ANNA OLUOCH (DW2)** on the other hand was emphatic in her statement dated 17<sup>th</sup> March 2017 that not only does the plaintiff

not live on the suit land but goes on to deny that the plaintiff's late father **KILLION OBIERO OBUDHO** was buried thereon. However, in paragraph six of the same statement she states as follows:

***“EZEKIEL NDONG'A OBIERO'S contention that the land is his ancestral and for over 100 years is a blatant lie as the land was sold by KILLION OBIERO OBUDHO to my husband many years back and was registered in my name in the year 1989.”***

And in paragraph six of her replying affidavit dated 1<sup>st</sup> September 2015, she avers as follows;

***“That I know of my own knowledge that my husband JOHN OLUOCH ODHIAMBO purchased the land from KILLION OBIERO OBUDHO, the father to the plaintiff in the year 1980 and my husband had the property registered in my name in 1989.”***

**WALTER AUM HONGO (DW4)** appears only to have started living on the suit land in 2009 but he too admitted in cross-examination that the suit land was previously claimed by the plaintiff's late father and that the plaintiff is his cousin. This is what he said when cross-examined by **Ms. ODHONG**:

***“Me and the plaintiff are relatives. The plaintiff is my cousin. I am 53 years old. The land originally belonged to KILLION OBIERO. He is the father of the plaintiff and he is the one who sold us the land”***

That testimony from the defence witnesses clearly confirms the plaintiff's evidence that his late father has always claimed ownership of the suit land and although there was no documentary evidence of how his late father sold the suit land to the husband of **PENINA ANNA OLUOCH (DW2)**, surely the late **KILLION OBIERO OBUDHO** must have been in possession of the suit land otherwise how could he have sold what he did not possess?

The defendant's principal witness **NAVINCHANDRA SHAH (DW1)** conceded that although he knew there were people living on the suit land, he did not know them at the time the defendant purchased it. This is what he said upon cross-examination by the court;

***“I know there are people living on the suit land but I don't know them. I cannot recall if there were people living on the land when we bought it.”***

He cannot therefore be heard to claim, as he has done in paragraph eleven of his replying affidavit dated 1<sup>st</sup> September 2015:

***“That the applicant's averment that he has been in open peaceful, continuous and un-interrupted occupation of the property from time immemorial is a blatant untruth.”***

I am therefore satisfied that the plaintiff has proved that he, and before that his parents, have always been in possession and occupation of the suit land where he was born some 67 years ago.

It is also clear from the evidence that the plaintiff's possession and occupation of the suit land has been exclusive and un-interrupted. **NAVINCHANDRA SHAH (DW)** has similarly averred in paragraph fifteen of his replying affidavit dated 1<sup>st</sup> September 2015 that it is **WALTER AUM HONGO** and **PETER AUM** (deceased) who have been occupying the suit land. It is instructive to note, however, from the evidence of the said **WALTER AUM HONGO (DW4)**, that he is in fact a cousin to the plaintiff and therefore part of the plaintiff's family for whose benefit this suit is actually filed, yet when he was re-examined by Counsel for the defendant **Mr. MAGANGA**, he said;

***“It is the defendant who has allowed us to live on the land.”***

It is not difficult for this court to conclude that the evidence of **WALTER AUM HONGO (DW4)** was clearly doctored to favour the defendant and only succeeded being badly contradictory. He could not have been allowed to stay on the suit land by the plaintiff's father (as he conceded in cross-examination) and also by the defendant (as per his written statement).

**NAVINCHANDRA SHAH (DW1)** also avers in his replying affidavit at paragraph ten that the defendant has a caretaker who has been tilling on the suit land daily for the past six years planting maize on his instructions. He however conceded when cross-examined by his own counsel that the defendant has ***“only fenced the property in dispute”***. I am satisfied that the defendant has clearly been disposed of the suit land which is in the possession or occupation of the plaintiff.

It is also clear that the plaintiff's possession and occupation of the suit land has been open, exclusive, un-interrupted and with the knowledge of the defendant yet no action has been taken to file a suit to evict him or any of his family members – **GITHU V NDEETE 1984 KLR 776**. All that the defendant did was to file an application for injunction in this suit to restrain the plaintiff or his family members from burying one **EUNICE AKONGO AKONGO** on the suit land. But that was rather too little too late because by the time that application was being filed on 28<sup>th</sup> August 2015, and although the order for injunction was granted, the plaintiff and his family had already been in possession and occupation of the suit land well in excess of the statutory twelve years period.

The suit land has changed ownership from **PENINA ANNA OLUOCH** (who acquired title in 1989) to **VYATU LTD (2010)** and then to the defendant (2013). The position in law however is that change of ownership does not interrupt possession – **GITHU V NDEETE** (supra). The Limitation period commenced from 21<sup>st</sup> June 1989 when the suit land was first registered in the names of **PENINA ANNA OLUOCH (DW3)**. Therefore, by the time the suit land was registered in the names of **VYATU LTD** on 20<sup>th</sup> September 2010, **PENINA ANNA**

**OLUOCH (DW3)**'s interest therein had long been extinguished and both she and the subsequent registered owners including the defendant were only holding it as trustees of the plaintiff and his family.

Having considered all the evidence herein, I find that the plaintiff has established his case against the defendant as required in law. I therefore answer all the three questions set out above in favour of the plaintiff and enter Judgment for him in the following terms:

1. The Plaintiff is entitled to have the parcel **No. KISUMU/KOANDO/1978** registered in his names by virtue of having been in open, peaceful and un-interrupted occupation thereof for a period of over twelve (12) years.
2. The defendant is hereby ordered to execute all the necessary documents to facilitate the transfer of the land parcel **No. KISUMU/KORANDO/1978** in the names of the plaintiff within thirty (30) days of this Judgment failure to which the Deputy Registrar of this court shall execute all such documents in favour of the plaintiff.
3. The defendant shall meet the costs of this suit.

**Judgment Dated, Signed and Delivered this 7<sup>th</sup> day of November, 2018 in Open Court at Kisumu.**

**Mr. Onyango for Mr. Olel for the Plaintiff - present**

**Mr. Otieno for Mr. Maganga for the Defendant Present**

**B. N. Olao**

**Judge 7<sup>th</sup> November 2018**