



IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 1 OF 2015 (O.S)

GEORGE OPUKO OMORITI a.k.a

SEWUS OPUKO OMOLITI.....PLAINTIFF

VERSUS

JOHN OMORITI.....DEFENDANT

J U D G M E N T

Introduction

1. This suit is a necessary corollary of Succession proceedings at the High Court, Busia, in P & A No.55 of 2003. In these proceedings, there was a contestation as to ownership of Land Parcel No. L.R. No. BUKHAYO/MALANGA/394, with the Plaintiff herein claiming a portion of it while the Defendant, as registered owner, averred that he owned the whole land. Due to jurisdictional constraints the High Court referred the matter to this court for determination as to ownership.

2. The Plaintiff claims six acres of land from the aforementioned property, **L.R NO. BUKHAYO/MALANGA/394** (*hereinafter "the suit property"*) by way of adverse possession and by virtue of a customary trust. The Court has been invited to determine the following questions:

- i. THAT the Applicant GEORGE OPUKO OMORIT a.k.a SEWUS OPUKO OMORIT be declared the absolute registered proprietor of six acres of that parcel of land known as **BUKHAYO/MALANGA/394** or thereabout of which he has been in actual possession notoriously, adversely, openly and uninterrupted for a period exceeding 12 years
- ii. THAT in the alternative, the Applicant GEORGE OPUKO OMORIT a.k.a SEWUS OPUKO OMORIT be declared the absolute registered proprietor of six acres of that parcel of land known as **BUKHAYO/MALANGA/394** by virtue of a customary trust.
- iii. THAT the Respondent, JOHN OMORIT be ordered to execute all documents of transfer in respect of the six acres or thereabouts of all that parcel of land known as **BUKHAYO/MALANGA/394** in favour of the Applicant herein failing which an officer of this Court be empowered to execute the same in place of the Respondent and the Land Registrar to dispense with the production of the original title deed if the Respondent does not comply.
- iv. THAT an inhibition do issue restraining the Respondent from interfering, disposing or in any other manner dealing with land parcel **NO. BUKHAYO/MALANGA/394** pending the hearing and final determination of this suit.
- v. THAT costs be provided for.

3. The Defendant entered appearance on 10th February 2015. He filed his Replying Affidavit dated 26th February 2015 on 5th March 2015. The hearing of the matter proceeded on various dates beginning with 12th July 2017 and ending on 18th April 2018 with two witnesses testifying on behalf of the Plaintiff and three on behalf of the Defendant. Parties then filed their respective submissions on the 21st and 22nd of May 2018.

Plaintiff's Case

4. The Plaintiff testified as PW 1. He stated that the Defendant is his cousin. In his testimony which is in tandem with his pleadings and statements, he claims that he has been in consistent possession of six acres of the **Land Parcel NO. BUKHAYO/MALANGA/394** from the 1982 to date. He was brought to the said property by the Defendant's father who was holding the six acres in trust for his late father and by extension himself. He asserts that the suit property initially belonged to his grandfather one Opuko and that his father, Rateng' Opuko was the elder brother to the Defendant's father, Clement Opuko. Rateng' Opuko died in 1956 when the Plaintiff was still a minor and Clement Opuko registered the property during land adjudication and registration on his own behalf and in trust for the Plaintiff. Clement subsequently

showed the Plaintiff his share in the late 1970s and planted a boundary for him. He erected houses on the property and resides there with his two wives and children. He has also planted trees and has been cultivating crops on the suit property to date.

5. The Plaintiff testified further that when Clement Opuko died, the Defendant tried to tamper with official records to disenfranchise him of the suit property. The Defendant has also been selling portions of the property and has tried to disentitle him using Court action. The Defendant attempted to have him arrested for trespass but he showed the Police his house on the property and the case did not proceed. The Plaintiff asserts that his father was buried on the suit property, not parcel No. 397 which he has no knowledge of.

6. Leonard Okumu Ige testified as PW 2. He stated that he is an uncle to both the Plaintiff and Defendant and that he knew about the suit property though he could not recall its registration number. He stated that the property belonged to the grandmother of the parties. Their fathers, Clement and Rateng' Opuko were supposed to share the property in two equal halves. The Plaintiff's father died before land adjudication was done and the Defendant's father was registered as the owner of the land. PW 2 confirmed that both the Plaintiff and Defendant have been living on the suit property and that the Defendant has tried to claim the entire property for himself. However, he was not sure of the dimensions of the property occupied by the Plaintiff. He testified that it was not 6 acres but was clear that the property should be divided into two equal portions.

Defendant's Case

7. The Defendant (DW 1) confirmed that the Plaintiff is his cousin. He relied on his replying affidavit, witness statements and accompanying documents. He claimed that the Plaintiff came to his land on 24th October 2003 and unlawfully constructed a house on it. He occupies three acres of the suit property. He reported the Plaintiff at Nambale Police Patrol Base for the offence of trespass and instituted Busia Senior Principal Magistrate Case No. 1780 of 2003. The case was however withdrawn as the suit property was still in the name of the deceased, Clement Omoriti Opuka and the Defendant had not been issued with letters of administration. He sought the intervention of the area District Officer and chief but the Plaintiff persisted and even went ahead to bury the remains of his late mother on the suit property.

8. The Defendant was adamant that the Plaintiff invaded his land which had never been allocated to him by his father and that elders were not called to witness such an occurrence. He insisted that the Plaintiff's father occupied **L.R NO. BUKHAYO/MALANGA/397** and was buried thereon. He further stated that the Tribunal made a decision on the ownership of the suit property which decision was not adopted by a Court of law and confirmed that he had been selling portions of the suit property which he was entitled to do as it was his father's land.

9. One Grevas Barasa Odewa testified as PW 2. He stated that he knew the parties to the suit and that they were "neighbours." On cross-examination he admitted that he knew the Plaintiff as the son of Rateng' Opuko and that Land Parcel No. 397 belonged to him. He however could not recall when Rateng' came into occupation of the said property or when he died. He claimed that the Defendant's father never divided the suit property but admitted that he had no knowledge of the Plaintiff and Defendant's customs. He was merely a neighbour and did not know the Plaintiff's children. DW 3, Flora Nekesa Nyabola mainly echoed the testimony of DW 1 and DW 2.

Submissions

10. Hearing over, both sides filed written submissions. The Plaintiff's submissions were filed on 27/5/2018. In the submissions, the Plaintiff reiterated that he and the Defendant had a common grandfather. The grandfather originally owned the suit land. He died and left the Plaintiff's father and the Defendant's father as his surviving sons. The Plaintiff's father died before the onset of Land Adjudication and Registration in the area. That left the Defendant's late father as the surviving son. The Defendant's late father became the registered owner of the suit land but was aware that it was family or ancestral land. At the appropriate time, he gifted the Plaintiff a portion measuring approximately six acres and even put a boundary for him.

11. The Plaintiff and his family have been living on that land for over 40 years now. According to the Plaintiff, that portion is his own both by way of a trust and adverse possession. And this is so notwithstanding that the Defendant became the registered owner of the suit land after the death of his father.

12. The Defendant's submissions were filed on 21/5/2018. To the Defendant, the Plaintiff possession and/or occupation of the suit land was with permission from the Defendant's father and, that being the case, the Plaintiff cannot be said to have acquired any adverse or prescriptive rights. The cases of **BENJAMIN KAMAU MURIMA & Others Vs GLADYS NJERI: CIVIL APPEAL NO. 213 of 1996, NYERI, MBUI Vs MARANYA [1993] KLR 26**, and **SAMUEL KIHAMBA Vs MARY MBATSI [2015] eKLR** were availed among others to drive home the point permitted possession and/or occupation and adverse possession cannot co-exist.

13. It was also the position of the Defendant that the Plaintiff entered the suit land in October 2003 and adverse possession had not yet accrued in January 2015 when the suit was filed.

Determination

14. I have given due attention and consideration to the pleadings, evidence, rival submissions and availed case law. The Plaintiff's claim comes under two heads: customary trust and adverse possession.

15. Under customary trust, the Plaintiff traced his lineage to his grandfather. The grandfather owned the suit land. The Defendant is also a grandson to this same grandfather. In simple terms, the fathers of the parties in this suit were brothers. After the death of the parties' grandfather, the fathers of the parties were supposed to inherit the suit land. But the Plaintiff's father died before adjudication and registration came to the area. That left the defendant's late father to be registered as owner of the suit land. But that registration was in trust

for the larger family. In recognition of this, the Defendant's late father showed the Plaintiff his own portion. That is where the Plaintiff is living with his family now.

16. The concept of customary trust has for a long time been thought to have been ousted by provisions of the now repealed Registered Land Act (cap 300). This line of thought arose from the holding of the court in the decided cases of **ESIROYO V ESIROYO [1973] EA 358** and **Obiero Vs Opiyo [1972] EA 277**. In later decisions – see for instance **MURIUKI MARIGI V RICHARD MARIGI & 2 Others (NYERI CA No. 189/96: Unreported)**, **ALAN Kiama Vs Ndia Mathunya & Others: CA 42/1978** and **GATHIBA Vs GATHIBA: HCC No. 1647/1994, NAIROBI** – the courts have almost religiously clung to this position.

17. But it is necessary now to appreciate that we are in a new constitutional dispensation. Under this dispensation, it became imperative to have a new land law regime, at least from a statutory perspective. One of the new statutes under the new regime is the Land Registration Act, 2012. Under this statute a customary trust is expressly recognised as an overriding interest at Section 28(b).

18. It is equally necessary to appreciate that even under the now repealed Registered Land Act (cap 300), there has been a re-think and re-interpretation of the law as it was then. And this led to a change in the earlier position. All this found expression in the Supreme Court's decision in **ISACK M' INANGA KIEBIA Vs ISAYA THEURI M' LINTARI & Another PETITION No. 10 of 2015**. In the matter, the apex court in this country eloquently pronounced itself thus:

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor is subject under the proviso to Section 28 of the Registered Land Act.”

19. Elsewhere in the same decision; the court gave some pointers as to what might lead to an inference of customary trust in favour of a claimant. A customary trust would be said to arise where:

- 1) The land in dispute was before registration, family, clan or group land.**
- 2) The claimant belongs to such family or group.**
- 3) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make the claim idle or adventurous.**
- 4) The claimant could have been entitled to be a registered owner or other beneficiary of the land but for some intervening circumstances.**
- 5) The claim is directed against the registered proprietor who is a member of the family, clan or group.**

20. It is in light of all this that I intend to find out whether the Plaintiff's claim has merits. To begin with, the Plaintiff and the Defendant trace their family line to the same grandfather. That grandfather was the father to the fathers of the Plaintiff and the Defendant. He was also the original owner of the land. The Plaintiff's father died when the Plaintiff was still a child and before land adjudication and registration. Quite clearly, the Plaintiff's father, were he alive, would be entitled to the land. The Plaintiff himself, by dint of being his father son, becomes entitled to what his late father would have inherited.

21. In this context, the land, though registered in the name of the Defendant's father, was family land. And it is in recognition of this that the Defendant's late father showed the Plaintiff the portion where he lives with his family now. Credible evidence adduced shows clearly that the Plaintiff has met the threshold set out in the criteria enumerated in the Supreme Court decision. He becomes entitled to the portion he possesses and occupies by dint of his familial or lineal ties to the original owner of the land. The original owner is the grandfather to both himself and the Defendant. The suit land is family land. The plaintiff belongs to the family. His relationship to the family is close, not remote. A trust is clearly manifest.

22. I therefore hold, without equivocating, that the Plaintiff is entitled to the portion he possess and occupies under a customary trust. And that is so whether that portion is exactly 6 acres or more or less than that.

23. I now come to the next question: would the Plaintiff be entitled to the land under adverse possession? It appears to me clear that the Defendant's father put the Plaintiff on the suit land some forty or so years ago. The Plaintiff's possession and occupation of the land therefore was through permissive arrangements between himself and the Defendant's late father. And it appears clear that before the demise of the Defendant's father, that permissive arrangement had not been withdrawn.

24. The Defendant himself seems to appreciate this position for he depones at paragraphs 11 of his supporting affidavit that since the demise of the Defendant's father, he has occupied the land for over 12 years. What this essentially means is that the Plaintiff's interests can only be deemed to be adverse for the period that the Defendant himself, not the Defendant's late father, became the registered owner of the land. And when was that period? The green-card annexed to the Originating Summons shows the Defendant became such owner on 1/3/2003.

25. The Plaintiff filed this suit on 6/1/2015. Given that the Defendant became a registered owner on 1/3/2003, simple calculation would reveal that by the time the Plaintiff filed the suit, he was still some two or so months shy of attaining the required minimum of 12 years for a person to claim under adverse possession. In my view therefore, the Plaintiff would not be entitled to his portion of land under adverse possession and I therefore reject his claim under this head.

26. There issues for determination set out in the Originating Summons and set out also in this Judgment. It is now time to answer them.

- Issue No. i, sought to establish whether the Plaintiff is an adverse possessor. The answer is that he is not. He came to court before the matter was ripe for adverse possession.
- Issue No. ii, is about customary trust. The Plaintiff wants to be declared owner under such trust. Yes, the Plaintiff is entitled to the portion he occupies under a customary trust.
- Issue No. iii, is essentially a prayer that the Defendant executes all documents of transfer to effectively make the Plaintiff a registered owner of the portion he occupies. The Plaintiff would wish an officer of this court to do so if the Defendant proves adamant or unwilling. That prayer or request is granted.
- Issue iv concerns a prayer for an order for inhibition to run before determination of this suit. That prayer is now idle and/or moot. This judgment itself is the determination of the suit and the prayer for inhibition should have come in interlocutory stages.
- Issue v, is about costs. This is a delicate family matter and I would be reluctant to condemn any side to pay costs. Let each side bear its own costs.

Dated, signed and delivered at Busia this 18th day of December, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

1st Interested Party:

2nd Interested Party:

Counsel of Plaintiff and 2nd Interested Party:

Counsel of Defendant and 1st Interested Party: