



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC NO. 138 OF 2013 (FORMERLY HCC NO. 26/05(OS))

1. LIVINGSTONE JASON MUKOYA OGONGO

2. BENARD OKOCHI OUNDO.....PLAINTIFFS

3. WILBRODA AUMA OPONDO

4. JULIA MAGOROMBO

VERSUS

1. GEORGE WILLIAM OKELLO

2. CHRISPINUS OUNDO ONYANGO.....DEFENDANTS

3. FREDRICK OPONDO

4. WYCLIFF OKOCHI BANYA

J U D G E M E N T

1. By an Originating Summons (O.S) dated 20/6/2005 and filed here on 22/6/2005, the four plaintiffs - **LIVINGSTONE JASON MUKOYA OGONDO, BENARD OKOCHI OUNDO, WILBRODA AUMA OPONDO, and JULIA MAGOROMBO** - claim ownership by adverse possession of parts of Land Parcel No. SAMIA/BUDONGO/613 (“Suit Land”) by virtue of having resided on, cultivated, or being in actual possession for a period running over thirty years. According to them, their possession of the suit land has been peaceful, notorious, open, and uninterrupted for the said period. The claim is brought against the Defendants - **GEORGE WILLIAM OKELLO, CHRISPINUS OUNDO ONYANGO, IBRAHIM AUMA OJIAMBO, FREDRICK OPONDO, WYCLIFFE BANYA and GILBERT OKOCHI** - who are said to be the registered owners of the suit land.

2. The following is sought to be determined:

1) That the Applicants (Plaintiffs) **LIVINGSTON MUKOYA OGONGO, BENARD OKOCHI OUNDO, WILBRODA AUMA OPONDO and JULIA MAGOROMBO** be declared absolute owners of parts of that parcel of Land Known as SAMIA/BUDONGO/613 measuring 13.6 Hectares or thereabouts in which they have resided on, cultivated, and have been in actual possession peacefully, notoriously, adversely, openly and uninterrupted for a period exceeding 30 years.

2) That the respondents **GEORGE WILLIAM OKELLO, CHRISPINUS OUNDO ONYANGO, IBRAHIM AUMA OJIAMBO, FREDRICK OPONDO, WYCLIFFE BANYA and GILBERT OKOCHI** be ordered to execute all documents of transfer in respect of parcel of land known as SAMIA/BUDONGO/613 in favour of the applicants (Plaintiffs) herein failing which an authorized officer of this honourable court be empowered to execute the same in place of the respondents (Defendants).

3) That an inhibition do issue restraining the respondents from transferring or in any manner interfering with land parcel No. SAMIA/BUDONGO/613.

4) That Costs of this application be awarded to the applicants.

3. The Plaintiffs averred that their respective portions of land are clearly surveyed and demarcated on the ground. They have been occupying and/or using them since 1974. It was stated that the suit land was originally registered in the names of OJIAMBO MBOKO, ONYANGO OJWANGI, and LUDUBA OGONA in trust for the Plaintiffs. The three then died and some of the Defendants filed Succession Case No. SRM Succession 121/1994, BUSIA, allegedly to ensure, inter alia, that the Plaintiffs got their respective portions. This however did not happen. The Defendants transferred the land to themselves instead. In spite of this development, the Plaintiffs continued occupying and/or using their respective portions of land.

4. The Defendants responded vide a replying affidavit dated 29/8/2005 filed here on the same date. According to them, the suit is based on misleading information to build up a false claim. It was pointed out that the first plaintiff has sometimes cultivated the suit land with permission from the proprietors. The suit land was said to have been the subject of litigation since 1965. For a long time, it had a restriction placed on it and the restriction was only removed in the year 2000 to pave way for succession proceedings. The Plaintiffs were said to have their own parcels of land elsewhere but have chosen to abuse the generosity extended to them by the original proprietors by seeking to acquire free land.

5. The defendants averred that if the plaintiffs felt that they had not been catered for during succession, they still had a remedy under Succession Law. This suit was said to be a belated afterthought and without merit.

6. The 1st Plaintiff - **LIVINGSTON JASON MUKOYA OGONGO** - filed his written statement on 31/10/2011 and had his evidence taken by the court on 31/7/2013. He said that way back in 1955 his parents were farming on the land. Then in or around 1975, he himself started living on the land. He has houses on the land, he said, and his boundary is marked with sisal plants. The size of his land is approximately 2½ to 3 acres. From 1st plaintiff, we gather that the 2nd plaintiff - **BENARD OKOCHI OUNDO** - has also constructed on the land. The 3rd and 4th plaintiffs are claiming the parcels of land left behind by their deceased husbands. Each is using about half an acre. This witness testified as PW1.

7. Cross-examination by Wanyama for the defendants shows the first plaintiff saying that the land was claimed by three clans – Ababondi, Abatabona and Abasubo, with the 1st Plaintiff himself belonging to Ababondi clan. But one clan seems to have claimed exclusive ownership, which the other two disputed. This led to a protracted suit leading to a decision to subdivide the suit land among the three clans. By then however, the three people who represented the clans and who were parties to the suit, had passed on. This then led to commencement of succession proceedings which ultimately led to registration of the defendants as owners.

8. The resulting subdivision of the suit land was supposed to cater for the plaintiffs' interest. This never happened however and the plaintiffs felt shortchanged. This seems to have led to the filing of this suit. As stated elsewhere, the plaintiffs' position is that they have been in continuous, notorious, adverse, and open occupation, of portions of the suit land for over 30 years. Their position is that this has made them owners whose rights of proprietorship override the rights of the registered owners.

9. The 2nd plaintiff testified as PW2 on 20/1/2015. He had earlier availed his statement dated 8/11/2013. That statement was filed in court on 15/11/2013. According to him, his father was using a portion of the suit land. That portion was handed over to him in year 2000. A sisal boundary marks the portion and he put up his house there in 2001. He has rented that house to a tenant. He has also planted avocados, mangoes and other types of trees on the land.

10. During cross-examination by Wanyama for Plaintiffs, the 2nd plaintiff talked of never having resided on the suit land. The land he resides on abuts on the suit land. He denied living in Uganda with one of his wives.

11. Then there was the testimony of the 3rd Plaintiff - **WILBRODA AUMA OPONDO**. She largely adopted her written statement dated 8/11/2013. According to her, **WILLIAM OPONDO** was her husband and was living on a portion of the suit land with another wife. The land was however subdivided in 1995 and her family was given half an acre. They moved out of the portion as it was too small but they continued cultivating it. They still do so to-date and the portion is marked with a sisal boundary.

12. During cross-examination by the plaintiff's counsel, the 3rd plaintiff maintained that she lives on a different land but continues to cultivate on her portion of the suit land.

13. The 4th plaintiff testified as PW4. Like 2nd and 3rd plaintiff, she adopted her written statement. She is claiming one acre from the suit land. She said she participated in subdivision of the suit land in 1995 on invitation of Ibrahim Auma (3rd Defendant). She averred too in cross-examination that the 1st plaintiff left the portion he had occupied in 1975 and went to another one in 1985 still in the suit land. He is still living on that portion.

14. After the testimony of the 4th plaintiff, the plaintiffs' case was closed. And while my predecessor (Kibunja J) concluded the plaintiffs' case, it fell on me to conduct the defence case.

15. The 1st defendant, **GEORGE WILLIAM OKELLO**, testified as DW1 on 15/2/2017. It is clear from his evidence that the defendants are all sued as representatives of the three people – Luduba Ogana, Ojiambo Mboko, and Anyango Obwangi – who were supposed to be the original proprietors. These three people were themselves representatives of the three clans that were tussling over the ownership of the land. The three people have since passed on, hence their legal representation by the defendants.

16. The 1st defendant adopted his written statement as his evidence. That statement is a 68-paragraph sworn narrative that gives detailed history and background surrounding the suit land. It is a narrative that is not his own only; it is for the other defendants as well. From this witness, it emerged that the great grandfathers of the defendants came from Uganda and settled on the suit land. At the onset of land adjudication, the land was being cultivated at random by the 3 families of OJIAMBO, LUDUBA and ANYANGO. But OJIAMBO, the father of 3rd defendant, claimed the whole land and that elicited protests from Luduba and Anyango.

17. The prevailing state of affairs gave rise to a dispute first at the area African Court then in existence and later, as an appeal, at the High Court at Kakamega. The appeal at Kakamega took long and the original disputants passed on. The defendants then took over after some succession proceedings. Then in 1997, the land was shared out among the families of the three original litigants. It is alleged that during the sharing the 1st plaintiff was present and even assisted in the exercise. He is said to have done so without raising any complaint. The 1st plaintiff is said to be on the land but the others live far away.

18. According to 1st defendant, the 1st plaintiff stays in his house on the land but does not cultivate. He only tethers his cows to graze. The rest of the plaintiffs stay far off the land. It is the defendants' position that the plaintiffs have no claim to the suit land whether customary or otherwise as they are not relatives of the three original proprietors. They are said to be confusing issues by trying to introduce clan and customary claims in unprocedural manner. The land is said to have been in dispute since 1965 and full

implementation of the court decision is yet to be done and this makes the plaintiffs claim misplaced.

19. The defendants further averred that owing to the existence of cases from 1965 to 1999 the distribution of land has not yet been conclusively done and the claim by the plaintiffs therefore cannot stand.

20. The other defendants who testified are **CHRISPINUS OUNDO** (2nd Defendant) and **GILBERT OKOCHI** (6th Defendant). They largely adopted the evidence of the 1st Defendant.

21. Both sides filed written submissions. The plaintiffs' submissions were filed on 25/7/2017. The plaintiffs submitted, inter alia, that the evidence and written statements availed show that they have lived on and/or used the suit land from 1974 to date. And they have done so openly, continuously and peacefully. They have therefore become adverse possessors. Two decided cases were availed to guide the court. The first one is that of **CHARITY WARUGURU MAINA vs MAGINDA RANCHOD CHOGAN (2006) eKLR**. The other case is that of **WANAINA vs MURAI & Others [1946] KLR 227**. I have read and considered the two cases. I am constrained to observe that the facts and issues arising in the two cases are different from this case. Both however dealt with adverse possession and found for the plaintiffs in light of the facts and issues pertinent to each case.

22. The defendants' submissions were filed on 27/7/2017. It was emphasized that the suit land had a long running case spanning a period that started in 1965 all the way to 1994. At this time, it was not clear who would get the land as the dispute was about ownership. In such a scenario, the defendants submitted that time for adverse possession could not be said to be running.

23. The suit land was said to have been surveyed and shared out among the sons of the original proprietors in 1997. And after the sharing out, the 1st plaintiff, who is the only one acknowledged to have been living on the land; moved from the land apportioned to Anyango Angwangi's family to the share of OJIAMBO MBOKO'S family which is the clan to which he belonged. The shares of all the three original owners or clans were ascertained in 1997.

24. According to the defendants, the pending cases that ran from 1965 to 1999 meant that time for adverse possession could not run. And this is so because ownership had not been fully ascertained. The 1st plaintiff's occupation of land during the period before 1997 was with permission from the family of Angwangi. That permission ended when he left that portion and went to live in a portion earmarked for Ojiambo Mboko's family sometimes in 1998. If there is any adverse possession in favour of 1st plaintiff therefore, it could only run from 1998 or 1997 to the year 2005 when this case was filed.

25. The defendants offered various decided cases to guide the court. These were **WAMBUGU vs NJUGUNA [1983] KLR 172**, **LEONOLA NERIMA KARANI vs WILLIAM WANYAMA NDEGE [2013] eKLR**, **MWATANDO MWAGAMBO WASONGA vs MULJI DEVRAJ & BROSS LTD [2013] eKL**, **GITHU vs NDEETE [1984] KLR 776**, and **FRANCIS MUSYOKI KILONZO vs VINCENT MUTUA MUTISO [2013] eKLR**. I have read and considered these cases.

26. The general thrust of each side's case has been highlighted. It is now crunch time. Adverse possession entails extinguishing of title by lapse of time. The plaintiff or claimant has to show that he possess or uses the land as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion). For one to succeed in a claim of adverse possession, it has to be shown that possession of the land has been open, peaceful and unpermitted. And this state of affairs has to persist for at least 12 years. It is also required that the person against whom the claim is brought must have a good title to the land.

27. In this case, it appears clear that there was a long running case concerning the ownership of the suit land. Before the final determination of the case, no one could tell for sure who owned which part of the land. And even after the case was determined the subsequent legal processes to establish who owned where took some time. The defendants for instance had to institute succession proceedings in order to replace or succeed the original disputing owners. There is even persuasive evidence that the 1st plaintiff himself had to shift base from one portion to another when it became clear that the clan to which he

belonged was entitled to part of the land different from where his first portion was.

28. The certainty as to ownership only seems to have occurred when the land was surveyed in 1997, with the defendant subsequently becoming registered proprietors in sometime in the year 2000. I have already painted out that the person against whom a claim of adverse possession is brought needs to be shown and recognized as having a good title. A question then arises: Can the Defendants in this case, or their predecessors who are said to be the original owners, be deemed to have had good title before the dispute in court was determined? And the answer seems to be **NO**. Time, then, could not run against them.

29. Additionally, a less appreciated requirement to prove adverse possession is the certainty of the physical location of the land being claimed by the adverse possessor. In this matter, the certainty of the whole of the suit land or even of the portions claimed by plaintiff is clear. But the same cannot be said of the portions that the defendants would ultimately come to own. This is so because when the case was going on, no one could tell who would own where. This only became clear when the survey was done sometimes in 1997. It is on the basis of this that the defendant subsequently became registered owners.

30. Adverse possession, as pointed out earlier, has everything to do with the lapse of time. Additionally, it is also about certainty of ownership and certainty of the physical location of the land being claimed. This suit was filed in the year 2005. The certainty as to which portions the defendant would own only became clear in 1997 when the survey was done. The certainty as to registration of ownership became clear in the year 2000. Whether you start counting time from 1997 when the survey was done or year 2000 when the defendants were registered as owners, it is clear that 12 years, which is the minimum period for adverse possession to accrue, had not lapsed by the year 2005 when this case was filed.

31. It could well be that the plaintiffs have had the long possession of portions of the suit land as claimed by them. But as long as the court dispute raged or continued in court, time was not running as ownership of the land was not yet clear. It was not clear too which portions of land the defendants or their predecessors would ultimately own.

32. When all this is considered, it becomes clear that the plaintiffs claim cannot hold in the circumstances. It could well be that the plaintiffs may be entitled to their portions of land in some other ways BUT certainly not through adverse possession. It therefore follows that none of the issues stated in the Originating Summons and captured in para 2 of this judgement can be determined in the plaintiffs favour. The Plaintiffs' entire claim is therefore hereby dismissed. On the issue of cost however, I realise that this seems to be a family matter. Let each side bear its own Costs.

Dated, signed and delivered at Busia this 27th day of September, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs:

Defendants:

Interested Party: ...

Counsel: