



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 154 OF 2013 (FORMERLY HCC. 23 OF 2011)**

**ROBERT OUMA ODUORI.....APPLICANT/PLAINTIFF**

**-VERSUS-**

**THOMAS MUKA MAULO...1<sup>ST</sup> RESPONDENT/DEFENDANT**

**WALTER WASHINGTON**

**BARASA NYONGESA.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**J U D G M E N T.**

**1. BACKGROUND.**

- a. **ROBERT OUMA ODUORI**, hereinafter referred to as the Plaintiff, commenced this case through the originating summons dated 25<sup>th</sup> November, 2011 claiming land parcel Bukhayo/Matayos/3116 on the basis of being an adverse possessor for having lived on it for 40 years. He had named Thomas Muka Maulo as the Defendant.
- b. The Plaintiff then filed the amended originating summons dated 16<sup>th</sup> January, 2012 adding a second Defendant. The Plaintiff's claim under the amended originating summons is against Thomas Muka Maulo and Walter Washington Barasa Nyongesa hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant respectively.
- c. The 1<sup>st</sup> Defendant filed his replying affidavit sworn on 3<sup>rd</sup> January, 2012 while 2<sup>nd</sup> Defendant filed his replying affidavit sworn on 23<sup>rd</sup> February, 2012.
- d. The parties counsel appeared before the court on 29<sup>th</sup> January, 2013 and recorded a consent that the matter be heard through viva voce evidence.
- e. The Plaintiff filed the following documents;
  0. Witness statement of the Plaintiff dated 27<sup>th</sup> February, 2012,
  0. Witness statement of Philip Juma Kasala dated 27<sup>th</sup> February, 2012,
  0. Witness statement of Philip Wandera Okongo,
  0. List of documents dated 12<sup>th</sup> October, 2012,
  0. Amended list of documents dated 28<sup>th</sup> July, 2013.
  0. Plaintiff's supporting affidavits sworn on 25<sup>th</sup> November, 2011 and 16<sup>th</sup> January, 2012.
  0. Plaintiff's replying affidavit in response to further affidavit sworn on 26<sup>th</sup> June, 2013.

f. The Defendants filed the following documents;

0. Witness statement of the 2<sup>nd</sup> Defendant dated 23<sup>rd</sup> February, 2012.
0. Witness statement of the 1<sup>st</sup> Defendant dated 3<sup>rd</sup> January, 2012.
0. The 2<sup>nd</sup> Defendant's further affidavit sworn on 17<sup>th</sup> June, 2013.
0. Witness statement of Victor Oduor Ngwabe which is undated but date stamped 28<sup>th</sup> January, 2013.
0. The evidence affidavit of Victor Oduor Ngwabe sworn on 13<sup>th</sup> February, 2013.
0. Defendant list of documents dated 3<sup>rd</sup> January, 2013.
0. 2<sup>nd</sup> Defendant further list of documents dated 10<sup>th</sup> February, 2014.

2. During the hearing, the Plaintiff testified as PW 1 and called Philip Wandera Okongo and Philip Juma Kasala who testified as PW 2 and PW 3 respectively. The Plaintiff then closed his case and a date was fixed for defence hearing. However, when the matter came up for defence hearing on 8<sup>th</sup> October, 2013, the parties counsel entered a consent to reopen the Plaintiff's suit to allow a visit on the suit land by the court. The visit was made on 23<sup>rd</sup> October, 2014 and the record contains the court's observations. PW 1 was then recalled to the witness box by his counsel and after being cross-examined by the Defendant's counsel, the Plaintiff closed his case.

3. The Defendants called Victor Oduor Ngwabe as a witness and he testified as DW 1. Thereafter the 2<sup>nd</sup> Defendant testified as DW 2 on behalf of himself and his father, the 1<sup>st</sup> Defendant, who had given him a power of Attorney dated 13<sup>th</sup> February, 2013 in respect of this case. The Defendants then closed their case.

4. Upon completion of the oral evidence, the parties counsel undertook to file written submissions. The Plaintiff's counsel filed his dated 25<sup>th</sup> February, 2015 on the 26<sup>th</sup> February, 2015. The Defendants' counsel filed their submission dated 4<sup>th</sup> March, 2015 on the 17<sup>th</sup> March, 2015.

### **ISSUES FOR DETERMINATION.**

- a. Whether the Plaintiff has been in exclusive, peaceful, open and uninterrupted occupation and possession of the suit land for over 12 years.
- b. Whether the Plaintiff's occupation and possession of the suit land was as a licensee and if so when the licensee was terminated.
- c. Whether the Plaintiff has acquired rights of an adverse possessor over the suit land and if so whether the Defendants rights over the suit land have been extinguished.
- d. Whether the Plaintiff should be registered as the proprietor of the suit land by virtue of section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya.

### **5. ANALYSIS OF THE EVIDENCE.**

- a. That from the parties evidence and copies of the land registers attached to the affidavits filed herein, the suit land is a subdivision from Bukhayo/Matayos/2451 which was itself a subdivision from Bukhayo/Matayos/943. The register for Bukhayo/Matayos/943 was closed on 16<sup>th</sup> August, 1996 upon being subdivided into parcels 2431 and 2432.
- b. That the evidence adduced by the parties shows clearly that the first registered proprietor of Bukhayo/Matayos/943 was Thomas Muka, the 1<sup>st</sup> Defendant herein.
- c. That 1<sup>st</sup> Defendant is the elder brother to the Plaintiff and father to the 2<sup>nd</sup> Defendant herein. The parties therefore know each other very well due to their close relationship.
- d. That the Plaintiff's evidence shows that he took possession of the portion of land that later came to be registered as Bukahyo/Matayos/3116 in 1970 with the permission of the 1<sup>st</sup> Defendant. The Plaintiff evidence was that he has used that portion exclusively with his family members and his mother. The Defendants disputes the Plaintiff's claim saying that he took possession of the suit

land without the 1<sup>st</sup> Defendants permission or knowledge and contend that when 1<sup>st</sup> Defendant returned from Uganda in 1975, he asked the Plaintiff to vacate from the suit land but he did not do so. The Defendants therefore took the Plaintiff as a person squatting or illegally occupying the suit land. The rival testimonies of the parties on how and when the Plaintiff took possession of the suit land points to the following two scenarios.

0. That the Plaintiff took possession of the suit land in 1970. This has not been rebutted by the Defendants. The Plaintiff's contention that the 1<sup>st</sup> Defendant allowed him to take possession however has been disputed by the Defendants.
0. That whether or not the Plaintiff took possession of the suit land with the 1<sup>st</sup> Defendant's permission, that permission was terminated by the 1<sup>st</sup> Defendant upon his return from Uganda in 1975.

The Plaintiff was therefore a licensee of the 1<sup>st</sup> Defendant for the period of 1970 to 1975 when the presumed licence or authority was terminated. The period of 1970 to 1975 cannot be counted when computing the period if any, that the plaintiff has been in adverse possession of the suit land.

e) That the available evidence shows that the Plaintiff continued occupying a designated portion of the suit land that was after the two subdivision exercises involving Bukhayo/Matayos/943 and 2431 registered as Bukhayo/Matayos/3116. The Plaintiff produced copies of application for consent of Land Control Board and transfer for land for Bukhayo/Matayos/3116 both dated 20<sup>th</sup> January, 2003 duly signed by the 1<sup>st</sup> Defendant in his favour. Though the Defendants did not rebut these documents, the court notes that the letter of consent was not exhibited and the court cannot tell whether it was ever issued. The court was also not told why the transfer form was not presented to the Land Registrar for registration. The application for consent and transfer forms though duly signed by the 1<sup>st</sup> Defendant were not lodged with the appropriate offices for action and are of no value in a claim based on adverse possession. Those documents can only be taken to have been done on the 1<sup>st</sup> Defendant's acceptance that the Plaintiff had acquired proprietary rights over the suit land due to the period of over 12 years that he had been in possession.

f) That evidence availed by the Plaintiff and the court's observation on visiting the suit land confirms that contrary to the Defendants claim that the Plaintiff is only occupying a small portion of the suit land, the Plaintiff and his family are in actual and exclusive possession of the whole suit land Bukhayo/Matayos/3116. The suit land was during the visit found to be clearly marked with mature live fence. The Plaintiff has eleven houses, plants, fruit trees and food crops on the suit land. The Plaintiff evidence is that he has been in exclusive possession since 1970. This shows that from 1975, when 1<sup>st</sup> Defendant terminated the permission he had given him, to 25<sup>th</sup> November, 2011 when the originating summons was filed, the Plaintiff had been in occupation and possession of the suit land for about 36 years. If the court was to count the period from 1975 to the year 2003 when the Plaintiff and 1<sup>st</sup> Defendant signed the application for consent and transfer forms, a period of about 28 years had lapsed. In law the Plaintiff had become an adverse possessor of the suit land at the expiry of 12 years from 1975 which was in 1987. The Defendants specifically, the 1<sup>st</sup> Defendant right to recover the suit land lapsed on or about 1987 and by the time he transferred the suit land to the 2<sup>nd</sup> Defendant on 21<sup>st</sup> December, 2011, it was subject to the Plaintiff's right of adverse possessor. [*see Kairu –vs- Gacheru (1988) 2 KAR 111*]

g) That the Plaintiff claim is that of an adverse possessor of the suit land and does not affect his beneficial interest on his father's properties.

## **6. FINDINGS.**

- a. That the Plaintiff's occupation of the suit land, then forming a part of Bukhayo/Matayos/943, between 1970 to 1975, was under licence from the 1<sup>st</sup> Defendant. During that period, the Plaintiff

- did not disposes the 1<sup>st</sup> Defendant and his possession was not adverse.
- b. That upon the Plaintiff declining to give vacant possession of the suit land in 1975 as required of him by the 1<sup>st</sup> Defendant, his continued occupation and possession of the suit land became adverse to the title of the 1<sup>st</sup> Defendant, who was the registered proprietor, at the expiry of 12 years.
  - c. That by 1987, the Plaintiff had been in occupation and possession of the suit land for over 12 years and acquired rights of an adverse possessor of the land. That the 1<sup>st</sup> Defendant lost the right to recover that portion of the land by the application of section 7 of the Limitation of Action Act Chapter 22 of Laws of Kenya. [*see William Gatuhi Murathe –vs- Gakuru Gathimbi (1998)eKLR*]
  - d. That when parcel Bukhayo/Matayos/2431, subdivided from parcel Bukhayo/Matayos/943, was itself subdivided, it curved out the portion the Plaintiff had been occupying since 1975 and was registered as Bukhayo/Matayos/3116. This is the land subject matter of the Plaintiff's claim.
  - e. That the 1<sup>st</sup> Defendant remained as the registered proprietor of Bukhayo/Matayos/3116 subject to the Plaintiffs rights of an adverse possessor of that land with effect from 1987.
  - f. That by the time the 1<sup>st</sup> Defendant transferred the suit land to the 2<sup>nd</sup> Defendant on 21<sup>st</sup> December, 2011, which was about a month after the originating summons dated 25<sup>th</sup> November, 2011 was filed, the 2<sup>nd</sup> Defendant acquired the title to the suit land also subject to the Plaintiff's rights of an adverse possessor.
  - g. That the Plaintiff has established his claim of an adverse possessor over the suit land and the 2<sup>nd</sup> Defendant's title to the said land is hereby declared extinguished under section 7 of the Limitations of Action Act, Chapter 22 of the Laws of Kenya.
  - h. That the Plaintiff should be registered as the proprietor of the suit land Bukhayo/Matayos/3116 forthwith.
  - i. That the 2<sup>nd</sup> Defendant is hereby ordered to sign all the documents necessary to transfer the suit land, Bukhayo/Matayos/3116, to the Plaintiff and in default the Deputy Registrar of this court to sign all such necessary documents to give effect to (h) above.
  - j. That the Defendants to pay the Plaintiff's costs of this suit.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON .....18<sup>TH</sup> .....DAY OF JUNE, 2015**

**IN THE PRESENCE OF;**

**PLAINTIFF/APPLICANT.....PRESENT.....**

**1<sup>ST</sup>DEFENDANT/RESPONDENT.....ABSENT.....**

**2<sup>ND</sup> DEFENDANT/RESPONDENT... PRESENT.....**

**COUNSEL...MR. MANWARI AND OMOLO FOR PLAINTIFF AND DEFENDANTS RESPECTIVELY.**

**JUDGE.**