



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 23 OF 2020

IN THE MATTER OF REGISTERED LAND PARCEL NUMBER

MARACHI/ELUKHARI/1558

AND

IN THE MATTER OF

LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

JOSEPH ODUORI ODHIAMBO.....1ST APPLICANT

MAURICE AKULA OPANYI.....2ND APPLICANT

SIMON OWINO OPANYI.....3RD APPLICANT

= VERSUS =

FLORA AUMA OKOTH (Personal representative of the estate of

TIMOTHY MASINGO OJEWU).....1ST RESPONDENT

HOSEA OJOU MASINGO.....2ND RESPONDENT

J U D G M E N T

1. The Applicants commenced these proceedings vide the Originating Summons dated 6th July, 2020 and filed in court on the same date against the Respondents. The Applicants claim that they have acquired by way of adverse possession rights over land portion comprised in **L.R NO MARACHI/ELUKHARI/1558** or any other title derived therefrom as on the ground currently registered in the name of FLORA AUMA OKOTH and HOSEA OJOWU MASINGO pursuant to a grant issued in the estate of Timothy Masingo Ojowu-deceased. The Applicant posed the following questions for determination:

- a) *Whether or not the Applicants are in actual possession of the land parcel No. L.R MARACHI/ELUKHARI/1558?*
- b) *Whether or not the parcel of land L.R. MARACHI/ELUKHARI/1558 was originally registered in the name of their father OTANYI OTSIAMBO but transferred to TIMOTHY MASINGO OJOWU?*
- c) *Whether or not the Respondents are the beneficiaries of the estates of TIMOTHY MASINGO OJOWU after the succession process vide BUSIA HC P&A No. 78 of 2005?*
- d) *Whether or not the Applicants have openly, notoriously and in quiet occupation of L.R. MARACHI/ELUKHARI/1558?*
- e) *Whether or not the Respondents should bear the costs of the suit?*

2. The Applicant seeks to be granted the following ORDERS:

i) A declaration that the Applicants through adverse possession be declared proprietors of land they are in occupation.

ii) Costs of the suit.

3. The Originating Summons was supported by the affidavit of MAURICE AKULA OPANYI in which he deposed that the suit land was originally registered in the name of their father OTANYI OTSIAMBO. He stated that he was born in 1967 and has stayed on the suit land to date and that his brothers were born in 1979 and 1977 and have been in actual occupation since their birth. He deposes that they have used the suit land to the exclusion of the respondents and they have acquired the title to the suit land by virtue of adverse possession. Annexed to the affidavit is a copy of the certified copy of the register for L.R MARACHI/ELUKHARI/1558.

4. The Respondents entered appearance and filed a Replying Affidavit sworn by the 1st Respondent on her own behalf and on behalf of the 2nd Respondent. She deposed that they are the administrators of the estate of TIMOTHY MASINGO OJUWU(deceased) having been so appointed in BUSIA HIGH COURT SUCCESSION CAUSE NO. 78 OF 2006. She stated that the 2nd Respondent and her are administrators holding property in trust for beneficiaries who were minors when the grant was issued. She deposed that it is within her knowledge that L.R. NO. MARACHI/ELUKHARI/1558 is part of the deceased estate and the title is currently registered in their names as trustees. She stated that the deceased acquired the suit land by way of purchase from OPANYI ODHIAMBO in 1976, a fact that was known by the said OPANYI ODHIAMBO as demonstrated in BUSIA ELC NO. 195 OF 2014 and the applicants were the sons of the said OPANYI ODHIAMBO.

5. Upon the purchase of the suit land and transfer thereof to his name, the deceased took possession of the land and farmed it until his death in 1983. She thereafter with her husband PETER OJOU (deceased), who was the son of TIMOTHY MASINGO OJOWU, took possession of the suit land and farmed it until 2006. In 2006, she executed a contract to grow sugar cane with Mumias Sugar Company and when she started ploughing the suit land, OPANYI ODHIAMBO became hostile and stopped her from using the suit land claiming that the deceased bought 3 acres and not the entire parcel which comprises 5 acres. After much acrimony, OPANYI ODHIAMBO and his family invaded the suit land sometime in 2007 and put up temporary structures thereon. She lodged a complaint with the area assistant chief but the efforts to resolve the dispute were unsuccessful.

6. She stated that in 2009 as the administrators of the deceased's estate they lodged a claim before the BUTULA LAND DISPUTES TRIBUNAL vide claim number 010/11/2009 against OPANYI ODHIAMBO. The claim was heard and on 12/4/2010 an award was made by which the Tribunal ordered that OPANYI ODHIAMBO be evicted from the suit land. The Tribunal award was adopted as an order of the court vide BUSIA PMC LAND CASE NO. 84 OF 2010 on 4/11/2010. She stated that the said award and order of the court have not been set aside. Before they could execute the decree to evict OPANYI ODHIAMBO and the applicants, the father filed ELC NO. 195 OF 2014 which they defended. The suit was withdrawn on or about 22/1/2020. In view of the foregoing she stated that the applicants have never been in open, notorious and actual possession of the suit land from 1967, 1977 and or 1979 as alleged. The applicants reside on the suit land in their father's homestead having invaded the land in 2007. That their forceful occupation has never been peaceful but acrimonious and with impunity including openly defying government directive to vacate. She stated that the 2nd Respondent and her have asserted their rights over the suit land including filing proceedings against the Applicant's father before the Land Disputes Tribunal and in court from which they have a valid eviction order.

7. She stated that the applicants do not recognise the validity of their title and cannot be heard to plead adverse possession and that they are merely holding the land as trustees and therefore time for the purposes of adverse possession cannot run against them. The real owners were minors when the Applicants and their father invaded the land in 2007 and therefore persons under disability against whom time could not run. She further deposed that the applicants have not made up a case for adverse possession and the summons should be struck out with costs. She annexed to the replying affidavit a copy of the grant of the estate of Timothy Masingo-deceased; a copy of the title deed, a copy of the amended plaint & defence filed in BUSIA ELC NO. 195 OF 2014, a copy of the proceedings in Butula LDT case no. 10/11 of 2009 and order adopting the award in BUSIA PMC ELC NO. 84 OF 2010.

8. After the hearing began on November 3, 2020, the Applicants called four witnesses. MAURICE AKULA OPANYI, who is the 2nd Applicant, testified as PW1 and adopted his witness statement filed in court as evidence. He comes from Bukati Village within Butula sub-county and he is a farmer. He said that he has lived on the suit land since his birth in 1967 and that he has been in continuous uninterrupted, open and notorious occupation of L.R. MARACHI/ELUKHARI/1558 to the exclusion of the Respondents. He stated that the Respondents petitioned the land knowing very well that he was on the ground and that adverse possession had accrued against them by virtue of being on the land for over 12 years. He produced the certified register for L.R. No. 1558 as *Pex 1*.

9. Upon cross-examination, **PW1** stated that he lived on the land because it was his father's land. He confirmed that he discovered the land is currently registered in the name of the 1st Respondent that when he wanted to do succession of the estate of his late father in the year 2020. He said that entry No. 5 in *PEX 1* shows that the 1st Respondent is registered as a trustee for minors. He further denied that the 1st Respondent's title is genuine. He stated that where he lives is his home where he was shown by his grandfather and he lives there to date. He claimed that the land is ancestral/family land. He was not aware if his father ever sold the land and he has never seen the 1st Respondent using the land. He did not know if his father and the 1st Respondent had a case before. He stated that when the 1st Applicant died, he was buried on the suit land because the land is theirs. He further stated that he has never been summoned before the chief on dispute over the suit land.

10. SIMON OWINO OPANYI, testified as **PW2** and adopted his witness statement dated 6/7/2020 as part of his evidence. He stated that he was born in 1979 and he has been in continuous uninterrupted, open and notorious occupation of the suit land for over 12 years to the exclusion of the Respondents. He stated that he is a farmer and comes from Bukati Village in Butula Sub County. Upon cross-examination, PW2 stated that as at the time of giving his testimony, L.R. NO.1558 was in the name of the 1st defendant but he found out this in year 2020. He stated that he was born in 1979 and he knew the land belonged to his grandfather who bequeathed it to his father.

11. COSMAS AKURA ODHIAMBO, as **PW3** adopted his witness statement dated 1/12/2020 as his evidence in chief. He is also a resident of Bukati Village earning a living working as a watchman. He stated that he knew the applicants who are all living on L.R.

MARACHI/ELUKHARI/1558 since 2006. He stated that the applicants have established their homes and grow food crops and have also planted trees which are big in size on the suit land. He further stated that they have graves on the suit land and he has never seen the family members of the Respondents on the suit land.

12. In cross-examination, PW3 stated that he was born in 1945 and the Applicants are the sons of Opanyi Odhiambo who was his brother. He stated that Opanyi Odhiambo never sold the land and he does not recognise the 1st Respondent's title. He stated that since 2006 when the applicants entered the suit land, he did not know who the land belonged to. He did not agree that the land belongs to Opanyi Odhiambo. He denied knowing if there was ever a case between the 1st Respondent and Opanyi Odhiambo.

13. KILILIMO OOKO ONYANGO, testified as **PW4** and adopted his witness statement dated 26/11/2020 as his evidence. He comes from the same village as the Applicants. He stated that the applicants are his nephews and his home and theirs share a common boundary but denied knowing the respondents. PW4 stated that since 2006, the applicants have been in continuous occupation of the suit land to date and they have built homes on this land. He stated that they have always grown crops, planted trees which have matured and sold. He further stated that the applicants have buried their beloved ones on the suit land without any interferences and the respondents have not used the land since 2006 to date.

14. Put on cross-examination, PW4 stated that he did not know the title number of the land the applicants live on or the registered owner of the suit land. He reiterated that he did not know the Respondents. He stated that the applicants are living on the land as the grandsons of Odhiambo and it is their family land. He did not know if the land was ever sold.

15. FLORA AUMA OKOTH, who is the 1st Respondent testified as **DW1** by adopting her Replying Affidavit as part of her evidence. She stated that she lives in Butula doing general business and peasant farming. She stated that the 2nd defendant is her first born son. She knows that applicants as they are her neighbours and that they are the sons to Opanyi Odhiambo who sold land to her deceased husband. She stated that the 1st Applicant passed on during the pendency of this suit and was buried on their land parcel No. 1558 without her consent and they were not aware due to the COVID-19 Pandemic. She produced the documents annexed to the replying affidavit as exhibits *Dex 1- 7* and urged the court for an order for their eviction, removal of the body and the Applicants case to be dismissed.

16. Upon cross-examination, DW1 said that the 2nd and 3rd applicants are living on the suit land and she did not know how long they have lived there. She stated that she did not live on the land and none of her family members live on it. She stated that she last used the land in 2006 and the applicants have houses on the land. She further stated that she had never removed the applicants from the land. She confirmed that the applicants have been on the land for over 12 years since she left. On re-examination by her counsel, she stated that the case before the tribunal was between her and Odhiambo and Odhiambo does not live on the suit land. She also said that she had filed a case to try and evict the plaintiff and she used to plant sugar cane on the land.

17. The parties agreed to file their written submissions within 21 days. The Respondents filed their submissions on 16th June 2021 and submitted that the applicants have not proved their case on a balance of probabilities. First, that a claim for adverse possession cannot be sustained against a minor and the applicants have not at any stage of the hearing shown that the minors have since attained the age of majority. Second, that the applicants have stated that they do not know the Respondents and as such their occupation cannot be adverse to the Respondent's title. Also, if the applicants' discovered that the Respondents' were the registered owners in 2020, then the 12 years ceiling has obviously not been attained. They further submitted that the adverse possession claim fails as it has not been peaceful as underscored by the proceedings in court. They further submitted that the applicants have not proved their case and the respondents should be allowed to execute the order from the tribunal as adopted by court and evict the applicants and also be at liberty to exhume the 1st applicant's remains from the suit land.

18. The applicants filed their submission son 30th June 2021 and they submitted that the applicants have laid before court evidence in affirmation of the principles in adverse possession and that the applicants had proved their claim on a balance of probabilities.

19. I have considered the pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:-

a) Whether the Applicants' occupation of the Suit Land became adverse to that of the Respondent; and

b) Who bears the costs of this suit?

20. The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, CAP 22 Laws of Kenya, which provides that: -

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

21. To establish adverse possession of land, a claimant must demonstrate that he has been in peaceful, continuous, and uninterrupted occupation of the claimed parcel for a period of more than twelve (12) years. The applicants' witnesses, PW1 and PW2 have testified that they have been in possession of the suit land since birth that is 1967 and 1979 respectively. This was disputed by the DW1 who stated that the applicants' entered the land in 2006 and barred her from farming sugarcane. The suit title was issued in the year 1977 as shown in the register there it was not existing or time was not running when the 2nd Applicant was born in the year 1967. Secondly from the pleading in paragraph 6B of the amended plaint in BSA ELC 195 of 2014 (now withdrawn) the Applicants father stated that he allowed Timothy Masingo-deceased time to cultivate sugarcane on the suit land in a bid to recover the deposit paid and subsequently surrender vacant possession. The inference drawn is that when the land was sold in 1976, it was not occupied by the Applicants.

22. The Applicants averment of occupation since birth is contradicted the evidence of PW3 and PW4 who stated that the applicants' entered the suit land in the year 2006. The evidence of these two witnesses is corroborated by evidence adduced by the 1st Respondent when she appeared before the Butula LDT at paragraph 6 of her evidence where she said that Daudi Opanyi started causing problems in the year 2006 when their contract with Mumias Co. Ltd ended. The applicants' have submitted that their occupation on the land has exceeded 12 years and was open, and notorious and that the occupation must recognize the Respondents' as the registered proprietors. However, this submission is not supported by the evidence on record both in terms of time period, peaceful use and recognition of the Respondent's title.

23. For instance, DW1 stated that after the applicants' entered the suit land in the year 2006, she reported to their assistant chief then later brought a claim before the Butula Land Disputes Tribunal and an award was made in her favour which award was later adopted as an order of court in 2010. The proceedings before the Tribunal have not been challenged. Later in 2014, the applicants' father commenced a suit against the Respondents which suit was withdrawn in the year 2020. The land in question in the two former suits is the same subject matter in the current suit. For instance, in the withdrawn suit, the claim was that the deceased had acquired title to the suit land fraudulently and the Applicants' father sought for an order of revocation.

24. The Respondents have also submitted that the adverse possession claim cannot be sustained against minors and the applicants' have not shown that the minors have reached the age of majority. He cited the decision in **M'mbaoni M'thaara v James Mbaka (2017) eKLR** where the Court of Appeal held that a right to adverse possession cannot be obtained against a minor since a minor has no capacity to be sued. Indeed, the applicants and their witnesses have not shown this court the minors whom the title is registered in trust by the Respondents have attained the age of majority and when they attained the age of majority. In my opinion and I so hold, that time was running from when the Applicants took occupation and not when the title was registered in trust for the minors.

25. The 1st applicant passed on during the pendency of this suit but he was not substituted as is required under the law. The Respondent submitted that his claim for adverse possession cannot stand for non-substitution. I hold otherwise because the suit was jointly filed as evidenced by the supporting affidavit sworn by the 2nd Applicant on his own behalf and on behalf of the 1st and 3rd Applicants.

26. The summary of my findings and analysis of the evidence, the documents produced in support of the case and the submissions rendered is that the Applicants occupation ran from the year 2006. However, that period was terminated by the filing of Butula LDT against their father and the proceedings commenced by their father against the Respondents in the year 2014. I hold that these two suit affect them because their evidence clearly showed they derived their right to sue by virtue of this being ancestral land which falls to them as an inheritance from their father. Consequently, computation of time in their favour failed on account that their claim for adverse possession could have been included in the withdrawn suit.

27. In conclusion, it is my finding that the applicants' occupation has failed to meet the criteria for adverse possession on balance of probabilities and as such the originating summons is found to be without merit. The same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 11TH DAY OF NOVEMBER 2021.

A. OMOLLO

JUDGE