



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC NO. 63 OF 2019**

**IN THE MATTER OF APPLICATION FOR DECLARATION OF OWNERSHIP OF**

**PART OF BUNYALA/BUKOMA/260 BY ADVERSE POSSESSION**

**BETWEEN**

**RAPHAEL BEDA WANYAMA NGABOMASOA.....APPLICANT**

**- VERSUS -**

**WYCLIFFE BWIRE KHAYOKO.....RESPONDENT**

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

1. The Applicant commenced these proceedings vide the Originating Summons dated 3<sup>rd</sup> October 2019 and filed in court on 4<sup>th</sup> October 2019 against the Respondent. The Applicant claims to have acquired by way of adverse possession rights over 2.59 acres' land portion comprised in **L.R NO BUNYALA/BUKOMA/260** measuring approximately 10.374 acres or any other title derived therefrom as on the ground currently registered in the joint names of WYCLIFFE BWIRE KHAYOKO, JACTON, and OTIENO MUNYOBI. The Applicant posed the following questions for determination:

- a. Whether the court may make a declaration that the Applicant is the bonafide owner of 2.59 acres being part of BUNYALA/BUKOMA/260 which measures 10.374 acres by adverse possession.
- b. Whether the Applicant has been in open, quiet and notorious possession of 2.59 acres being part of BUNYALA/BUKOMA/260 measuring approximately 10.374 acres for a period exceeding 12 years.
- c. Whether the Respondent's title to 2.59 acres in BUNYALA/BUKOMA/260 became extinguished upon expiry of 12 years from the time the Applicant went into possession of the land i.e. from the year 1996.
- d. Whether the Applicant has now acquired title to the said portion of land by virtue of adverse possession.
- e. Whether the registration of the Respondent as the owner of one quarter (2.59 acres) of BUNYALA/BUKOMA/260 should be cancelled with a view of the Applicant getting registered as the owner of part of the said land measuring 2.59 acres.
- f. Who should pay costs of this suit.

2. The Applicant has pleaded that in 1996 he bought a small piece of land to reside on from WYCLIFFE BWIRE KHAYOKO and settled on it in August 1996. On 13<sup>th</sup> November 2009 he formalized the transaction by reducing the agreement into writing whereby WYCLIFFE BWIRE KHAYOKO agreed to sell his portion of land in BUNYALA/BUKOMA/260 at a price of Kshs.65,000/=.

3. The Respondent after service with the Originating Summon entered appearance by filing a Replying Affidavit dated 23<sup>rd</sup> October 2020. He deposed that the applicant has not held in possession the land in issue at all nor has his purported entry thereto been notorious, peaceful and uninterrupted. He stated that the purported sale agreement was null and void as he was never paid the consideration amount and the applicant's purported entry into the said land was assisted by brutal force applied by the Provincial Administration agents, which coercive acts he has resisted to date.

4. The matter was set down for hearing on 27<sup>th</sup> September 2021 with RAPHAEL BEDA WANYAMA testifying as PW1. He adopted his

supporting affidavit as his evidence in chief. He deposed that the sale agreement is dated 2009 while a deposit was made in the year 1996 and it was drawn after he had occupied the land. He stated that when he demanded that the person who sold him land do carry out succession process to enable him to get a title deed for his portion of land and that is when he engaged the chief. He stated that he is claiming the share that belonged to the respondent out of his father's land. That he has been living on the suit land and even buried his first wife and one of his children on said land.

5. Upon cross-examination by counsel for the Respondent, the plaintiff stated that he has been living on the portion of land he is claiming since 1996 and he has built a permanent and semi-permanent house. According to PEX 4, the land is registered in the name of four people but he only sued the one who sold him the land. In the agreement, he stated that the balance was to be paid in the year 2010 and he is aware the respondent rescinded the agreement in the year 2010 January. He continued that the respondent did not state that he wanted him evicted.

6. He told the court that he filed suit no. 409 of 2014 CMCC because the respondent had sold the same portion to Stella Otiato and Elvis Abora. He reiterated that he paid the respondent Kshs.28,000/= and the subsequent payments was through the chief and DO. The agreed purchase price was Kshs.65,000/= and on 21<sup>st</sup> January 2010, he paid Kshs.37,000/= to the DO who was to give the respondent but he refused to accept payment. He denied using the provincial administration to get the land after he breached the sale agreement or that he had a personal relationship with the DO. On re-examination, he stated that he gave the money to the DO in the presence of the chief, respondent and his family and that the respondent sold the land to 3<sup>rd</sup> parties in 2014.

7. The Respondent testified that he is a bodaboda cyclist and he knew that the land 260 was registered in four names. He admitted that the plaintiff lives on the suit land and they have lived peacefully. He stated that the plaintiff approached him to sell him land in 1996 when he paid a deposit of Kshs.12,000/=. The plaintiff made additional instalment in 3 years which together with the deposit summed upto Kshs.28,000/=while the agreed purchase price was Kshs.65,000/= which was delayed. He continued that he decided to give the plaintiff a portion for what he paid and the remaining part, he sold to Stella. Before the DO, the plaintiff was to pay Kshs.37,000/=. On 20/1/2010, he refunded Stella and went to the DO's office and no money was paid. He stated that the plaintiff is now not co-operating so he wanted him evicted. He stated that he had not gone to the plaintiff's home to ask him to leave.

8. Upon cross-examination by counsel for the applicant, the Respondent stated that the plaintiff came to him in 1996 and after agreeing he allowed him to build after paying a deposit of Kshs.12,000/=. He reiterated that the plaintiff has not paid the balance of Kshs.37,000/= to date. He stated that he did not write a letter demanding for the balance and that the DO or chief had not forced him to sign any document because the land is his.

9. The parties put in their written submissions with the Respondent filed their submissions on 12<sup>th</sup> November 2021 submitting that the period of limitation starts to run on the date of the payment of the last instalment of the purchase as was decided in the case of **WANYOIKE V KAHIRI (1979) KLR**. In the present case time started to run on 21<sup>st</sup> January 2010 when the plaintiff was to make the final payment of the purchase price and it would extinguish on 20<sup>th</sup> January 2022. It was their submission that the 12-year period of occupation by the plaintiff had not lapsed by the time the suit was filed on 4<sup>th</sup> October 2019. He relied on the decision in **JOSEPH GAHUMI KIRITU V LAWRENCE MUNYAMBU KABURA CA NO. 20 OF 1993 (supra)**.

10. The Applicant filed their submissions on 1<sup>st</sup> December 2021 and submitted that he has proved his case on the required standards and judgment should be entered in his favour together with costs.

11. I have considered the pleadings, submissions made by the parties and applicable law and frame the following questions for determination;

- i. Whether the applicant occupation of the suit land is adverse to that of the registered owners;
- ii. Who should pay costs of the suit?

12. The law in respect to adverse possession is now settled and for one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

**“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.**

13. 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. It is not in dispute that the applicant is in occupation of the suit land and has been in occupation since 1996. The Respondent confirmed that the applicant approached him in 1996 and after he paid a deposit of Kshs.12,000/=: he allowed him to build on the suit land. The Respondent also confirmed that they have lived peacefully with the applicant.

14. The Applicant stated that the sale agreement dated 13/11/2009 produced as PEX 1 was drawn after he was already in possession. The Respondent is contesting the Plaintiff's claim while submitting that time in this case sated to run when the last instalment was paid re is an acknowledgement for payment of Kshs.12,000/= dated 25/11/2009 and a further on 20/1/2010. The submission is correct however, in this case by the time the agreement was being drawn in the year 2009, the plaintiff's possession of the land had taken more than twelve years (between August 1996 to November 2009). Therefore, the subsequent drawing of the late agreement did not change time from running in the Applicant's favour.

15. The question of adverse possession where the possession was initiated by a sale agreement was answered by the Court of Appeal in the

case of **Public Trustee vs. Wanduru**, where **Madan J A** stated as follows; -

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

16. The upshot of the foregoing is that the applicant proved his claim for adverse possession on balance of probabilities and as such the originating summons dated 3<sup>rd</sup> October 2019 is found to merited. The following orders are made:

**a. A declaration be and is hereby made declaring that the Applicant is the bonafide owner of 2.59 acres being part of BUNYALA/BUKOMA/260 by adverse possession.**

**b. That a portion measuring 2.59 acres being the Respondent's share in L.R. BUNYALA/BUKOMA/260 shall be registered in the name of the Applicant measuring approximately 10.374 acres for a period exceeding 12 years.**

**c. The Respondent is ordered to execute all the necessary statutory documents required of him to facilitated the transfer of the suit portion into the name of the Applicant and in case of his default, the Deputy Registrar of the court shall proceed to sign the said documents.**

**d. The Respondent and his agents or persons claiming through him be and are hereby permanently restrained from taking, using and or any manner interfering with the Applicant's land use of the suit portion of 2.59 acres.**

**e. Each party to bear their respective costs of the suit.**

**DATED, SIGNED & DELIVERED AT BUSIA THIS 21<sup>ST</sup> DAY OF APRIL 2022**

**A. OMOLLO**

**JUDGE**