



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 33 OF 2019 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF PARCELS OF LAND KNOWN AS BUNYALA/BULEMIA/2678

BETWEEN

ABRAHAM ADAMS GINA (Suing on behalf of his

GEOFFREY ADAMS OGWA).....APPLICANT

= VERSUS =

GEOFREY OGABA NAMADOA.....RESPONDENT

J U D G M E N T

1. The Applicant commenced these proceedings vide the Originating Summons dated 18th April, 2019 and filed in court on 24th April 2019 against the Respondent. The Applicant claims that he has acquired by way of adverse possession rights over L.R NO BUNYALA/BULEMIA/2678 or any other title derived therefrom as on the ground currently registered in the name of GEOFFREY OGABA NAMADOA. The Applicant posed the following questions for determination:

- a. *Whether the Applicant's father had lived openly on the suit land NO. BUNYALA/BULEMIA/2678 since the year 1991 to the year 2004.*
- b. *Whether the Applicant who claims to be an administrator to the estate hence acquired proprietary rights of his late father GEOFFREY ADAMS OGWA is entitled to be registered as proprietor of the suit land his father having acquired the title by adverse possession.*
- c. *Whether the suit land is registered in the names of the Respondent and whether by the time the Respondent was obtaining registration, the Applicant's father's rights as an adverse possessor had accrued and crystallized and whether they had superseded the rights of one James Ouma Natolio who sold the land to the Respondent.*
- d. *Whether by the time the late James Ouma Natolio was selling and transferring land on 15.4.2014 to the Respondent he had any transferable rights over the suit property given that the rights of the adverse possessor (the Applicant's father) had already accrued.*
- e. *Whether an order of permanent injunction should be issued*
against the Respondent.
- f. *Whether an order of eviction should be issued against the Respondent, his servants and or agents.*
- g. *Whether the Applicant should be paid costs of this suit.*

h. Whether the registration of the Respondent as absolute proprietor of the suit land should be cancelled in favour of the Applicant.

i. Whether the Land Registrar Busia County should be directed to register the Applicant in place of the Respondent.

j. Whether the Deputy Registrar of this Court should sign transfer forms in favour of the Applicant of the disputed properties.

2. The Summons was premised on the following grounds;

i) That the Applicant's father had lived openly on the suit land NO. BUNYALA/BULEMIA/2678 since the year 1991 to the year 2004.

ii) That the Applicant who claims to be an administrator to the estate hence acquired proprietary rights of his late father GEOFFREY ADAMS OGWA is entitled to be registered s proprietor of the suit land his father having acquired the title by adverse possession.

iii) That the suit land is registered in the names of the Respondent and whether by the time the Respondent was obtaining registration, the Applicant's father's rights as an adverse possessor had accrued and crystallized and that they had superseded the rights of James Ouma Natolio who sold the land to the Respondent.

iv) That by the time the late James Ouma Natolio was selling and transferring land on 15.4.2014 to the Respondent he had any transferrable rights over the suit property given that the rights of the adverse possessor (the Applicant's father) had already accrued.

v) That an order of permanent injunction should be issued against the Respondent, his servant and or agents.

vi) That an order of eviction should be issued against the Respondent, his servant and or agents.

3. The Originating Summons was supported by an affidavit sworn by the applicant on 18th April 2019 together with a witness statement. Annexed to the affidavit are copies of the green card to LR. BUNYALA/BULEMIA/2678 and a copy of judgment in Busia ELC NO. 70 OF 2013.

4. The Respondent was served with the Originating Summons and he entered appearance on 6th May 2019 together with a Preliminary Objection and a replying affidavit. He raised the following grounds in the objection;

a) The suit is time barred and offends Section 7 of the Limitation of Actions Act CAP 22 Laws of Kenya.

b) The suit is Res Judicata as the issues herein having been determined in ELC NO. 70 of 2013 hence this court lacks jurisdiction to entertain the suit.

c) The applicant has no reasonable cause of action as there is no possession of the land and his claim offends the provisions of section 13 of the Limitations of Actions Act.

d) The suit is bad in law as the applicant has not demonstrated any locus standi to file this suit and it offends the provisions of Section 82(a) of the Succession Act as no letters of administration has been filed in this suit.

e) The suit is frivolous, vexatious, incompetent, misconceived, bad in law and an abuse of the court process.

5. In his Replying Affidavit on 12th June 2019 the Respondent deposed that he is the registered proprietor of all the suit property known as BUNYALA/BULEMIA/2678 having bought it for value from the late JAMES OUMA NATOLIO in the year 2015 free from any encumbrances after the applicant's claim was dismissed by the Honourable Court in ELC NO. 70 of 2013. He denied that the applicant is in possession of the suit property and that their home is in the property. He also deposed that the applicant's claim is contradictory in itself as he claims in his application that he is in possession of the land yet avers that they had moved from the suit property in 2004. The Respondent asserted that he took vacant possession of the property and fenced it with cider poles and barbed wires in the year 2015. He termed the current suit as res judicata and that the applicant lacks a reasonable cause of action as his claim does not meet the legal threshold to qualify for adverse possession.

6. The Respondent added that this is the third suit the applicant is filing laying claim over the same suit property which action amounts to an abuse of the court process and he should not be allowed to take the court on a fishing expedition trying his luck by bringing different suits over the same property. He stated that the late father of the applicant did not have peaceful occupation as claimed as the late Natolio tried severally to eject him from the said parcel hence the long-standing dispute between the parties with the father of the applicant moving out of the suit land in 2004. It is his averment that the burial of relatives in a parcel of land does not of itself confer title to land and is not aningredient of adverse possession. He said that the applicant's claim is time barred, and is against the provisions of the Limitations of Action Act having been filed out of time without the leave of court hence bad in law and should be dismissed with cost.

7. The matter was set down for hearing on 4/3/2021 with the plaintiff, ABRAHAM GINA ADAMS, testifying as PW1 by adopting his affidavit dated 6/5/2019. He testified that he lives in Budalangi within Bunyala sub-county in Siginga sub-location and Nawina village. He told the court that Geoffrey Adams Ogwa who died in 2006 is his father. To his knowledge, his deceased father bought the land Bulemia/2678 in 1991 from James Ouma who is also deceased and they took possession immediately. Among the developments they did on

the suit land included cultivating crops and they built two houses on it where they lived in. PW1 stated further that his mother Regina Ogutu, brother William Ogwa and Veronica Adams were all buried on this land and he can locate their graves. His mother was buried in early 1994, William in August 1994 and Veronica in 1995. His father was buried in 2006 in their ancestral home in Siginga village as his grandmother demanded that his father be taken back home while he was ailing.

8. The witness avers that they also stayed with his uncle Lazarus whose wife was buried on the suit land. However, Lazarus was buried in Siginga due to traditional rights. He went on to say that his father had been using the suit parcel from 1991-2006 and there was no interruption of their stay in the land. Currently there was nothing on the land except the fencing and trees planted by his late father. It was now bare land and the owners have not reclaimed it. He stated that one time his father allowed James Omondi Okumu (his brother-in-law) to cultivate the land from 1992-2006 while they were away at place of work, but occasionally, they would visit the land on weekends and holidays. The size of the land sold was 2.4HA. He stated that there was a previous suit BUSIA ELC NO. 70 OF 2013 where he sued James Ouma seeking for an order of transfer of the land to him. The Applicant produced in support of his claim, copy of the Limited Grant as PEX1, Green card as PEX2, copy of judgment as PEX3. He stated that he had sued the defendant as he had bought the same parcel of land in 2015. He prayed for the orders sought in the originating summons.

9. Upon cross-examination by Mrs. Ashioya learned counsel for the Respondent, PW1 stated that his father bought the land from James Ouma Natolio in 1991 and they had sued James over the agreement. He said that he agreed with the judgment rendered in ELC 70/2013 where the court found that the agreement gave his father consent to take possession of the land and carry out developments. He had brought evidence of several wrangles between Natolio and his father on use of the land and the wrangles were being brought by Fidelis Okumu who had also purchased the land. He stated that it was Fidelis who was pushing James to cause the wrangles. He reiterated that it was James who gave his father permission to live on the land and the said consent ran from 1991-2006 and as a purchaser of the land. He said that his father left the land in 2004 and the defendant was registered on 15/4/15. He stated that their case being BUSIA ELC 70/2013 was dismissed and he did not appeal the judgment and he did not file for extension of time before filing this suit.

10. On re-examination the Applicant said that the dispute in page 9 of the proceedings was that his father had not paid the whole amount, not that they move out of the land and the dispute never interfered with their possession. That in Busia ELC 70/2013 the court distinguished that the claim before it was not adverse possession but for specific performance. Between 2003- 2019 he had filed succession proceedings to enable him to sue.

11. The second witness JAMES OMONDI LUKUKU testifying as PW2 adopted his witness statement dated 3/3/2021 as his evidence in chief. He testified that Godfrey Adams Ogwa was his father- in-law and he met his wife in her father in-law's home which is the land in question. Wilmina (the wife) was doing horticultural farming on the land and they continued doing so from 1992- 2006. His father-in-law was working in Kisumu and he and his wife would mostly come to the land/home on weekends. He said that Regina fell ill, died and was buried on the land and in 1994 August, the son who died was also buried on the land. The following year, another sibling was buried on the said land. Around 2000, Godfrey moved from Kisumu and came to live on the suit land and Lazarus Mboya Ogwa stayed with him. In 2002, PW1 and his sisters went to school in Uganda. In 2004, Geoffrey started ailing and being alone he decided to return to his mother's home in Siginga where he died in 2006, and was buried according to the Islamic rites. Before his death, he handed him a set of documents with instructions to hand them over to PW1 when he becomes an adult. He continued that James Ouma Natolio started raising complaints that the land still belonged to him so they should stop farming. The houses were demolished and the graves levelled. The planted trees were cut down and the land is in vacant possession.

12. Upon cross-examination by counsel for the Respondent, PW2 stated that he was aware PW1 filed a case against James Ouma Natolio and the court made a determination in ELC 70/2013 dismissing the case. He said that his testimony relates between Geoffrey Adams and James Natolio. He said that Geoffrey did not wholly vacate the land as he went to live with his mother because of his illness. This marked the close of the Applicant's case.

13. CAPTAIN GEOFFREY OGABA NAMADOA relied on his sole evidence for his defence. He testified as DW1 adopting his Replying Affidavit dated 2/5/2019 and filed in court on 12/6/2019. He testified that he is currently the owner of the suit land and he got the land pursuant to a court order. That he had first bought it in 2003 from the late Geoffrey Adams Ogwa for an amount of Kshs.500,000/=. When he moved in to take possession in 2004, he discovered that Mzee Natolio Ouma was the registered owner and Mzee Ogwa had assured him that Mzee Natolio would transfer the land to him. However, Mzee Natolio demanded for a new payment claiming Mzee Ogwa had not paid him as agreed. That when he purchased the land, Ogwa was living on the suit property but he left in 2004. The Respondent averred that Mzee Ogwa left because he had protracted dispute between him and Natolio.

14. He stated that he was aware Natolio had previously been sued and he had been incorporated as an interested party where he testified before the magistrate's court. He said that the issues in this present case are similar to the issues that were before the Chief Magistrates' Court. The witness stated that in the former suit, the plaintiff admitted that it is Natolio who had given permission to his father to occupy the land and the court found in favour of Natolio in February 2015. It is his case that he finally bought the land in April 2015 after the judgment and there was no caution on the land. That from 2004, the plaintiff's family has not lived on the land since he has been living on said land from 2004. Currently he was the only one using the land, that it is fenced and his workers are working the land. He concluded his evidence that at the time he bought the land, there was no pending case before the court nor was there a caution registered on the title.

15. During cross-examination by Mr. Okeyo learned counsel appearing for the Applicant, the Respondent stated that at paragraph 8 of his replying affidavit he deposed to being aware of ELC case 70/2013 and the claim was for specific performance while the current one is for adverse possession. In 2003 when he was buying the land, Mzee Ogwa was honest and told him it was Natolio to transfer since he had not processed the title. By 2003 when he visited the land, there was no structure but Mzee Ogwa said that he was using the land. He stated that he entered into an agreement with Mzee Natolio because Mzee Ogwa had indicated there were pending issues between them and the transaction between him and Natolio delayed because he had to do succession with his brothers. He said that paragraph 7 at page 8 of the judgment said that the moving out of Geoffrey from the land in 2004 did not extinguish his rights over the suit land. Before Ogwa moved out in 2004, he was carrying out minimal subsistence farming. The Respondent denied that Ogwa had constructed a home on the land or that he had buried some relatives on the suit land.

16. In re-examination, the Respondent reiterated that in paragraph 8 of the judgment in ELC case no 70/2013, the court noted the claim was not based on adverse possession but for specific performance. He said that Ogwa moved out in 2004 and the current suit was filed in 2019 which is period of 16 years. He stated that he has been sued after 17 years of his possession.

17. Parties agreed to exchange written submissions. The Applicant filed his submissions on 31st January 2022 and submitted that the findings by Justice Kibunja in BUSIA ELC 70 OF 2013 are findings of fact by a competent court and they have not been varied, set aside nor appealed against and they urged the court to take judicial notice of the same. He urged the court to find that the plaintiff and that of his witness proved the claim for adverse possession. He submitted that the suit is not res judicata as claimed and prayed that the court finds in his favour in terms of the prayers in the Originating Summons.

18. The Respondent filed his submissions on 4th February 2022 and submitted that the applicant has admitted that his father's occupation of the suit land from 1991-2004 was with the consent of the late James Ouma Natolio which takes away the non-permissive requirement of entry under a claim of adverse possession. He submitted that possession alone does not give rise to a right of adverse possession. The Respondent submitted that nowhere in the entire judgment did the Hon Judge make a finding that the interests of the plaintiff's father were that of adverse possession and if the court would have made such a finding nothing would have been easier than to award the applicant the land on rights of adverse possession in his judgment in BUSIA ELC 70 of 2013. He submitted further that the suit time was barred as it was brought 16 years after the right of action had accrued and brought against a wrong person. He relied on the decisions in **Haro Yonda Juaje V Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR**, **Simon Muthuka Kamau V Harrison Musyimi Kakundi & Another (2021) eKLR**.

19. Having looked at the parties' pleadings and submissions, I frame the following issues for determination;

- i) Whether the Applicant's claim is time barred and res judicata;**
- ii) Whether the applicant has established a claim for adverse possession and;**
- iii) Whether the respondent is an innocent purchaser for value without notice;**
- iv) Who meets the costs of the suit?**

20. The Respondent challenged the legality of the suit before court in two fronts; the first question and which in my opinion easy to answer is whether or not the claim was time barred. The Respondent quoted the provisions of section 7 of the Limitations Act and the decision in Busia ELC CASE NO 70 OF 2013. The claim before court is for adverse possession and the law in section 37 of the Limitation of Actions Act refers only to when time starts and stops running in favour of or against an adverse possessor. The suit can only be considered to be time barred if the owner takes possession either by filing of suit or using a process provided by the law. Unlike suits founded on contract, the longer an adverse possessor stays on a suit land, the better for their claim. In my opinion, and I so hold that it is a misapprehension of the law for the Respondent to argue that this suit was filed 16 years after the deceased vacated the land without establishing that the movement out of the land extinguished the rights which had accrued.

21. The Applicant explained the reasons behind the departure of the deceased from the suit land which was because of his illness and there was no one to take care of him. He stated further that he (applicant) was young and they had gone to stay in Uganda. Pw2 corroborated the Applicant's evidence by stating that he continued cultivating on the land until the year 2006 when the previous owner started raising issues. Pw2 said that he shied off from using the land until the legal representatives could take up the matter. It is admitted that by the year 2004, the twelve year had lapsed. There is no evidence presented by the Respondent to show that the previous owner had taken steps to recover the land that would make time not continue to run in favour of the estate of Geoffrey Adams Ogwa-deceased. Even the suit ELC 70 of 2013 referred to was commenced by this applicant against the previous registered owner. My answer on whether the current is time barred is negative.

22. The second limb is whether this suit is res judicata Busia ELC 70 OF 2013 case was between the Applicant and the late James Natolio over the same parcel of land. Both parties produced the judgement as an exhibit in support of their claim/defence. The principle of res judicata is well explained in section 7 of the Civil Procedure Act. The former suit was heard and determined by a court of competent jurisdiction. This court is called upon to determine whether this claim is a candidate of striking out under the doctrine of res judicata. Was the current cause of action adjudicated in the former suit? The parties agree that the former suit sought specific performance of the contract entered between Geoffrey Ogwa-deceased and James Natolio-deceased. The current is for a claim for adverse possession. Although, there was a mention of the issue of adverse possession in the judgement, the same was not adjudicated upon.

23. Was the suit between the same parties? The Respondent was not a party to ELC case no 70 of 2013 although his name featured during the hearing with Michael Ogada testifying DW2 at page 14 stating that he knew the Respondent's interest in the land in dispute. As at the time, the suit was heard and determined, the Respondent was not the registered owner of the land. However, he can claim the defence of res judicata because he derived his title from James Natolo who had earlier been sued. Despite the fact that the parties may have been the same and the former suit was heard on merits, in my analysis of the pleadings and facts, I hold that the current suit is not res judicata. One of the reasons for holding so is because, the first claim of specific performance was strictly between the parties to the contract while the claim for adverse possession includes the rights of parties to the contract as well as the rights of the Applicant in his individual capacity as a beneficiary.

24. The Applicant's rights under contract form the basis for a cause of action totally distinct from adverse possession. This is because adverse possession accrues by operation of the law which does not suffer time bar. The rights under contract are extinguishable by breach on the part of any party or voidable under statute, for instance the Land Control Act. Besides, the facts on which specific performance is based includes the assertion that the title belongs to the defendant, whereas in adverse possession the main claim is that the defendant's title has been extinguished. Inclusion of the two claims in one suit would be therefore contradictory. Therefore, I find there was no mistake in the Applicant not bringing the claim of adverse possession in the former suit thus the current suit is not res judicata.

25. The second question for determination is whether or not the Applicant has demonstrated a case for adverse possession. The Applicant tendered evidence to show that they indeed took possession from 1991. The Respondent does not deny the fact of possession but submits that the possession was with the consent of the land owner. The Respondent also averred that one of the reasons the deceased moved out of the land in 2004 was because of hostility from the previous owner. He however does not state when according to him this hostility started. In the case of *Wambugu vs Njuguna*, dispossession occurs when owner is denied opportunity to put into use the purpose for which he intended to put the land into. Geoffrey Ogwa and James Natolio were not relatives. The consent to occupy was based on the sale agreement between the parties and nothing more. Therefore, would begin running adverse after the sixth month where consent of Land Control Board was not obtained.

26. The occupation by the Geoffrey Ogwa- deceased and his family was open and continuous such that even the Respondent knew the suit land belonged to him. The Respondent alleged that he first bought land from the late Geoffrey Ogwa in the year 2004 and paid him Kshs.500,000. If this was true, then the Applicant's interests of adverse possession was extinguished by this sale. In contradicting this assertion of sale is the evidence of PW2 who stated that he continued cultivating the land until the year 2006 when they shied away not chased away. In fact PW2 said that Geoffrey did not vacate the land but went to live with his mother because of his illness. The Respondent did not produce evidence of purchase between him and the late Geoffrey.

27. In terms of possession post the year 2006, Pw1 said the trees planted by his father were still on the land. The Respondent stated that he had been living on the land since 2004. He did not demonstrate what he was doing on the land that dispossessed the late Geoffrey of the rights of adverse possession which had accrued to him. In the absence of a sale agreement between the Respondent and the late Geoffrey and in the absence of proof of taking possession prior to 2015, I find the possession of the Applicant was not interrupted. By the time the late James Natolio was selling land to the Respondent, his interests in the suit land had been extinguished and he had nothing to pass on to the Respondent. Section 16 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides as follows: -

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration.”

28. The Respondent pleaded the defence of and submitted that he is an innocent purchaser for value. The Court of Appeal of Uganda in the case of *KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173* held that:

“For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, ... (he) must prove that:

- (a) he holds a certificate of title;**
- (b) he purchased the property in good faith;**
- (c) he had no knowledge of the fraud;**
- (d) he purchased for valuable consideration;**
- (e) the vendors had apparent valid title;**
- (f) he purchased without notice of any fraud;**
- (g) he was not party to any fraud.”**

29. In the instant case, the Respondent is holding a certificate of title but does not meet the rest of the qualifications for an innocent purchaser. The Respondent did not provide a sale agreement executed between him and James Natolio to show that he paid consideration for the suit property. He purchased this land well aware of the dispute that had started between the filing of the case between the Applicant and James Natolio-deceased. The Respondent stated he was aware James had sold this land to the late Geoffrey yet James had refused to transfer the land to the said Geoffrey. The Respondent was equally aware the late Geoffrey was in possession when he said by 2004 Geoffrey was doing subsistence farming. He was aware of the cautions registered on the title before they were removed in the year 2015. Yet he still went ahead and got into the sale transaction with James over the same parcel of land.

30. The Respondent is actually literate from his title as a Captain. With all the background information he had before buying the suit land, section 26(1) of the Land Registration Act catches up with him. Consequently, I hold that the defence of innocent purchaser for value is not available to him. The rights of the previous registered owner James Natolio had been extinguished by operation of law and so he had nothing to sell or transfer to the Respondent. Although the title to the suit property was in the name of the previous owner and subsequently the Respondent, they are merely holding the title in trust for the Applicant and the estate of the late Geoffrey Adams Ogwa.

31. In conclusion, I make a determination that the Applicant has proved the claim and is entitled to be declared as the owner of

L.R. BUNYALA/BULEMIA/2678. Accordingly, I enter judgement in favour of the Applicant that;

- a) That an order of permanent injunction be and is hereby**

issued against the Respondent restraining him from using and or interfering with the suit land Bunyala/Bulemia/2678.

b) An order of eviction be and is issued against the Respondent, his servants and or agents remove any of their structures from the suit land.

c) The registration of the Respondent as absolute

proprietor of the suit land shall be cancelled in favour of the Applicant.

d) The Land Registrar Busia County is directed to register the Applicant in place of the Respondent.

e) The Respondent shall execute transfer documents in favour of the Respondent within 45 days hereof, in default the Deputy Registrar of this Court shall sign transfer forms in favour of the Applicant to facilitate the registration of the suit title in the name of the Applicant.

f) Each party to bear their respective costs of the suit.

Dated, sign and delivered virtually this 31st day of March 2022.

A. OMOLLO

JUDGE