



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 55 OF 2019

JOHN ODUNGA BARASA.....APPLICANT

VERSUS

VINCENT BARASA OMOLLO.....RESPONDENT

J U D G M E N T

1. The Applicant commenced these proceedings by taking out the Originating Summons dated 23rd August 2019 and filed in court on 16th September 2019 against the Respondent. The Applicant claims that he has acquired by way of adverse possession rights over **L.R No Bukhayo/Bugengi/15029** or any other title derived therefrom as on the ground currently registered in the names of VINCENT BARASA OMOLO respectively. The Applicants posed the following questions for determination:

- a) *Whether the applicant has been in open and notorious possession of a portion measuring approximately 0.4HA out of L.R. NO. BUKHAYO/BUGENGI/15029 for a period exceeding 12 years.*
- b) *Whether the respondent's title to a portion of L.R.NO. BUKHAYO/BUGENGI/15029 measuring 0.4HA became extinguished upon expiry of 2 years from the time the applicant went into possession of the said portion.*
- c) *Whether the applicant has now acquired title to a portion of L.R. NO. BUKHAYO/BUGENGI/15029 measuring 0.4HA by virtue of adverse possession.*
- d) *Whether a portion of L.R.NO. BUKHAYO/BUGENGI/15029 measuring approximately 0.4HA should be transferred to the applicant.*
- e) *Who should pay the costs of this cause?*

2. The Applicant sought to be granted the following orders;

- a) **That the respondent's rights over a portion of LR No. Bukhayo/Bugengi/15029 measuring 0.4Ha got extinguished by adverse possession upon expiry of the 12 years from the date the applicant came into possession.**
- b) **That the respondents be perpetually barred from taking and or using a portion of LR. No. Bukhayo/Bugengi/15029 measuring 0.4Ha presently under the occupation and use by the applicants.**
- c) **That a portion LR. No. Bukhayo/Bugengi/15029 measuring 0.4Ha be and hereby registered in the name of the applicant as absolute proprietor thereof.**
- d) **That the respondent do execute all the relevant documents to facilitate the sub-division and transfer of a portion of LR. No. Bukhayo/Bugengi/15029 measuring 0.4Hectares into the name of the applicant and that in default the deputy registrar do execute the same in the place of the respondent.**
- e) **That the respondents do pay the costs of this case.**

3. The Originating Summons was supported by the affidavit of JOHN ODUNGA BARASA which annexed copies of sale agreement, certified copies of the register of L.R. NO. Bukhayo/Bugengi/597 and L.R. NO. Bukhayo/Bugengi/15029. The Applicant deposed that on 23rd April 2002, he bought approximately one acre of land from Benson Wesonga Odunga. The Land sold was comprised in L.R no

Bukhayo/Bugengi/597. He added that the sold portion was clearly demarcated on the ground with boundaries planted. The Applicant deposed further that the portion he purchased and which he presently occupies falls within L.R No. 15029 and registered in the name of the Respondent.

4. The Respondent entered appearance and filed a Replying Affidavit dated 25th September 2019 and filed in court on 26th September 2019. He deposed that he is the son of the late OMOLLO OMOSINGI whom by virtue of succession cause no. 242 of 2013 BUSIA HC became the administrator of the said estate. He deposed that it is a lie for the applicant to claim to have been in open and continuous possession of a portion out of L.R. NO. Bukhayo/Bugengi/15029 for a period exceeding 12 years. He claimed that from the documents filed by the applicant Busia ELC NO. 95 OF 2019, he never completed paying the consideration and has now sought to file the originating summons against him as if BENSON WESONGA was a beneficiary of the estate of OMOLO OMOSINGI-deceased. The Respondent deposed further that the agreement was signed by parties who engaged themselves in a fraudulent transaction and their actions amount to intermeddling in the estate of the deceased.

5. He added that the applicant trespassed upon the deceased estate in 2010 where upon he reported him to the area village elder known as PIUS BARASA who summoned and cautioned him against his acts of trespass but to no avail. He further stated that the purported sale agreement was only between BENSON WESONGA ODUNGA and JOHN ODUNGA BARASA and not with his father OMOLO OMOSINGI hence it was null and void ab initio. He claimed that the remedy of adverse possession is not available to the applicant. Annexed to the replying affidavit was a copy of a green card.

6. The parties took directions to proceed by way of viva voce evidence and commenced the hearing on 2/2/2021 with the applicant JOHN ODUNGA BARASA testifying as PW1. He introduced himself as a resident of Korinda within Busia Town and his home is in Emaseno within Busia County. He informed the court that he owns a portion of land parcel no. BUKHAYO/BUGENGI/597 through purchase from Benson Wesonga. That the said Benson had bought a portion measuring two acres from Omolo Omosingi.

The Applicant stated further while selling to him the disputed portion, Benson informed the defendant's family in March 2002.

7. That a sale agreement was drawn between Benson and himself and he paid the purchase price in full. It is the Applicant's case that at the time of buying the land, Benson was cultivating it and the boundaries had been marked and TOM OMOLO AGULI and JUDITH MAKOKHA were present as witnesses of the respondent's family. He continued that he built his home on the plot in the year 2002, and he also built a permanent toilet and two kitchens, dug a borehole, planted trees and left a portion for cultivation. It is the applicant's case that he has used the land for 19 years now. He told the court that he sued Respondent because he is the administrator of his father's estate and he had asked the respondent to give him title for his portion but he refused.

8. PW1 stated that after appointment as administrator, the defendant sub-divided L.R. No 597 into two i.e. numbers 15029 and 15030 and his share lies in number 15029. He relied on the agreements and green cards attached to the supporting affidavit. He produced the agreements as PEX 1(a-b), green card as PEX 2 (a-b), letter as PEX 3 and photographs as PEX4. He asked the court for an order that gives him title to his portion and costs of this suit.

9. Upon cross-examination by counsel for the respondent, PW1 stated that they had a transaction with the defendant after he was sold the suit portion by Benson Wesonga who was the first buyer. He told the court that it was the Respondent and his mother who sold to Benson. He reiterated that Benson used to farm the land. In PEX 1(b), the parcel number is given as BUKHAYO WEST/BUGENGI sub-location/EISIKA/549 and it shows there was a balance of Kshs.4,500/=. That this was the last agreement he had with Benson. He stated that the defendant did not sign the agreement between Benson and him. Aguti's sign was not appended on PEX 1(b). Upon re-examination, he stated that PEX 1(a) he paid Kshs.28,000/= and he was not the one who drew the agreement but they wrote the sub-location where the land is located. He denied owing Benson any money. Later Pw1 was recalled and he produced the sale agreement executed between Benson Wesonga, the Respondent and the Respondent's mother.

10. **ANACLET HAGGAI BARASA** testifying as PW2 opened his evidence stating that he lives in Korinda and is a farmer. PW2 stated that he knows both parties in this case. He stated that he is a cousin of Benson and the plaintiff and Benson invited the plaintiff to buy his land. They visited the land and later visited the home of the seller. The deceased Omolo Omosingi is like his grandfather and they come from the same village. He stated that he is the one who wrote the agreement between the Applicant and Benson and some family members of the deceased signed as witnesses. He informed the court that the plaintiff has developed the land with his home, planted trees and cultivates. That Benson had used the land for about 10 years before selling it to the Applicant.

11. Upon cross-examination by counsel for the respondent, PW2 stated that he is the one who drew PEX 1(a). At the time of the transaction with the plaintiff, Benson showed him the agreement between him and Omolo Omosingi deceased. He said that Benson retained the agreement and he did not keep his copy. The plaintiff took possession immediately after execution of the agreement. He conceded that Mama Aguti did not sign PEX 1(a).

12. **BENSON WESONGA** testified as PW3 and stated that he comes from Bugengi village and he is a retired teacher. He confirmed that he knew both parties and the plaintiff is his cousin. In 2002, he sold the plaintiff one acre of land at Kshs.32,000/= and he bought this land from the family of Omollo Odingi who had sold him two acres. He said that they had a sale agreement drawn on 7th February 1994 and after paying the money he started using the land but he had not got title because the land was pending succession process. While selling to the plaintiff, the defendants were involved. They had not put demarcation on his share and the plaintiff's land and he allowed him to use the same land. He said the plaintiff has built on and lives on and cultivates the suit land.

13. Upon cross-examination by counsel for the respondent, PW3 stated that according to his agreement with the seller, the parcel number was 549 before he confirmed the correct number was 597 from the lands office. When he bought the land he was aware the registered owner was dead and he sold to the plaintiff parcel No. 549. He used to cultivate the land before he sold it to the plaintiff. PW3 said he bought the land from Cornelia Akuti Omolo who was the widow to the registered owner and he paid the whole amount in two instalments. He added that the transaction was done before Vincent went to Nairobi. On re-examination, he stated that when buying the land, the number given by

the sellers was 549 on which basis they made the agreement. He discovered the correct number as 597 in the year 2002 as shown in PEX 1(a).

14. The Respondent testified as DW1 by adopting his witness statement dated 29/9/2019 as his evidence in chief. His witness statement was similar to the averments deposed to in the Replying Affidavit. He produced the documents in his list of documents dated 29/9/2019 as DEX1, 2 & 3 and documents in the further list of documents dated 15/3/2021 as DEX 4 & 5. He denied knowing the plaintiff or Benson Wesonga. He denied that they had any sale or rectification of title in this matter and they had never had any complaint raised by any one.

15. Upon cross-examination by Mr Bogonko, learned counsel for the applicant, DW1 said that his father owned land number BUGENGI/597 and not L.R. No. 549. He said he took out letters of grant in Succession Cause no. 242 of 2013 and distributed the land to the beneficiaries. His portion is number 1605 which he also sub-divided and gave out. He admitted that L.R. No. 15029 is also in his name and the plaintiff came to live in the said land in the year 2010. He stated that he went to Nairobi in the year 1981 and he learnt of the Applicant's presence when he returned home in 2010. He admitted that on the land, there is a well, a house and a kitchen and he also cultivates on it. He said that the plaintiff cut down the trees he had planted and planted others. He further stated that the portion the plaintiff is using is more than one plot and that he entered the land like a thief. That his wife used to plough the land until the year 2011.

16. On re-examination, the Respondent reiterated that the plaintiff entered the land in 2010 and when he reported to the village elder, the elder advised him to go on with his business because he was not aware of any sale agreement. He added that his wife used to plant cassava until the plaintiff invaded the land.

17. **TOPISTA ADHIAMBO OMOLO** gave her evidence as DW2 and adopted her witness statement as her evidence in chief. She stated that she has been married to the Respondent for about 27 years and she knows that L.R.NO. 597 registered in the names of the late OMOLO OMOSINGI who was her father-in-law. That it is only by virtue of succession that DW1 was made an administrator through H/C Succession Cause No. 242/2013. She denied that her husband and her were privy to the then existence of the purported sale agreement as then between BENSON WESONGA BARASA and his father-in-law OMOLO OMOSINGI. It is her evidence that the applicants trespassed upon the suit land claiming purchaser's interest and has since persisted in such trespass. She further stated that the applicant is a land grabber who wants to use the court in his sinister motive to obtain adverse possession by way of fraudulent means.

18. Upon cross-examination by counsel for the applicant, the witness said that she got married in 1991 and stayed in Nairobi until the year 2002 when she returned. That the plaintiff came onto the land in 2010 when her mother-in-law was still alive but she was old. She never reported to the police but the village elder. She admitted that paragraph 8 of her statement was true that her mother-in-law died in the year 2005. She changed and stated that the plaintiff entered the land after the demise of her mother-in-law around 2005. She denied that she did not state that the applicant entered the land at night but he came at night. She stated that the plaintiff is using approximately one acre and his home is still there. She denied that she had nothing to do with the sale to the plaintiff. On re-examination she stated that her mother-in-law died in the year 2005 and the plaintiff forcefully entered the land after the demise of her mother-in-law in 2010.

19. Parties agreed to exchange written submissions within 14 days. The Applicant filed their submissions on 25th October 2021 and submitted that he has established his case against the respondent to the required standards and this court should be pleased to grant the prayers sought in the originating summons. He relied on the decisions in **Peter Mbiru Michuki -V- Samuel Mugo, Court of Appeal at Nyeri, Civil Appeal No. 22 of 2013, Mtana Lewa -V- Kahindi Ngala Mwangandi (2005) eKLR.**

20. The Respondent also filed his submissions on 25th October 2021 and submitted that the prayers sought by the applicant are not grantable. He stated that a declaration order cannot issue in the circumstances of the case since adverse possession was never proven and since the applicant has pleaded that he bought the land and subsequently did not claim for breach of special performance, said prayer of adverse possession is unavailable to him in the circumstances. He submitted that no basis in regard to claim adverse possession has been laid and the same must fail. He relied on the decision in **Samuel Kamere -V- Land Registrar (2015) eKLR** *"In order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property."* (Emphasis added)

21. Having carefully looked at the parties' pleadings and submissions, the following questions are framed for determination of the dispute;

a) Whether the applicant's occupation of the suit land was adverse to that of the Respondent;

b) Who bears the costs of this suit?

22. This suit is based on adverse possession and the applicable law on adverse possession has been widely discussed by both Kenyan Statute and case laws. In **Samwel Nyakenogo vs. Samwel Orucho Onyaru** Civil Appeal No. 24 of 2004 where the Court of Appeal had this to say:-

*"In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having discontinued his possession of it. The Limitation of Actions Act on adverse possession contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for that requisite period. See **Wambugu Vs. Njuguna** Civil Appeal No. 10 of 1982. Adverse possession means that a person is in possession in whose favour time can run."*

23. On whether the applicant's occupation of the suit land was adverse to the Respondent, the applicant has testified that he has been in occupation and possession of one acre initial out of L.R. No. 597 and now L.R. No 15029 for a period of 19 years now. DW1 and DW2 have

admitted that the PW1 is indeed in possession and occupation of the suit land except for them the period of occupation runs from the year 2010. Thus, the dispute between the parties is whether or not the applicant has been in occupation of the suit land for a period of over 12 years. The applicant adduced evidence that he came to occupy the suit land by virtue of a sale agreement dated 23/4/2002 (PEX 1b) executed with PW3 who sold him one acre from the two acres he had bought from the family of the deceased Omolo Omosingi. Pw3 Benson Wesonga stated that he purchased two acres of land from the Respondent's mum in 1994 and the Respondent was one of the witnesses. Pw3 added that although the seller gave the parcel number of the land sold as 549, he later learnt that the correct number was number 597.

24. The Respondent did not deny that two acres of land had been sold to Benson Wesonga. Instead he was stating that the said transaction amounted to intermeddling with the deceased property. It is a half portion of the two acres earlier purchased by PW3 that the Applicant purchased. The Respondent is that being dishonest to refer to the Applicant as a land grabber. The Applicant proceeded to demonstrate that he took occupation immediately after purchasing the one-acre portion. Although DW2 tried to say the applicant entered the land at night, and that he was a thief, it begs answers why they let him put up all the structures that are admitted to be on the land including digging a borehole without taking any steps to stop or remove the applicant.

25. In their defence, DW2 testified that PW1 entered the land after the death of her mother-in-law in 2005 and later contradicted herself by saying that the applicant entered the land in 2010. It is important to note that DW1 told the court that he learnt of the applicant being on the land when he came home in 2010. This does not change the fact that the Respondent had been dispossessed of the suit portion from the year 1994 after the sold it to PW3. Although he denied the signature on Pex5 (agreement for sale made in 1994), he did not call his brother who also witnessed the sale to corroborate his evidence. I find that the respondent witnesses testimonies were contradictory on when the applicant started occupying the suit land. The applicant's witnesses' testimonies were consistent with how the applicant came to be in occupation of the suit land.

26. It is indeed true that the person who sold land to PW3 did not have capacity to sell neither did PW3 have capacity to sell to the Applicant for want of letters of administration. However, this did not change the fact that the Applicant was put in possession of the suit land and time could run adversely to the interest of the registered owner and or the beneficiaries thereof which beneficiaries included the Respondent. I find the Applicant's evidence corroborated on how and when he came on to the land. The purpose of the sale agreement was to confirm his entry. Secondly, the Applicant's occupation has not been interrupted from 2002 to the date of filing suit.

27. In the case of **Kweyu vs Omutut [1990] KLR 709**, the Court of Appeal, stated as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right.

28. The applicant thus met the threshold of adverse possession when he demonstrated that his occupation was non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption. The upshot of the foregoing is that the applicant's Originating Summons dated 23rd August 2019 is merited and allowed as follows;

a) It is hereby decreed and declared that the respondent's rights over a portion of LR No. Bukhayo/Bugengi/15029 measuring 0.4Ha got extinguished by adverse possession upon expiry of the 12 years from the date the applicant came into possession from March 2002.

b) An order be and is hereby issued against the respondents perpetually barring them from taking and or using a portion of LR. No. Bukhayo/Bugengi/15029 measuring 0.4Ha presently under the occupation and use by the applicants.

c) It is hereby decreed and ordered that a portion LR. No. Bukhayo/Bugengi/15029 measuring 0.4Ha to be forthwith registered in the name of the applicant as absolute proprietor thereof.

d) The respondent is hereby directed to execute all the relevant documents to facilitate the sub-division and transfer of the portion of LR. No. Bukhayo/Bugengi/15029 measuring 0.4Hectares into the name of the applicant and that in default the Deputy Registrar shall execute the same in the place of the respondent.

e) Each party do bear their respective costs of this case.

Dated, signed and delivered at BUSIA this 16th day of March 2022.

A. OMOLLO

JUDGE