



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**

**ELC CASE NO. 12 OF 2021(OS)**

**DONALD OMUYAKU OKINAMI.....PLAINTIFF**

**VERSUS**

**LUANDA REVIVAL WORSHIP CENTRE.....DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. This case was initiated vide the Originating Summons dated 8<sup>th</sup> June, 2016 brought pursuant to the Provisions of Order 37 Rule 7 (1) of the Civil Procedure Rules, 2010. It seeks that title to Land parcel known as W/BUNYORE/ESIANDUMBA/545(the suit land) be transferred to the Plaintiff by operation of the doctrine of Adverse Possession.
2. The Originating Summons is supported by a Supporting Affidavit sworn by the plaintiff on 8<sup>th</sup> June, 2016. In the Affidavit, the plaintiff deposes that his deceased father one OKINAMI OCHINA was the rightful owner of the suit land. That since the demise of his late father he has been occupying and using the said parcel peacefully till the year 2005 when the Defendant invaded the suit land giving rise to the dispute. That since the death of his father, he has had peaceful and uninterrupted enjoyment of the suit land for a period of over 30 years. He therefore applies to be registered as the proprietor of all that portion of land measuring 1.6 acres of the suit land.
3. The Defendant's reply to the Originating Summons is contained in a Replying Affidavit sworn by one Norbetus Oyugi Akhombo on behalf of the Defendant on 7<sup>th</sup> September, 2020. He deposes, *inter alia*, that the suit land belongs to the Defendant who bought it from one HALLON OKWARO and that the plaintiff owns a neighboring land parcel known as W/BUNYORE/ESIANDUMBA/546 which is his (Plaintiff's) ancestral land and not the suit land. He deposes further that the plaintiff has never occupied the suit land although he destroyed the common boundary between the suit land and his land.
4. The matter proceeded to hearing on 15<sup>th</sup> November, 2021.

**SUMMARY OF THE EVIDENCE**

5. The plaintiff relied on his Supporting Affidavit sworn on 8<sup>th</sup> June 2016 as his evidence in chief. In his testimony in court he stated that he would like the title issued to the defendant in respect of the suit land to be cancelled and issued in his name because he has lived on the suit land since he was born in 1954. That his parents and some of his deceased brothers were buried in the suit land. That he has his residence on one section of the suit land while he cultivates on the other section wherein he has planted many things including bananas.

He denies that he has any relationship with Bishop Norbetus Okhambo who swore the Replying Affidavit. He narrated the history of the suit land as shown on the green card and stated that none of the people who owned the suit land before the Defendant had ever demanded that the plaintiff vacates the land. He further testified that the members of the Defendant church invaded the land,

attacked him, destroyed crops and demanded that the plaintiff vacates the land. They also caused him to be charged with the offence of interfering with boundary features of which he was found guilty and placed on probation. That all these happened in the year 2002. That in the year 2017 the Defendant sued him in Maseno Court, seeking vacant possession of the suit land. He stated that the suit land is now occupied by the Defendant who entered thereon forcefully in the year 2006. That before then, he had open, exclusive and continuous occupation thereof. He produced a copy of the green card and certificate of official search in respect of the suit land as exhibits P 1 & 2 respectively.

The Defendant testified through one Bishop Norbetus Oyugi Okhambo. He stated that he is authorized to act on behalf of the Defendant church. The contents of the Replying Affidavit sworn by him were adopted as his evidence in chief.

He produced exhibits D 1 to 5 namely; a land sale agreement dated 23.10.2002, copy of judgement in Maseno SRM Cr.C No.64/2006, copy of pleadings in Maseno SRM Civil Case No. 191/2007, a copy of County surveyor's report dated 15.6.2016 and proceeding from Luanda land Dispute Tribunal dated 23.1.2002. He stated that the Defendant bought the land from Hallon Okwaro who was the registered owner as at the time of purchase in the year 2002. That the Defendant entered the land in the year 2008 and built a church house thereon where its members congregate to date.

He stated that the boundary between the suit land and the land occupied by the plaintiff was destroyed by the plaintiff as a result of which the plaintiff was charged and found guilty of the offence.

He denied that the plaintiff occupies the suit land. He stated that the plaintiff occupies land parcel No.WEST BUNYORE/ESIANDUMBA/546.

## **SUBMISSIONS**

6. At the close of the evidence of both parties, court gave directions that parties file and exchange written submissions within 14 days. The plaintiff filed written submissions dated 7<sup>th</sup> December 2021 through the firm of D. G. S. Mango & Co Advocates. He submits that the Plaintiff has uncontrovertibly shown that he has been in occupation of the suit land in excess of 40 years from the time of his birth. That he has extensively utilized the land and even buried his deceased kin thereon. He relied on the authority of **Maweu vs Liu Ranching and Farming Cooperative Society [1985] eKLR** and **Benjamin Murima & Others vs Gladys Njeri Court of Appeal No 213 of 1996.**

He prayed that the Appeal be allowed.

7. The Defendant filed written submissions dated 6<sup>th</sup> December, 2021 through the firm of Mukabi & Co. Advocates. He submits that as it was held in the case of Francis Gicharu – vs- Peter Njoroge Mairu [2005] e KLR in order for a claim of Adverse Possession to succeed.

*“ the plaintiff has to prove that he used the land which he claims as of right, nec vi, nec clam, nec precario meaning no force, no secrecy, no persuasion. The plaintiff must show that the defendant had knowledge means of knowing actual or constructive of the possession or occupation. Such possession must be continuous it must not be broken for any temporary purpose or any endeavor to interrupt if by way of recurrent consideration.”*

He further submits that the plaintiff has not proved his case as the suit land is no-longer in his possession. That there is no evidence that the plaintiff has had peaceful and uninterrupted occupation of the suit land. He urges the court to dismiss the case with costs.

## **ISSUES FOR DETERMINATION**

8. The questions set out on the face of the Originating Summons form the issues for determination herein. The questions are as follows:

i. Whether the plaintiff has been in possession of LR No.WEST/BUNYORE/ESIANDUMBA/545 and has developed and stayed on the said land for a period of over thirty (30) years.

ii. Whether the plaintiff was born on the a foresaid land and has continued to be in adverse possession of the same for a period of over thirty (30) years and in order that he be registered as the proprietor of the said land in terms of sections 7, 17 and 38 Cap 22 of the Laws of Kenya as the title of the proprietor has been extinguished by the operation of the provision of section 77 Cap 22 of the Laws of Kenya.

iii. THAT ever if the L.R No. WEST/BUNYORE/ESIANDUMBA/545 is currently registered in the names of the defendant, the defendant fraudulently registered itself therein and just occupies a small portion thereof and the same should be registered in the names of the plaintiff who has been in adverse possession peacefully, uninterrupted and without evasion of secrecy ever since 1970.

iv. Costs herein be provided for.

v. Any other or further orders be made as this Honorable Court may deem.

#### **ANALYSIS AND DETERMINATION.**

##### **a) Whether the plaintiff has been in possession of the suit land and has developed and stayed thereon for 30 years.**

9. While the plaintiff alleged in his pleadings and part of his evidence that he has been on the land since 1954 when he was born, he admitted both in his evidence in chief and on cross examination that he no longer has possession of the suit land. He alleged that in the year 2006 the Defendant's members entered the land, threatened him, damaged crops and took possession of the land. He stated:

*“ the land is now occupied by the Defendant. They entered forcefully in the year 2006.”*

On Cross examination by Mr. Mukabi Counsel for the Defendant, he stated:

*“ I confirm that the land is currently in occupation of Luanda Revival church.... I used to occupy it till 2006 when the defendant entered forcefully.”*

10. The Defendant denied that the plaintiff has ever occupied the suit land. DW1 testified that since the year 2008, the Defendant has been in occupation of the suit land whereon they have constructed a church house where its members congregate.

This evidence answers the first question on the Originating summons in the negative. It shows that for the past approximately more than 13 years the plaintiff has not had occupation of the suit land. The occupation, use and development thereof is with the defendant.

##### **(b) whether the plaintiff was born on the suit land and has continued to be in adverse possession of the same for a period of over thirty (30) years and in order that he be registered as the proprietor of the said land in terms of section 7, 17 and 38 Cap 22 of the Laws of the Kenya as the title of the proprietor has been extinguished by, the operation of the provisions of section 77 Cap 22 of the Laws of Kenya.**

11. Vide this question the Plaintiff seeks the court to determine that he is entitled to ownership of the suit land by operation of the doctrine of Adverse Possession as envisaged in the law namely the Limitation of Actions Act Cap 22 Laws of Kenya.

He cites section 7 of the Limitation of Actions Act which section sets the limitation period within which a proprietor of land can bring an action to recover land. The section paves way for a trespasser or a holder of possession to acquire title to land whose owner has been indolent or in active in asserting his rights as such proprietor.

The Ingredients of the doctrine of adverse possession as set out in case law are not disputed by the parties herein. The Plaintiff in his submission states that:

**“the law ensures that in order for a claim of adverse possession to succeed, a plaintiff must demonstrate that he has been in such possession NEC VI, NEC CLAM, NEC PRECARIO.”**

The Defendant similarly relying on the case of Francis Gicheru (supra) states that the claim must be “**nec vi, nec clam, nec precario, meaning no force no secrecy no persuasion.**”

11. In the case of Mtana Lewa –vs- Kahindi ngala Mwangandi [2015] e KLR the Court of Appeal stated that:

**“adverse possession is essentially a situation where a person takes possession of land and assets rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve years. The process springs into action essentially by default or inaction of the owner. The essential pre-requisitions being that the possession of the adverse possessor is neither by force nor stealth nor under license of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the title owner.”**

12. Though the plaintiff testified that he was born on the suit land in 1954 and had lived thereon for a period in excess of 30 years, he conceded to having been forcefully displaced therefrom by the defendant in the year 2006 who has been in occupation to date. He further conceded to have been arrested at the instant of the Defendant and charged with the offence of interfering with boundary features, convicted and sentenced. He also conceded to have been sued in Maseno Court by the Defendant who was seeking to enforce their rights and assert their title over the suit land. Proceedings in Maseno SRM Criminal case and pleadings in the civil case were produced as exhibits.

From the evidence adduced, the plaintiff’s occupation of the suit land, if any, having been interrupted by the Defendant who asserted its rights and took possession, does not amount to adverse possession.

**c) That ever if the L.R No. WEST BUNYORE/ESIANDUMBA/545 is currently registered in the name of the Defendant the Defendant fraudulently registered itself therein and just occupies a small portion thereof and the same should be registered in the name of the plaintiff who has been in adverse possession peacefully, uninterrupted and without evasion of secrecy ever since 1970**

13. As to whether registration of the suit land in the name of the Defendant was done fraudulently, there is no evidence that was led to prove the same. On cross examination the plaintiff conceded that before the land was transferred to the defendant it had four previous registered owners. The law requires that fraud must not only be specifically pleaded but also strictly proved. And although the standard of proof of fraud is not proof beyond a reasonable doubt, it is higher than proof on a balance of probabilities required in other civil claims.

In the case of Kinyanjui Kamau vs George Kamau [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

*“It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo (2008)IKLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..” In case where fraud is alleged it is not enough to simply infer fraud from the facts.*

In the instant case, the allegation of fraud was not specifically pleaded. No evidence was adduced to prove the allegation to the required degree or at all.

#### **d) Costs**

Under section 27 of the Civil Procedure Act costs of any action, cause or other matter follow the event.

#### **Conclusion**

Having found that adverse possession has not been proved and that registration of the suit land in the name of the Defendant was not fraudulent, I make the following orders:

**1. The plaintiff's suit commenced vide the originating summons dated 8<sup>th</sup> June 2016 is hereby dismissed**

**2. Costs of the suit shall be paid by the Plaintiff.**

Orders accordingly.

**JUDGEMENT DELIVERED, DATED, AND SIGNED IN OPEN COURT AT VIHIGA THIS 14<sup>TH</sup> DAY OF DECEMBER, 2021.**

**E. ASATI**

**JUDGE**

**IN THE PRESENCE OF:**

**PLAINTIFF PRESENT IN PERSON**

**N/A FOR THE DEFENDANT**

**COURT ASSISTANT AJEVI**

**E. ASATI**

**JUDGE.**



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