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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT CASE NO. 24 OF 2016 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF L.R NO. BUKHAYO/BUGENGI/4923

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION

BETWEEN

LEONARD OKOME ONYANGO.....APPLICANT

= VERSUS =

GEORGE OUMA EUKO.....RESPONDENT

J U D G E M E N T

1. The Applicant commenced these proceedings vide the Originating Summons dated 29th March, 2017 against the Respondent. The Applicant's case is that he has acquired by way of adverse possession **L.R NO BUKHAYO/BUGENGI/4923** measuring approximately one acre and posed the following questions for determination:

- a) **Whether the Applicant has been in open and notorious possession of L.R No. BUKHAYO/BUGENGI/4923 measuring approximately one acre for a period exceeding 12 years;**
- b) **Whether the Respondent's title to L.R No. BUKHAYO/BUGENGI/4923 measuring approximately one acre became extinguished upon expiry of 12 years from the time the Applicant went into possession of the said land;**
- c) **Whether the Applicant has now acquired title to the said land by virtue of adverse possession;**
- d) **Whether the registration of the Respondent as owner of L.R No. BUKHAYO/BUGENGI/4923 approximately one acre should be cancelled and the applicant be registered as owner of the portion;**
- e) **Who should pay costs of this cause.**

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

- a) That the Respondent's right over L.R No. BUKHAYO/BUGENGI/4923 measuring approximately one (1) acre got extinguished by adverse possession upon expiry of the 12 years from the date the Applicant came into possession;
- b) That the Respondent's be perpetually barred from taking and or using L.R No. BUKHAYO/BUGENGI/4923;

c) That the Applicant be registered as the proprietor for L.R No. BUKHAYO/BUGENGI/4923 measuring approximately one (1) acre;

d) That the Respondent do execute all the relevant documents to facilitate the transfer of L.R No. BUKHAYO/BUGENGI/4923 measuring approximately one (1) acre into the name of the Applicant and that in default the Deputy Registrar do execute the same in place of the Respondent;

e) That the Respondent do pay costs of the suit.

3. That the Originating Summons was supported by the Applicant's supporting affidavit dated 29th March, 2016 to which he attached a copy of the green card of the Suit Land, agreements for sale, a letter of consent, a mutation form and the grant of letters of administration for the estate of Francis Ouko Eitoro.

4. The Respondent filed his Replying Affidavit on the 7th of December, 2016. He stated that he was the registered proprietor of L.R No. BUGENGI/BUKHAYO/4923 which was sub-divided from L.R No. BUKHAYO/BUGENGI/2741 which was initially owned by his father FRANCIS OUKO EITOTO who is deceased. The Respondent confirmed that his late father entered into a land sale agreement with the Applicant but the same aborted when the Applicant failed to clear the purchase price of KShs.3,000/- and his father passed away. That in these circumstances the Applicant is only a squatter on the land and as such his application as placed is misconceived, misplaced and a total abuse of the court process and it ought to be struck out with costs.

5. The matter proceeded for hearing on the 21st of November, 2018. The Applicant called two witnesses. The Applicant, **LEONARD OKOME ONYANGO** testified as **PW1**. He stated that he hailed from Bugengi village and worked at the Ministry of Water in Kakamega. That the Defendant was the son of Francisco Ouko Etoto, the person who sold one acre of BUKHAYO/BUGENGI/4923 on the 12th of July, 1993. That he paid KShs. 4,000 in the presence of the Defendant, who was the village elder at the time who signed both as his father's witness and as a village elder. That on the 13th of July, 1993 he paid an extra KShs.7,000/=, on the 12th of August 1993 he paid an extra KShs.1,700 and an extra KShs.1,300/- on the 20th of November, 1994 to the seller. That he made several agreements which he produced as PEx. No. 1A-D.

6. **PW1** continued in evidence that the once acre was to be extracted from land parcel no. 2741 which was in the name of the seller. That after payment of the money, they went to the Land Control Board to have the land subdivided which consent was obtained and the land was subdivided into land parcels No. 4922 and 4923. That **PW1** was supposed to get parcel number 4923. That although the subdivision happened in view of transferring the land to him, the seller died before doing so. He produced the green card of 4923 as PEx. No. 2, mutation form dated 18th March, 1996 as PEx 3 and the consent for subdivision as PEx 4.

7. That the Defendant became the administrator of the seller's estate and therefore the new owner of parcel number 4923. That when he bought the land, the seller planted a boundary in 1993 and the Defendant was present when this was done. That he started using the land in November, 1994, put a house thereon and has been living with his family on the land since then. That he cultivates maize and beans on the said parcel as well and no one has ever troubled him since he bought the same. He stated that he has been on the land for over 20 years and it is not true that a balance of KShs.3,000/= remains unpaid. He urged this Court to give him the land as he had obtained the same via adverse possession.

8. Upon cross-examination, **PW1** stated that the seller did not transfer the land to him because his ID card got misplaced or stolen. That he has approached the Respondent severally to transfer the land but he declined. **PW1** reiterated that he cleared the balance of the purchase price and that he does not owe the Respondent any monies. On re-examination, **PW1** stated that he had no balance to pay.

9. **PW2** was **LAWRENCE OKOTH**. He stated that he lives in Bugengi area and was a farmer. That the Defendant's father is Francis Euko Etoto and in July, 1983 he entered into a sale agreement for the sale of an acre of land KShs. 14,000/=. That a deposit of KShs. 4,000 was paid on execution and the next day 14/7/1982 KShs. 7,000/- was paid and that in August, KShs. 1,000/-. That Mzee Euko was paid the total amount before he died. **PW2** stated further that the other witnesses to the agreement are dead. That the one acre was demarcated and the buyer built a house on it. The purchaser upon payment of the purchase price he started using the land. He concluded by stating that he is a neighbour.

10. Upon examination, **PW2** stated that the last instalment paid was KShs.1,300. That there were documents to show the balance was paid. That a copy of the agreement showing KShs.3,000 was paid is in the court file. This marked the close of the Plaintiff's case.

11. The defence called **GEORGE OUMA EUKO** testified **DW1**. He stated that he is a pastor that hails from Bugengi village. That after the death of his parents he did succession and shared land to his siblings. He testified that he has never denied the Applicant land and he only wants the money he used for the succession (which was KShs.340,000/-) and the balance of the purchase price which was KShs.3,000. He confirmed that he has the title for the land and if the Applicant pays him all the expenses incurred he will hand him the title of the portion he is in occupation of i.e. Bukhayo/Bugengi/4923.

12. Upon cross-examination, **DW1** stated that he has no objection to transferring the title to the Plaintiff's name as long as he is paid the expenses. He stated that he has no receipts for the expenses he incurred. He confirmed that he was present when his father sold the land to the Plaintiff and he even oversaw the payment of KShs.11,000. He stated that he did not agree with the agreement dated 20th April, 1994 which insinuated that the balance was paid. **DW1** stated that he had no idea whether his father had died by 1994 even though the certificate of death stated that he died on the 24th of July, 2002. He concluded that the Plaintiff is living on the suit land.

13. **DW2** was **VINCENT ODUNGA EUKO**. He adopted his statement dated 11th August, 2021 as his evidence in chief wherein he stated that his father sold the Applicant 0.4Ha of the suit land sometime in July, 1993. That the Applicant only paid part of the agreed consideration leaving a balance of KShs.3,000 which has never been paid to date. That their father died before the balance was cleared and that their mother Agnes Apondi Euko took over the matter to no avail. That upon the death of their mother, they asked the Applicant for the balance and he told them to take a loan which he would repay but afterward declined to do so. That after succession they informed the Applicant to pay the balance to so that they can transfer the land to him but he refused.

14. That the consideration for the land at the time of sale in 1993 was KShs.11,000/- and the same is now KShs.4,000,000 and the balance of KShs.3,000 is equivalent to KShs.1,090,909. That if the costs of succession are added thereon, the value escalates to KShs.1,200,000 which is the amount they are claiming from the Applicant in order to transfer the land to him. That they have never evicted anyone from the land and all they want is for the balance to be paid to them as administrators of the land.

15. Upon cross-examination, **DW2** stated that he knows the Applicant and that his father sold him one acre of land in 1993 which acre was demarcated on the ground and a survey done. That the Applicant lives on the land and he built thereon immediately after the sale. That they were all present when the sale was done and he even received the first payment. **DW2** continued stating that the purchase price agreed was KShs.14,000-15,000. That he knows his father did not sign for the balance of the purchase price. He concluded by stating that his father died in 2001.

16. On re-examination **DW2** clarified that his father died in July, 2002. This marked the close of the Respondent.

17. The parties were then given 14 days to file their respective submissions but only the Applicant filed his submissions. He submitted that in 1993, July, 12th Francis Euko Eitoto offered to sell and The Plaintiff agreed to buy a portion of land measuring one acre out of L.R BUKHAYO/BUGENGI/2741 at an agreed consideration of KShs.14,000 which consideration was paid in four instalments of KShs.4,000/-, KShs.7,000/- and KShs.3,000. That the said portion was demarcated on the from and he took possession thereof fenced the same and built two permanent houses and three semi-permanent houses. That the land was consequently sub divided into two portions namely LR No. 4922 and 4923. He submitted on one issue for determination: whether he had acquired by suit land measuring one acre by way of adverse possession. The Plaintiff submitted that the Defendant had conceded that he had been staying on the land from 1993 to date and had even extensively developed the same.

18. The Plaintiff submitted further that the sale agreements he had produced as evidence confirmed that the entire consideration was paid hence the seller's agreement to subdivide the land. That the boundaries on the mutation forms was picked by the survivor. He concluded by stating that he had proved the essential elements of adverse possession.

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

a) *Whether the Applicant has proved his claim for adverse possession over the Suit Land;*

b) *Who bears the costs of this suit''*

20. A claimant for the land adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, CAP 22 Laws of Kenya. Justice Asike Makhandia J.A in Mtana Lewa vs Kahindi Ngala Mwangandi (2005) eKLR described adverse possession as below:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner.”

21. The Applicant’s assertions are that he bought an acre of the suit land from the Respondent’s father in 1993 for a consideration of KShs.14,000/-. The various agreements were produced as PEx 1a-d. He stated that it was on the basis of the last agreement dated 20th November, 1994 after he cleared the balance of KShs.1,300/= that seller, Francis applied for and obtained a consent to subdivide the land into two parcels. That the Applicant then inhabited the subdivided land and has lived thereon since 1993. PW2, DW1 and DW2 all confirmed that the Applicant has been living on the suit parcel since 1993.

22. DW1 stated that he had no objection to transferring the parcel of land to the Applicant on condition that he clears the balance of KShs.3,000/- and also pay KShs.340,000/- for the succession process. This evidence is however not substantiated as the Applicant produced several agreements which confirm that the purchase price was paid with the last instalment being paid on the 20th November, 1994 while the Respondent’s father was still alive. In the case of Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, the Court of Appeal held thus:

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant *qua* vendor. In the case of Public Trustee – v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated 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.”

23. The real question therefore is: has the Applicant being on the suit land, for more than twelve years, having peaceful, continuous and uninterrupted occupation of the said parcel with the knowledge of the proprietor. This was confirmed by the Respondent in his testimony. From 1993 to 2016 when the present suit was filed in Court, the Applicant had been on the suit land for 23 years. From the evidence adduced herein, the Respondent’s father died sometime in 2002 before effecting the transfer to the Applicant. The Respondent’s averments that there was a balance pending are time barred by section 4(1)(a) of the Limitations of Actions Act which provided that

‘The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(c) actions founded on contract;’

24. The Respondents cannot therefore claim any balance from the Applicant if any. After the period of limitation, the deceased’s title with regards to the portion automatically lapsed. The title was extinguished by dint of section 17 of the Limitation of Actions Act which provides thus:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

25. Neither the Respondent's father nor the Respondent attempted to evict the Applicant from the suit parcel or lodge a claim for the balance of the purchase price. In the case of **Daniel Kimani Ruchine vs. Swift Rutherford Co. Ltd & Another (1977)** eKLR Kneller J held that,

“The Plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecario* (no force, no secrecy, no evasion). So, the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession of occupation. The possession must be continuous. It must not be broken for any temporary purposes of by any endeavours to interrupt it or by any recurrent consideration.....”

26. In upshot of the foregoing evidence and analysis I am convinced that the Applicant has proved his case beyond the balance of probabilities that the possession of the Suit Land was open, actual, continuous and uninterrupted for twenty-three (23) years which information was confirmed by the Respondent.

27. I am of the considered opinion and I so hold that:

a) The Applicant's Originating Summons dated 29th of March, 2016 succeeds.

b) The Respondent execute transfer documents for the property known as L.R No. BUKHAYO/BUGENGI/4923 in favour of the Applicant within thirty days failure to which the Deputy Registrar shall execute the same to facilitate the registration of L.R No. BUKHAYO/BUGENGI/4923 measuring one(1) acre in the name of the Applicant;

c) An order of permanent injunction is hereby issued restraining the Respondent, his family members, agents, servants, employees and ALL persons claiming through them from interfering with the Applicant's use of L.R No. BUKHAYO/BUGENGI/4923; and

d) The costs of the suit are awarded to the Applicant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF APRIL, 2022.

A. OMOLLO

JUDGE



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