



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 2 OF 2005

KEREMENSIA BONARERI ONDIMU 1ST PLAINTIFF

NYAERA NGOGE 2ND PLAINTIFF

VERSUS

ONYIMBO NYABAYO AKUMA 1ST DEFENDANT

SAMWEL NYABAYO ONGONDI 2ND DEFENDANT

JUDGMENT

1. The defendants are the registered proprietors of all that parcel of land known as **LR No. Wanjare/Bogitaa/720** (hereinafter referred to as “**the suit property**”) measures 5.4hectares. The defendants were registered as the proprietors of the suit property on 4th August 1976 on first registration. The plaintiffs brought this suit by way of Originating Summons on 6th January 2005 seeking a declaration that the defendants’ right to recover the suit property is barred under the Limitations of Actions Act, Cap 22 Laws of Kenya and that they should be registered as the proprietors thereof. The Originating Summons was supported by affidavit sworn by the 1st plaintiff on her own behalf and on behalf of the 2nd plaintiff. The 1st plaintiff stated that, she is the widow of one, Ondimu Omwancha, deceased. She has occupied the suit property since 1966 when she was married to the deceased. She has a home on the suit property and also carries out subsistence farming thereon. She claimed that the defendants who have never occupied the suit property have been trying to evict her from the said property since the year 2002.

2. The Originating Summons was opposed by the defendants through a replying affidavit sworn by the 1st defendant on his own behalf and on behalf of the 2nd defendant on 22nd February 2005. The 1st defendant stated that they had a number of court cases with the spouses of the plaintiffs who are now deceased over the suit property before the plaintiffs instituted this suit which cases were all determined in their favour. He stated that the plaintiffs own parcels of land which are distinct and separate from the suit property namely, **LR No. Wanjare/Bogitaa/1344** (hereinafter referred to as “**Plot No. 1344**”) and **LR No. Wanjare/Bogitaa/1345** (hereinafter referred to as “**Plot No. 1345**”) and as such their contention that they have been in occupation of the suit property since the year 1966 cannot be true.

3. Prior to the filing of this suit, the defendants had filed two (2) civil suits in the lower court seeking the recovery of the suit property. The first suit was **Kisii CMCC No. 56 of 2003, Onyimbo Nyabayo Akuma and Samuel Nyabayo Ongondi –vs- Ondimo Omwancha and Ngogo Magoto** (hereinafter referred to as “**CMCC No. 56 of 2003**”). This suit was filed on 24th January 2003. Ondimu Omwancha, deceased who was the 1st defendant in this suit was the husband of the 1st plaintiff in the present suit while Ngogo Magoto, deceased who was the 2nd defendant was the husband of the 2nd plaintiff herein.

According to the evidence on record, Ondimu Omwancha died on 6th August 1989 while Ngoge Magoto died in the year 2003. In CMCC No. 56 of 2003, the defendants herein who were the plaintiffs in that suit sought an order for the eviction of Ondimu Omwancha and Ngoge Magoto from the suit property. In their plaint, the defendants herein averred that Ondimu Omwancha and Ngoge Magoto together with their servants and agents had entered onto the suit property without their consent on or about the year 1994, erected structures thereon and commenced cultivation. The defendants herein averred that Ondimu Omwancha and Ngoge Magoto had deprived them of the use and enjoyment of the suit property. Since the 1st defendant in the suit, Ondimu Omwancha, had died as at the time that suit was filed, the suit was defended by the 2nd defendant, Ngoge Magoto only. In his defence, Ngoge Magoto denied that he entered the suit property on or about the year 1994. He contended that he had occupied the suit property from the year 1930 and that the defendants herein had neither occupied nor used the suit property.

4. The defendants filed the second suit on 1st April 2003, namely, **Kisii CMCC No. 328 of 2003, Onyimbo Nyabayo Akuma and Samuel Nyabayo Ongondi –vs- Ngoge Magoto, Boera Ondimu and David Mwangi Ondimu** (hereinafter referred to as “**CMCC No. 328 of 2003**”). The 1st defendant in this second suit, Ngoge Magoto was sued as 2nd defendant in CMCC No. 56 of 2003. The 2nd defendant in the suit, Boera Ondimu, is said to be the same person as Keremensia Bonareri Ondimu who is the 1st plaintiff herein while David Mwangi Ondimu, the 3rd defendant is her son with Ondimu Omwancha who was the 1st defendant in CMCC No. 56 of 2003. The claim that was raised by the defendants herein against the defendants in this second suit is the same with the claim that the defendants had raised against Ondimu Omwancha and Ngoge Magoto in CMCC No. 56 of 2003. It is not clear from the record why the defendants herein decided to file this second suit while CMCC No. 56 of 2003 was pending. In this suit, the defendants herein claimed that in the year 1994, Ngoge Magoto, Boera Ondimu and David Mwangi Ondimu destroyed the physical features that marked the boundaries of Plot No.1344 and Plot No.1345, annexed the suit property and proceeded to occupy the same illegally. The defendants herein sought an order for the eviction of the said Ngoge Magoto, Boera Ondimu and David Mwangi Ondimu from the suit property. Ngoge Magoto, Boera Ondimu and David Mwangi Ondimu filed a joint statement of defence on 7th May 2003 denying the defendants’ claim in its entirety. They averred that they have occupied the suit property since the year 1930.

5. On 15th April 2010, CMCC No. 56 of 2003 and CMCC No. 328 of 2003 were transferred to this court by consent of the parties and consolidated with this suit. As I have stated above, Ondimu Omwancha died on 6th October 1989 before the filing of CMCC No. 56 of 2003 in which he was the 1st defendant. That means that the suit could not be maintained against him as no suit lies against a deceased person. Ngoge Magoto who was the 2nd defendant in CMCC No. 56 of 2003 died in the year 2003. There is no evidence that he was substituted in the suit by his legal representative as required by law. In the circumstances, the suit as against him abated in the year 2004. There is no evidence on record that the suit had been revived as at the time CMCC No.56 of 2003 was transferred to this court. It follows from the foregoing that, CMCC No. 56 of 2003 is no longer in existence. The suit abated one (1) year after the death of Ngoge Magoto in the year 2003. No relief can therefore be granted to any of the parties in CMCC No. 56 of 2003 in these proceedings. With respect to CMCC No. 328 of 2003, the same is not maintainable as against Ngoge Magoto who is the 1st defendant in the suit. As I have stated above, Ngoge Magoto died in the year 2003. In the absence of substitution, the suit as against him abated one year after his death. The suit is however maintainable as against the 2nd and 3rd defendants, Boera Ondimu and David Mwangi Ondimu.

6. In this judgment, I would be considering the plaintiff’s claim against the defendants in the Originating Summons in which they have sought to be registered as proprietors of the suit property by adverse possession and the defendants’ claim against the plaintiffs in CMCC No. 328 of 2003 in which the defendants have sought an order for the eviction of Boera Ondimu also known as Keremensia Bonareri Ondimu and David Mwangi Ondimu from the suit property. For ease of reference, I would in this judgment henceforth be referring to Keremensia Bonareri Ondimu, Nyaera Ngoge and David Mwangi Ondimu where the context so admits as plaintiffs and Onyimbo Nyabayo Akuma and Samuel Nyabayo Ongondi as defendants. I would also treat the Originating Summons by the plaintiffs as the main suit and

the defendants claim in CMCC No. 328 of 2003 as a counter-claim.

7. When the consolidated suit came up for hearing, the 1st plaintiff gave evidence and called three (3) witnesses who gave evidence on behalf of the plaintiffs. On the part of the defence, each of the defendants gave evidence. They however did not call any witness. The 1st plaintiff Keremensia Bonareri Ondimu (PW1) told the court that; she is the widow of Ondimu Omwancha, deceased to whom she was married in the year 1966. She stayed with the deceased on the suit property from the time she was married until he died and was buried on the suit property in the year 1989. She told the court that the suit property belongs to her deceased husband. She stated that the defendants are not known to her and she is not even aware that they are the registered proprietors of the suit property. She told the court that the defendants have never been to the suit property and have never taken any legal action against her in relation thereto. With regard to CMCC No. 56 of 2003 and CMCC No. 328 of 2003, she told the court that her husband was not alive in the year 2003 when the two suits were filed. She denied that she is a trespasser on the suit property and urged the court to order that she remains in possession thereof as she does not have any other parcel of land. She produced as exhibits, a copy of the death certificate dated 28th July 2004 for Ondimu Omwancha and a copy of the register for the suit property. In cross-examination, she stated that when she was married, she found her deceased husband occupying the suit property and that she was not aware that her deceased husband owned any other parcel of land. She reiterated that she was not aware of CMCC No. 56 of 2003 and 328 of 2003. She denied that they had entered onto the suit property by force in 1994 and reiterated that she has been occupying the suit property since she was married.

8. The plaintiffs' next witness was Bernard Maiko (PW2), Chief of Riana Location. He told the court that the plaintiffs are known to him and that they reside within his location on LR No. Wanjare/Bogitaa/720 ("the suit property"). He told the court that the defendants are not known to him and that he has never arbitrated on any dispute concerning the suit property. He stated that the plaintiffs are widows, the 1st plaintiff's husband having died in the year 1989 and the 2nd plaintiff's husband in the year 2003. In cross-examination, PW2 stated that he did not know the registered proprietors of the suit property. He stated further that the plaintiffs have been in occupation of the suit property since they were married. The witness who followed was John Onderi (PW3). He told the court that he is the plaintiffs' neighbour. He owns Plot No. 740 while the plaintiffs own Plot No. 720 ("the suit property"). He stated that the plaintiffs have occupied the suit property for a very long time and that their husbands were buried on the property. He told the court that he did not know the defendants as they have never stayed on the suit property.

9. The plaintiffs' last witness was Andrew Magori Okong'o (PW4). He also told the court that he is a neighbour to the plaintiffs. He owns Plot No. 736 while the plaintiffs occupy Plot No. 720 ("the suit property"). He told the court that the defendants are unknown to him and that apart from the plaintiffs and their families, no one else is in occupation of the suit property. He stated that he was not aware of any dispute that had arisen over the ownership of the suit property. In cross-examination, he told the court that he found the plaintiffs in occupation of the suit property when he was born in 1958.

10. For the defendants, the first to give evidence was the 1st defendant, Onyimbo Nyabayo Akuma (DW1). He told the court that he was staying at Kilgoris where he had been for the last 15 years while the 2nd defendant was staying at a place known as Nyamasege, Machoge Chache. He stated that his home is at Wanjare, Bogitaa and that the plaintiffs are his neighbours. He told the court that the plaintiffs have dispossessed them of LR No. Wanjare/Bogitaa/720 ("the suit property") which is owned by him jointly with the 2nd defendant who is his younger brother. He stated that the suit property shares a common boundary with LR No. Wanjare/Bogitaa/1344 ("Plot No. 1344") which is registered in the name of Ondimu Omwancha, deceased and LR No. Wanjare/Bogitaa/1345 ("Plot No. 1345") which is registered in the name of Ngoge Magoto, deceased. He told the court that he was born in the year 1944 and left Wanjare Bogitaa around 1952 when he was about 10 years old after the death of his parents. His father died in 1947 while his mother died in the year 1952. After the death of their parents, they were taken to the home of their aunt in Bobasi where they stayed until the year 1963. In 1963, they moved to Bomachoge to stay with their sister who got married in that year. They stayed with their sister until 1971. In 1974, their neighbour at Wanjare Bogitaa informed them that adjudication and demarcation of land was taking place at Wanjare Bogitaa. They went to Wanjare Bogitaa and got registered as joint

proprietors of the suit property. He told the court that they had a home on the suit property where their parents were buried which home was demolished by the plaintiffs.

11. DW1 told the court that in 1966, he attempted to put up a house on the suit property but did not complete the construction of the same because he became sick. He stated that the plaintiffs destroyed the boundary of the suit property, entered therein and have remained in occupation to date. DW1 stated that they (the defendants) had filed CMCC No. 56 of 2003 and CMCC No. 328 of 2003. They abandoned CMCC No. 56 of 2003 and filed CMCC No. 328 of 2003 after being advised that the pleadings in CMCC No. 56 of 2003 were not in order. They however did not pursue CMCC No. 328 of 2003 to conclusion because of the death of their advocate. They filed the two cases when the plaintiffs herein prevented them from putting up a house on the suit property in the year 2003. He urged the court to dismiss the plaintiffs' suit and proceed to grant the reliefs sought in CMCC No. 328 of 2003. He produced in evidence as exhibits, copies of; land certificate dated 17th February 1981 for the suit property, certificates of official search for LR Nos. Wanjare/Bogitaa/ 720, 1344, and 1345 and Registry Index Map for Wanjare/Bogitaa registration section.

12. The 2nd defendant, Samuel Nyabayo Ongondi (DW2) told the court in his evidence that he wished to adopt the evidence of DW1 who is his elder brother. After the close of the defendants' case, the advocates for the parties agreed to make their closing submissions in writing. The plaintiffs' advocates filed their submissions on 17th December 2014 while the defendants did so on 18th December 2014. I have considered the plaintiffs claim against the defendants and the defendants' counter-claim against the plaintiffs. I have also considered the evidence that was tendered by both parties and the closing submissions by the parties' advocates. The parties did not agree on issues for determination by the court. Upon consideration of the pleadings and the evidence that was adduced by the parties and their witnesses, the following in my view are the only issues that arise for determination in the consolidated suit before me:-

- i. Whether the plaintiffs have acquired title to the suit property by adverse possession and as such are entitled to be registered as proprietors of the same?
- ii. Whether the plaintiffs are trespassers on the suit property and as such should be ordered to give vacant possession of the same to the defendants?

13. Issue No. I;

In the case of **Wanje –vs- Saikwa (No. 2) [1984] KLR 284**, it was held that;

- a. In order to acquire by the statute of limitations a 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 having discontinued his possession of it.
- b. What constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

In the case of **Githu –vs- Ndeete [1984] KLR 776** it was held among others that: **“Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”**

14. It is on the foregoing principles that the plaintiffs' claim herein is to be considered. The 1st plaintiff gave evidence that she is the widow of Ondimu Omwancha, deceased (hereinafter referred to only as **“Ondimu”**). She was married to Ondimu in the year 1966. When she got married, she found Ondimu occupying the suit property. She remained in occupation of the suit property with Ondimu until his death in the year 1989. After the death of Ondimu, she continued occupying the suit property until the year 2002 when the defendants made attempts to evict her. The 1st plaintiff stated that she does not know the defendants and did not even know that they are the registered proprietors of the suit property. The 1st

defendant stated that the defendants have never occupied the suit property. The 2nd plaintiff did not give evidence and the 1st plaintiff's evidence did not touch on her claim to the suit property apart from stating that; **"I know Ngoge Mageto. He is my neighbour"**. The 1st plaintiff maintained in cross-examination that she started occupying the suit property in 1966 when she was married and she has remained in occupation to date. She denied that she entered the suit property in 1994 and retorted that in 1994 her husband Ondimu had already died and as such there is no way she could have entered the suit property in that year.

15. The 1st plaintiff's evidence was corroborated by the evidence of PW2, PW3 and PW4. PW2 testified that the plaintiffs are known to him and that they reside on the suit property. PW2 stated in cross-examination that the plaintiffs have occupied the suit property since they were married by their deceased husbands. PW3 also testified that the plaintiffs are known to him being his neighbours. He confirmed that the plaintiffs have occupied the suit property for a very long time. PW4 is also a neighbour of the plaintiffs. He also testified that the plaintiffs are in occupation of the suit property and that apart from the plaintiffs, no one else has occupied the suit property. The plaintiff, PW2, PW3 and PW4 were unanimous that the defendants are not known in the area and have not occupied the suit property at any time. The 1st plaintiff's evidence that she has occupied the suit property from the year 1966 when she was married to Ondimu was not challenged by the defendants. In their replying affidavit to the Originating Summons, the defendants denied the 1st plaintiff's contention that she has occupied the suit property since 1966. They did not however state as to when according to them the plaintiffs had entered and occupied the suit property. In their testimonies, they did not also state when the plaintiffs entered the suit property. They only stated that they went to the suit property in the year 2002 to construct a house thereon and were prevented from doing so by the plaintiffs. The 1st defendant who testified that he had visited the suit property from time to time since 1966 did not tell the court when he first saw the plaintiffs on the suit property. The 1st plaintiff testified that her deceased husband, Ondimu who died in the year 1989 was buried on the suit property. This evidence was corroborated by the evidence of PW2 and PW3. The defendants did not challenge this evidence. If Ondimu was buried on the suit property in the year 1989 then, the 1st plaintiff must have entered onto the suit property in the year 1989 or earlier. The defendants' contention in CMCC No. 56 of 2003 and CMCC No. 328 of 2003 that the plaintiffs entered the suit property in the year 1994 cannot therefore be correct. I find the evidence in support of the 1st plaintiff's contention that she entered onto the suit property in the year 1966 irresistible.

16. As far as the 2nd plaintiff is concerned, there is no evidence on record as to when she entered the suit property. Apart from the claim by PW2 in cross-examination that both plaintiffs have occupied the suit property since they were married, there is no other hint as to when the 2nd plaintiff may have entered the suit property. There is no evidence on record as to when the 2nd defendant was married to Ngoge Magoto. The court is unable to determine when she entered the suit property and for how long she had been in occupation of the same as at the time when CMCC No. 56 of 2003, CMCC No. 328 of 2003 and this suit were filed. If the 1st plaintiff entered the suit property in 1966 then she was on the suit property when the same was registered in the name of the defendants on 4th August 1976. From 4th August 1976 when the suit property was registered in the name of the defendants upto 24th January 2003 when CMCC No. 56 of 2003 was filed is a span of over 26 years. There is no evidence that the 1st plaintiff's occupation of the suit property was interrupted at any time during this period of 26 years. It follows that as at 6th January 2005 when the plaintiffs brought the Originating Summons herein, the 1st plaintiff had occupied the suit property for over 28 years which occupation was only interrupted as I have stated above by the filing of CMCC No. 56 of 2003. The filing of CMCC No. 56 of 2003 could actually not stop time from running as far as the 1st plaintiff is concerned. As I have stated at the beginning of this judgment, CMCC No. 56 of 2003 was instituted against Ondimu Omwancha and Ngoge Magoto after the death of Ondimu Omwancha who was the husband of the 1st plaintiff. The suit was therefore anullity for all intents and purposes as against Ondimu Omwancha. It cannot therefore be considered as a suit that was envisaged in **Githu –vs- Ndeete** (Supra). Even if it is assumed that the suit was valid as against Ondimu Omwancha, the same was filed after the expiry of 12 years from the time the 1st plaintiff herein and Ondimu Omwancha took possession of the suit property. The limitation period had therefore caught up

with the defendants. The limitation period had ran out and could not therefore be stopped.

17. From what I have stated above, I am satisfied that the 1st plaintiff has proved that she has acquired title to that portion of the suit property which is under her occupation by adverse possession. She has established that she has occupied a portion of the suit property peacefully for uninterrupted period of over 12 years as at the time she brought the Originating Summons herein. As far as the 2nd plaintiff's claim to a portion of the suit property under her occupation is concerned, I am not satisfied on the evidence before me that the 2nd plaintiff has occupied the said portion of the suit property for 12 years as at the time 2nd plaintiff joined the 1st plaintiff in bringing the Originating Summons application herein. It is my finding therefore that the 2nd plaintiff has not established that she has acquired title to the portion of the suit property in her occupation by adverse possession. The 1st plaintiff is therefore entitled to be registered as proprietor of the portion of the suit property in her occupation while the 2nd defendant is not entitled to such relief.

18. Issue No. II;

As I have held above, the 1st plaintiff has acquired title to a portion of the suit property in her occupation by adverse possession. The 1st plaintiff is therefore not a trespasser on the suit property. As far as the 2nd plaintiff is concerned, it is not disputed that she is in occupation of a portion of the suit property. It is also not disputed that the suit property is registered in the name of the defendants as the proprietors thereof. Having failed to establish her adverse possession claim over the suit property, the 2nd plaintiff has not given any justifiable cause or lawful excuse for her occupation of the suit property. In the absence of any such lawful cause or justification, the 2nd plaintiff must be taken to be occupying the suit property unlawfully and as such she is a trespasser. Having found that the 2nd plaintiff is a trespasser on the suit property, the defendants are entitled to possession of the portion of the suit property in her occupation.

19. Conclusion;

In conclusion, I hereby enter judgment in the three (3) consolidated cases as follows in the order in which they were filed;

a. Kisii CMCC No. 56 of 2003, Onyimbo Nyabayo Akuma & Another –vs- Ondimu Omwancha & Ngoge Magoto.

The 1st defendant in this case was sued when he was deceased. The suit against him was a non-starter and the same is hereby struck out. As against the 2nd defendant, the evidence before me shows that he died in the year 2003. There is no evidence that he was substituted by his legal representative as required by law before this suit was consolidated with CMCC No. 328 of 2003 and Kisii HCCC No. 2 of 2005 (O.S) on 15th April 2010. In the absence of substitution, this suit abated as against the 2nd defendant. In the circumstances, I hereby declare the plaintiff's claim as against the 2nd defendant in this suit as having abated.

b. Kisii CMCC No. 328 of 2003, Onyimbo NyabayoA kuma & Another –vs- Ngoge Magoto, Boera Ondimu and David Mwangi Ondimu.

As I have stated above, the 1st defendant in this suit, Ngoge Magoto died in the year 2003 and was not substituted with his legal representative. This suit has therefore abated as against the 1st defendant and I proceed to so hold. The 2nd defendant in this suit is also known Keremensia Bonareri Ondimu. The plaintiffs in this suit had contended that she is a trespasser on the suit property and as such should be compelled to yield vacant possession thereof. As I have held above, the 2nd defendant in this suit is not a trespasser on the suit property. She has acquired title to the portion of the suit property in her possession by adverse possession. In the circumstances, the plaintiffs are not entitled to the reliefs sought against her. The plaintiffs' claim against the 2nd defendant in this suit is dismissed accordingly. According to the

material on record, the 3rd defendant in this suit is the son of the 2nd defendant. The onus was upon the plaintiffs to prove that the 3rd defendant is a trespasser on the suit property. The plaintiffs did not prove that fact. Even the fact that the 3rd defendant is in occupation of any portion of the suit property was not proved. I therefore find the plaintiff's claim as against the 3rd defendant as not having been proved and the same is similarly dismissed.

c. Kisii HCCC No. 2 of 2005 (O.S), Keremensia Bonareri Ondimu and Nyaera Ngoge –vs- Onyimbo Nyabayo and Samuel Nyabayo Ongondi.

As stated above, the 1st plaintiff in this suit has proved her case against the defendants while the 2nd plaintiff's case has not been proved. I therefore dismiss the 2nd plaintiff's claim against the defendants and enter judgment for the 1st plaintiff against the defendants jointly and severally on the following terms;

- i. It is hereby declared that the defendants right to recover a portion of all that parcel of land known as LR No. Wanjare/Bogitaa/720 which is occupied by the 1st plaintiff and members of her family is barred under the Limitations of Actions Act, Cap 22 Laws of Kenya.
- ii. LR No. Wanjare/Bogitaa/720 shall be surveyed by a Government Surveyor at the 1st plaintiff's cost and shall be divided into two (2) portions; the portion occupied by the 1st plaintiff and members of her family shall be registered in the name of the 1st plaintiff while the portion which is occupied by the 2nd plaintiff shall remain registered in the joint names of the defendants. The deputy registrar of this court shall be at liberty to execute any document that may be necessary for the enforcement of this order in the event that any of the parties herein fail to do so.
- iii. Each party shall bear its own cost of the three (3) suits.

Delivered, signed and dated at KISII this 13th day of March, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Nyagwencha for the 1st and 2nd plaintiffs

Mr. Ochwang'i for Sagwe for the 1st and 2nd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE