



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.234 OF 2010

JOEL RACHUONYO OWUOR PLAINTIFF

VERSUS

SAMWEL ADONGO OMWAYI 1ST DEFENDANT

ALFONCE OKINYI ADONGO 2ND DEFENDANT

JUDGMENT

1. At all material times the parcel of land known as LR No. North Sakwa/Kadera Lwala/54 (hereinafter referred to as “Plot No. 54”) was registered in the name of Grado Omwayi Arongo, deceased (hereinafter referred to only as “the deceased”). Sometimes in the year 2002, the plaintiff herein filed an application by way of Originating Summons against the legal representatives of the deceased, Vincent Jonyo Omwayi and Samwel Adongo Omwayi (the 1st defendant herein) in Kisii High Court, Civil Case No. 40 of 2002, Joel Rachuonyo Owuor –vs- Vincent Jonyo Omwayi and Samwel Adongo Omwayi (sued as legal representatives of Grado Omwayi Arongo (deceased), seeking a declaration that their right to recover a portion of Plot No. 54 measuring 2 acres is barred under the Limitation of Actions Act and their title thereto extinguished on the ground that the plaintiff had been in continuous adverse possession of the said portion of Plot No. 84 for over 12 years. The plaintiff sought a further order that the said portion of Plot No. 54 measuring 2 acres be registered in his name as the proprietor thereof. Vincent Jonyo Omwayi and Samwel Adongo Omwayi (hereinafter jointly referred to as “the legal representatives of the deceased”) did not defend the Originating Summons application (hereinafter referred to only as “the previous suit”).
2. The previous suit was heard by P. K. K. A. Birech Commissioner of Assize who delivered a judgment on 5th July 2002 in favour of the plaintiff. The court made a declaration that the right of the legal representatives of the deceased to recover a portion measuring 2 acres of Plot No. 54 was barred under the Limitation of Actions Act and that their right over the same had been extinguished on account of the plaintiff’s adverse possession thereof for over 12 years. The court made a further order that Plot No. 54 be sub-divided and a portion thereof measuring 2 acres that was in the possession of the plaintiff be transferred to him. The court gave the executive officer of the court the liberty to execute all documents that were necessary to transfer the said portion of Plot No. 54 to the plaintiff in the event that the legal representatives of the deceased failed to do so. The court also made an order restraining the legal representatives of the deceased from interfering with the plaintiff’s peaceful occupation of the said portion of Plot No. 54.
3. Following the decree that was issued pursuant to the said judgment, Plot No. 54 was sub-divided on or about 5th October, 2004 and a portion thereof measuring 0.80ha (approximately 2 acres) registered in the name of the plaintiff as LR No. North Sakwa/Kadera Lwala/1551 (“hereinafter referred to as “the suit property”). The plaintiff was thereafter issued with a title deed for the suit

- property on the same date.
4. The 1st defendant herein as I have stated above is one of the legal representatives of the deceased while the 2nd defendant is his son. The plaintiff brought this suit against the defendants on 24th August 2010 claiming that on or about 3rd August 2010 the defendants without any lawful cause entered the suit property and ploughed the same using a tractor with the intention of planting sugarcane thereon. The plaintiff stated that as a result of the defendant's said acts of trespass, the plaintiff had been deprived of the use and enjoyment of the suit property and had thereby suffered loss and damage. The plaintiff sought judgment against the defendants for; a declaration that he is the registered and/or lawful owner of the suit property, a permanent injunction to restrain the defendants from in any manner whatsoever dealing with the suit property and general damages for trespass.
 5. The defendants filed a joint statement of defence on 13th September 2010 in which they denied the plaintiff's claim in its entirety. The defendants averred that the plaintiff acquired the title for the suit property un-procedurally and as such the said title is illegal, null and void. The defendants averred further that the plaintiff has not occupied the suit property or any part thereof since the year 2001 and that it is the defendants who are in occupation of the same. The defendants averred further that the reliefs sought by the plaintiff are not obtainable and that the plaintiff's suit is incompetent and bad in law.
 6. This suit came up for hearing before me on 28th May 2014 and 11th December 2014 when the plaintiff and the 1st defendant gave evidence and closed their respective cases without calling any witness. In his evidence, the plaintiff told the court that he is the registered owner of the suit property that he had purchased the same from the deceased in the year 1977. He stated that he took possession of the suit property immediately upon purchase as aforesaid and commenced sugarcane cultivation thereon. He remained in possession until 3rd August 2010 when the defendants entered thereon and started ploughing the same using a tractor contending that he had only leased the said property from the deceased and had not purchased the same. The defendant thereafter proceeded to plant maize and sugarcane on the suit property.
 7. The plaintiff stated that he had earlier on brought the previous suit against among others, the 1st defendant in which suit, judgment was made in his favour. The plaintiff stated that the defendants have continued to occupy the suit property even after he had obtained a temporary injunction from this court restraining the defendants from doing so. The plaintiff stated that he has been unable to occupy and use the suit property due to the defendants' aforesaid acts of trespass thereon. He denied that he acquired title to the suit property illegally. He produced in evidence as exhibits; a copy of the judgment in the previous case (P.Exh. 1), a copy of the decree that was issued in the said case (P.Exh.2), a copy of the title deed for the suit property (P.Exh.3) and a copy of a certificate of official search on the title of the suit (P.Exh.4)
 8. In his evidence, the 1st defendant stated that he is in occupation of Plot No. 54 that he inherited from the deceased, Grado Omwayi Adongo who was his father and who died in March, 1999. He stated that the deceased leased to the plaintiff a portion of Plot No. 54 in the year 1977 for a period of 5 years at a consideration of kshs. 1800/= . The plaintiff was to use the said portion of land for planting sugarcane. He stated that Vincent Jonyo Omwayi who was one of the defendants in the previous suit is his brother and that the 2nd defendant herein is his son. The defendant denied that the deceased sold to the plaintiff a portion of Plot No. 54. He told the court that he was not aware that Plot No. 54 had been sub-divided into three portions namely, Plot No. 1550, Plot No. 1551 ("the suit property") and Plot No. 1552. He denied any involvement in the said sub-division. The 1st defendant also denied any knowledge of how the plaintiff acquired the suit property. He maintained that Plot No. 54 has not been sub-divided and denied that he has trespassed on the suit property the location of which he told the court that he is not familiar with. The 1st defendant admitted that there was a previous case involving him and the plaintiff in which judgment was given against him. He stated that he engaged an advocate to appear for him in the matter but he failed to do so as a result of which judgment was entered against him without him having participated in the case.
 9. After the close of the defendants' case the advocates for the parties agreed to make closing submissions in writing. The written submissions were duly filed by both parties and the same are

on record. I have considered the pleadings on record, the evidence tendered by both parties and the closing submissions by the parties' respective advocates. The parties did not agree on the issues for determination by the court. From my analysis of the pleadings and the evidence on record, I am of the view that the following are the issues that arise for determination in this suit:-

- i. Whether the plaintiff acquired the suit property lawfully?
- ii. Whether the defendants have trespassed on the suit property?
- iii. Whether the plaintiff is entitled to the reliefs sought?

10. The first issue;

The plaintiff's case is that he purchased a portion of Plot No. 54 measuring 2 acres from the 1st defendant's father, one Grado Omwayi Adongo, deceased in the year 1977. The deceased gave him possession immediately but did not transfer the property to him. The deceased died in March, 1999 before transferring the said property to him. In the year 2002 he filed a suit against the deceased's legal representatives claiming the said portion of Plot No. 54 by adverse possession having occupied the same for over 12 years. The suit for adverse possession was not defended and the court in a judgment that was delivered on 5th July 2002 declared that he had acquired the said portion of Plot No. 54 by adverse possession. Plot No. 54 was subsequently sub-divided and a portion thereof measuring 2 acres which comprised of the suit property was registered in his name as the proprietor thereof. He was thereafter issued with a title deed. He produced in court a copy of the judgment and the decree that was issued in the previous case. He also produced in evidence a copy of the title deed that was issued to him in respect of the suit property and a certificate of official search on the register for the said property that shows that the same is registered in his name. The legal representatives of the deceased did not seek to set aside or vary the judgment and decree that was issued in the previous case. The same therefore remains valid and binding upon the legal representatives of the deceased. The suit property was acquired by the plaintiff through the aforesaid court decree. This court has no power in these proceedings to bring into question the said decree the issuance and the terms of which are not in contention.

11. Section 25 (1) of the Land Registration Act, 2012 provides that the rights of a proprietor of land whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in the said Act. Section 80 (1) of the said Act gives the court the power to cancel or amend any registration if it is satisfied that the same was obtained, made or omitted by fraud or mistake. The defendants have contended that the plaintiff had acquired title to the suit property illegally. The plaintiff having placed evidence before the court showing that he acquired title to the suit property through a lawful court order, the onus was upon the defendant to prove their allegation that the acquisition of the suit property by the plaintiff was tainted by illegality. Section 107 of the Evidence Act, Cap 80 Laws of Kenya provides that whoever wants the court to make judgment in his favour based on the existence of certain facts has to prove that those facts exist. The defendants placed no evidence before the court in proof of their allegation that the plaintiff acquired the suit property unlawfully. The defendants led evidence that the deceased had only leased the suit property to the plaintiff and that at no time had he sold the same to the plaintiff.

12. As I have stated above, the suit property was not acquired by the plaintiff pursuant to an agreement for sale which the defendants have contested. The plaintiff acquired the suit property by adverse possession through a court decree. The defendants' argument that the deceased did not sell the suit property to the plaintiff is therefore irrelevant. The defendants have also contended that they were not involved in the sub-division of Plot No. 54. Again, the said sub-division was carried out pursuant to a court decree that has not been varied or set aside. Whether or not the defendants participated in the said sub-division is therefore inconsequential and has no effect on the validity of the title of the suit property. Due to the foregoing, I am satisfied that the plaintiff acquired title to the suit property lawfully.

13. The second issue;-

I am satisfied that the plaintiff has established his ownership of the suit property. The plaintiff has

contended that he was in occupation of the suit property from 1977 until 3rd August 2010 when the defendants entered thereon without his permission and started ploughing the same using a tractor. Trespass has been defined as any unjustifiable intrusion by one person on the land in the possession of another. The defendants have contended that they are in occupation of Plot No. 54 and that the suit property does not exist. On the evidence before me, Plot No. 54 does not exist. The same was sub-divided pursuant to a court order and gave rise to among others the suit property. It cannot therefore be true that the defendants are occupying plot No. 54. The defendants denied that they had trespassed on the suit property which they claimed is non-existent. In cross examination, the 1st defendant stated that;-

“It is not true that I entered the suit property with a tractor on 8th March 2010. It is the community who have stopped the plaintiff from cultivating the suit property. The community is very bitter about the plaintiff’s attempt to grab the suit property.”

14. This statement leaves no doubt that the defendants are aware of the existence of the suit property and its location. The defendants are also aware that the plaintiff has been prevented from entering the suit property. I am unable to see how the members of the public would stop the plaintiff from entering the suit property. I find the 1st defendant’s evidence inconsistent and as such unreliable. I am inclined to accept the evidence by the plaintiff that the defendants entered the suit property, ploughed the same, planted sugarcane and maize and have remained in occupation to date. The 1st defendant who had claimed that the portion of Plot No. 54 which is now comprised in the suit property was leased to the plaintiff, cannot be telling the court the truth when he claims that he is not aware of the location of the suit property. If the 1st defendant can lie on this non-contentious issue, I see no reason why they cannot lie on a more fundamental issue namely, whether or not they entered the suit property and commenced ploughing and planting of crops thereon. I find the plaintiff’s evidence on this issue consistent and worthy of belief. I am therefore persuaded that the defendants entered the suit property in the year 2010 and have occupied the same to date. The defendants have not justified their entry and occupation of the suit property. Their occupation is therefore without any lawful cause. This makes them trespassers on the suit property.

15. The third issue;

In view of the findings that I have arrived at hereinabove, the plaintiff is entitled to all the reliefs set out in the plaint save for general damages for trespass which has not been proved. Damages whether special or general is compensatory. The same is not awardable as a matter of course. The claimant has to lay a basis for the same and must place before court material on which the court can assess such damages. In his evidence in chief the plaintiff simply told the court that;-

“I am also seeking general damages. I have been unable to use the suit property for growing sugarcane as I used to do.”

The plaintiff did not place any evidence that he used to grow sugarcane on the suit property. He also tendered no evidence regarding the yield and income that he used to realize from the same. I therefore have no basis on which I can assess general damages payable to the plaintiff for the defendants’ acts of trespass.

16. Conclusion;-

In conclusion, I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (i) and (ii) of the plaint dated 24th August 2010. To bring finality to the dispute herein, I hereby make a further order that the County Land Registrar, Migori County with the assistance of the County Land Surveyor shall visit LR Nos. North Sakwa/Kadera Lwala/1550, 1551 and 1552 and shall identify and mark their respective boundaries. The cost of the exercise shall be met by the plaintiff. The 1st defendant shall pay the costs of this suit to the plaintiff.

Delivered, Dated and Signed at Kisii this 27th day of August, 2015.

S.OKONG'O

JUDGE

In the presence of;

Mr. Ochwang'i for the plaintiff

Mr. Abobo h/b for Oyoo for the defendant

Mr. Omwoyo Court Assistant

S.OKONG'O

JUDGE