



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Case 236 of 2002

ISDORA OPIYO YOGOAPPLICANT

VERSUS

ESTHER A. NGICHORESPONDENT

J U D G E M E N T

The applicant first moved the court by way of an originating summons dated 18th July, 2002. the same was thereafter amended three times. The relevant application now is the further amended originating summons dated 3rd June 2009. In the same the applicant seeks for a declaration that land parcel No. **KAGAN/KOMENYA/457** belongs to the plaintiff and that parcel No. **KAGAN/KOMENYA/458** should only have included the respondent's homestead, further the applicant seeks for a declaration that the lower court had no power to interfere with the land committee's finding and for the Deputy Registrar to execute necessary documents of transfer in the event the defendant fails to do so voluntarily.

The application is based on the grounds that the applicant and her family have lived in the land subject matter for over 45 years, and she therefore contends that she has acquired the same through adverse possession; that the respondent is leaving her plot No.458 and invading the applicants; the respondent is capricious and likely to commit further acts of trespass further the respondent has committed acts of fraud and trickery.

The respondent objected to the originating summons by a replying affidavit dated 18th February, 2002. Although the originating summons was amended severally no other affidavit was filed in response to the said amendments to the originating summons. The gist of the opposition is that the parties have had the dispute go through the land adjudication committee at Komenya land Case **No.10**, Komenya Arbitration Board Case No.111; Land Adjudication Officer, and the minister for Land in **Appeal Case No.113 of 1993** where the applicant's case was dismissed and no further appeal preferred; that the applicant also filed **HCCC No.328 of 1998** in Kisii that the case is an abuse of court process, is misconceived, and misplaced. The urged for dismissal of the same.

Directions were given on the 13th of October, 2010 and parties were allowed to adduce **viva voce** evidence at the hearing. The applicant called 2 witnesses including herself. The defendant was the sole witness for his case.

On the 24th of April, 2007 the counsel for the applicant filed issues for determination as follows:-

1. **Can this suit be deemed res judicate given that the court has given judgment on this land dispute in the part in HCCC No.236 of 2002?**
2. **Can the plaintiff be regarded to be the adverse possessor of this piece of land given that she stayed, used, cultivated and developed openly, the suit land since 1938 to date a period of 69 years?**
3. **Is the restriction on usage of the suit land by the land registrar as against the plaintiff tantamount, to deregistration of plaintiff's title as enumerated in searches issued after 1996 by the Ministry of lands?**
4. **If indeed the plaintiff is an adverse possessor of the suit land can the defendants be ordered to transfer Kagan/Komenya/257 and 457 to the plaintiff.**
5. **Is the process used by the defendant in obtaining title Kagan/Komenya/257 and 457 lawful, procedural and benefit of any whiff of fraud and or trickery?**
6. **If the answer to 5 above is positive then can the court order the defendant to re-transfer the title to these pieces of land back to the plaintiff?**
7. **For how long should a suit be allowed to keep being heard by various courts before its deemed finally determined?**

The plaintiff's submissions were filed in court on the 22nd of March 2011 whereas the defendant's was file don the 10th of March, 2011.

The plaintiff's submission may be summarized as follows: That the plaintiff is the rightful owner of parcel **Kagan/Komenya/457** adjudication Section Homa-Bay whereas the defendant's land parcel is **458**. The parties had a case **No.19** of 1964 where the court demarcated the land boundaries. On appeal in **Appeal No.71 of 1996** the district court gave boundary lines rising from North-East to South-West. Further that during the adjudication land parcel **No.458** measuring 6.19 was registered in the names of the defendant and land parcel **No.457** measuring 4.9 hectares in the names of the plaintiff and Marilius Orodo Muga however at the moment both parcels are in the names of the defendant.

It was submitted further that the court may consider whether the applicant is an adverse possessor, and whether there was a mistake in the implementation of the court order of 1971 and if so whether the court has jurisdiction to do rectification.

On the part of the defendant the submissions may be summarized as follows: the husbands to the parties herein had a dispute in Homa-bay Township African Court Land case **No.19** of **1964** with an appeal being preferred in District Magistrate's Court **Civil Appeal No.E.A. 71 of 1964**; that during land adjudication the applicant lodged objection case No.10 before the Komenya Adjudication Committee which committee gave an award to the defendant on 13/3/1984; that applicant appealed to the Komenya Arbitration Board Case **No.11** and on 15/3/1986 which appeal was allowed; that the respondent being aggrieved appealed to the land adjudication officer Komenya adjudication section vide objection **No.34** and the land was awarded to the respondent on 23rd April 1991, further that the applicant being dissatisfied appealed to the Minister, which appeal was dismissed on 24th July 1998 in addition the applicant had filed suit **No.328 of 1998** at the Kisii High Court the same was later withdrawn; that according to the adjudication register the respondent was registered as proprietor of the land subject matter on 21/5/1985; and an official search produced as evidence show that the respondent was registered as proprietor on 3/1/1996.

Further it was submitted on behalf of the respondent that the suit is technically defective as a certified extract of title in question was not annexed to the application; and that the computation of time for purposes of determining whether the applicant is in adverse possession runs from 3/1/1996.

I have considered the pleadings, evidence and submissions by the parties. In my view the issues for

determination are as follows:

- 1. Whether the application before court is proper in view of the land cases and objection arising from the adjudication process and the subsequent appeals?**
- 2. Whether or not the applicant can claim to be an adverse possessor?**
- 3. Whether or not the court can make declarations as sort?**
- 4. Who pays the costs of this suit?**

From the evidence before court it is clear that the dispute on the land subject matter started in 1964 initially between the husbands of the parties now before court. The matter was first dealt with by the African Court in 1964 with an appeal in the District Magistrate's Court also in the same year, as a review in the Court of Review in Nairobi.

The matter resurfaced again during the adjudication process, the objection went for appeal up to the Minister on appeal where the current applicant's appeal was dismissed on 24th of July, 1998. It is noteworthy that no appeal was preferred against the decision by the Minister aforementioned.

I will summarise the cases and/or adjudication in various forums as follows:

- 1. Homa-Bay Township African Court Simon Yogo versus Ngicho Okweny Land case No.19 of 1964 –the court gave the land to the plaintiff. The defendant was ordered to remove his home from the portions.**

- 2. District Magistrate Appeal No.71/64 Ngicho Okweny**

Versus

Simon Yogo

Appeal allowed.

Appellant was to retain the homestead.

The fence form the North to South to form the boundary.

- 3. Court of Review Case No.64 of 1964**

Simon Yogo Muga

Versus

Ngicho Okweny

Review declined. Boundaries demarcated by the District Court confirmed.

- 4. Land Case No.11 Plot No.457 before Komenya Arbitration Board-**

Isdora Opiyo Yogo – vrs- Esther Angonga Ngicho –

Committee's decision in (3) above set aside.

- 5. Land Appeal No.113 of 1993**

Parcel No.457 Isdora Opiyo Yogo & Mathew Orodo Muga

Versus

Esther Aguga Ngicho – Appeal dismissed decision in No.4 set aside. Land Parcel 457 to remain in the names of Esther Ngicho Olweny

The decision of the appeals board chaired by the District Commissioner then in Homa-Bay was as follows: That in view of case **No.19 of 1964** and the subsequent appeal the land adjudication officer erred. The appeal was dismissed. Land Adjudication case **No.34** set aside and Parcel **No.457** was to remain in the names of **Esther Ngicho Olweny**.

In my view the decision of the Minister the correct position in law. There was no further appeal against the decision of the Minister. This case is not an appeal it is but an attempt to re-open a matter that was long concluded. Other than the issue of adverse possession the other declaration being sort for cannot be obtained as the matter in that regard is res judicata.

District Magistrate’s Court – Land case **No.71 of 1964** made the following findings:

“The appellant will not remove his house at the township as ordered by the court. The fence between the parties from North-East to South-West will form the boundary between the parties.”

In its observation the court found a sisal boundary which it took into consideration in arriving at the decision. The said decision was adopted by the review court in case **No.64 of 1964** and the Minister on 2nd July, 1998. I wonder how the adjudication register could have been completed and a title issued before Minister’s appeal was concluded. This was mischievous.

All in all I am therefore of the view that the decision of the District Court **No.71 of 1964** and affirmed by the Review Court and the Minister in the adjudication process is the lawful and correct position. The boundaries between the parties are as set out by the District court.

On the doctrine of adverse possession it is obvious the parties here have had cases since 1964 to date and the doctrine of adverse possession cannot therefore applicable herein.

The judgement of the court in summary therefore is as follows:``

- 1. The doctrine of adverse possession is not applicable.**
- 2. I herein declare that the land allocated to Esther Ngicho’s husband Ngicho Okwany and Isdora Yogo’s husband Simon Yogo are as outlined and demarcated by District Magistrate’s Court Case No.71 of 1964;**
- 3. I direct the relevant lands office to rectify the registers of L.R. No.457 & 458 in line with the decision of District Magistrate Case No.71 of 1964.**
- 4. Costs to the applicant.**

Dated and delivered this 14th day of July 2011

**ALI-ARONI
J U D G E**

In the presence of:

.....**Counsel for the applicant**

.....**Counsel for the respondent**