



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 716 OF 2017

(formerly Elc case no. 80 of 2014 (O.S))

CALEB OTIENO ACHIENG.....PLAINTIFF

VERSUS

FELIX OCHIENG OKUNG.....DEFENDANT

JUDGMENT

1. The present dispute is in respect of a piece of land known as LR NO. Kanyada/Kanyabala/1986 measuring approximately zero decimal eight hectares (0.8 Ha) in area (Hereinafter referred to as the suit land). It is a sub-division of the parent land, LR NO. Kayada/Kanyabala/1962 measuring approximately zero decimal nine seven hectares (0.97 Ha) in area. The same is contained in registry map sheet number 5 and located within Homa-Bay County.

2. The plaintiff Caleb Otieno Achieng is represented by the firm of G.S. Okoth and company Advocates.

3. On 21st June 2017, this suit was transferred to this court from Kisii Environment and Land Court where it was originally filed on 28th February 2019. The originating summons dated 21st February 2014 and duly filed in court on 26th February 2014 was treated as a plaint and suit was heard by way of viva voce evidence.

4. By the originating summons commenced pursuant to Order 37 Rule 14 Civil Procedure Rules as read with Order 57 rule 7 (1) and (2) of the Civil Procedure Rules and section 38 of the Limitation of Actions Act. The plaintiff claims to be entitled to be registered as the proprietor of the suit land having acquired prescriptive rights by way of adverse possession for the determination of seven questions namely:-

- 1) Whether the plaintiff Caleb Otieno Achieng purchased a portion of land parcel No. Kanyada/Kanyabala/1962 from Joseph Okung Ajuoga and if so what was the size of the portion purchased and at what price?
- 2) Whether the vendor sub divided the land and if so in how many portions and when did he do so and sell the portion to the purchaser?
- 3) Whether the purchaser, Caleb Otieno Achieng took actual possession and occupation of the said portion sold to him, and if so when did he take actual possession of the same?
- 4) Whether the vendor has at any time before his death challenged the possession and occupation of the same by the plaintiff.
- 5) Whether the defendant, as administrator of the estate of the vendor, is obliged in law to fulfil the contractual obligations of the vendor or not.
- 6) Whether the plaintiff has acquired legal rights by virtue of the occupation of the said land and if so what legal right has he acquired.
- 7) What is the relief available to the plaintiff and is he entitled to the said relief or not?
- 8) Whether the defendant has caused any damage to the plaintiff, and if so, what is the remedy?

5. The originating summons is premised on the plaintiff's supporting affidavit of 17 paragraphs sworn on the even date together with copies of the accompanying documents as follows:-

a) Photographs marked as Co-1A and CO-1B (Pexhibits 1 (a) and 1 (b))

b) A letter dated 20th September 1995 by Okung Ajuoga Joseph (Deceased) in regard to removal of a caution placed on title of the suit land and marked as CO-2” (PEXhibit 4).

c) A mutation form regarding the parent land and marked as “CO-3” (PEXhibit 2).

d) A police abstract in respect of loss of land sale agreement marked as “CO-4”

6. In brief, the plaintiff laments that on 14th March 1987, he bought the suit land from Cornelius Wabwire Maganda who had bought it from the deceased in 1983. That upon purchase, he built a semi-permanent house, fenced it and planted trees thereon. That the deceased obtained consent of the area Land Control Board to subdivide the parent land into the suit land and four other portions of land.

7. The plaintiff laments further that he resides on the suit land. That however, in the year 2012, the sons of the deceased did threat to evict the plaintiff and others from the suit land and the other four portions of land. Thus, it precipitated the instant suit.

8. On 28th February 2019, the plaintiff (PW1) did rely on his supporting affidavit in his oral testimony and also relied on PEXhibits 1 to 4 herein. He called no witness. Upon the close of the plaintiff’s case, his counsel sought time to file submissions.

9. Consequently, learned counsel for PW1 filed three (3) paged submissions dated 8th April 2019 on 11th April 2019. Counsel gave brief facts of the case and identified an issue for determination namely whether PW1 has acquired prescriptive rights over the suit land through possession. Reliance was made on **Gabriel Mbui =vs= Muindia Maranya (1993) eKLR** on the elements of adverse possession, **Samwel Nyakenogo =vs= Samwel Orucho Onyaru (2010) eKLR and Titus Mutuku Kasuve =vs= Mwaani Investment Ltd and others (2004) eKLR** regarding open and exclusive possession as of right and without interruption for a period of 12 years thereby dispossessing the owners or discontinuation of possession by the owner on his own volition. That the plaintiff’s claim is not contested and it is proved on a balance of probability against the defendant.

10. The defendant was duly served as per an affidavit of service sworn on 24th June 2014 and another one filed in court on 20th February 2019 by authorized process servers, Tom M. Obingo and Osir Jacob Caleb respectively. However, the defendant failed to enter appearance and filed any statement of defence herein.

11. It is trite law that issues for determination in a suit either flow from the pleadings or as framed by the parties for the court’s determination; see **Galaxy Paints Co. Ltd =vs= Falcon Grounds Ltd (2000) 2 EA 385**.

12. In view of the originating summons, the evidence of PW1, the plaintiff’s submissions, it is not in contest that the issues that flow for determination are the questions as set out on the face of the originating summons. I am of the opinion that the questions are condensed into the ingredients of adverse possession as have been restated in a long line of authorities including **Wambugu Njuguna 1983 KLR 172, Mtana Lewa =vs= Kahindi Ngala Mwangandi (2015) eKLR ,Titus Ong’anga Nyachio =vs= Martin Okioma Nyauma and 3 others (2017) eKLR and Mbui case (supra)**. So, the ingredients are whether PW1 did tender evidence on a balance of probabilities that :-

a) He entered upon the suit land openly, peacefully and without any interruption.

b) He has continued in such possession for an uninterrupted period of at least 12 years.

c) The defendants has been dispossessed thereby and his right and title thereto extinguished accordingly.

13. It is not in dispute that PW1 relied on his supporting affidavit which this court adopted as part of his evidence. At paragraph 6 thereof, he deposed in part that the deceased permitted him to proceed and develop the land as he (deceased) was making arrangements to sub-divide the land (parent land) and transfer the suit land to him (PW1).

14. It is also not in dispute that PW1 took possession and occupation of the suit land as revealed at paragraph 7 of the affidavit. PEXhibits 1 (a) and 1 (b) fortify that position.

15. It is settled law that possession of land in question can take different forms such as cultivation or fencing as shown in PEXhibits 1 (a) and 1 (b); see **Titus Nyachio case (supra)**.

16. It was the evidence of PW1 that he lives on the suit land as shown in PEXhibits 1 (a) and 1 (b). He relied on PEXhibit 2 which shows the definite area of land as disclosed at paragraph 10 of his affidavit; see also **West Bank Estates Ltd =vs= Arthur (1966) 3 WLR 750**.

17. PW1 further testified, inter alia-

“...the defendant has refused to transfer land to me todate. It is now 33 years.....”

18. Clearly, the plaintiff is in possession and occupation of the suit land. In the case of **Gatimu Kinguru=vs= Muya Gathangi (2008) 1 KLR 1007 at 1015 (G&F) Madan J** (as he then was) held thus;-

“The defendant’s possession was open and notorious.....there has been no discontinuation of possession by the plaintiff since 1959.....There was outster of the plaintiff from the law followed by adverse possession, occupation, development and cultivation of the land by the defendant.....”

19. To that extent, has PW1 been in possession of the suit land without interruption for a period in excess of 12 years? In light of his testimony inclusive of PExhibits 1a and 1 b, the answer is in the affirmative; see **Nyakenogo and Kasuve cases (supra)**.

20. It follows that the registered proprietor has ceased to possess the suit land; see **Halsbury’s Laws of England 4th Edition Volume 28**.

21. In **Kirugi and another =vs= Kabiya and 3 others (1987) KLR 347**, the Court of Appeal held that the burden was always on the plaintiff to prove his case on a balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof.

22. In the present case, the plaintiff’s claim is steadfast, cogent and uncontested. He has discharged the burden to the requisite standards.

23. Thus, Judgment be and is hereby entered for the plaintiff against the defendant as hereunder;-

a) A declaration that the plaintiff has acquired adverse possession on absolute title to the suit land which is in his possession and occupation.

b) A declaration that the plaintiff is entitled to an order under section 38 of Limitation of Actions Act Cap 22 Laws of Kenya to be registered as proprietor of the suit land in the place of the defendant whose title thereto has been extinguished thereby and that the defendant shall execute a valid transfer forthwith in favour of the plaintiff from any encumbrances whatsoever, in default, the Deputy Registrar of this court to execute the transfer accordingly.

c) The costs of this suit shall be borne by the defendant.

Orders accordingly.

DATED SIGNED and DELIVERED in open Court at **MIGORI** this **20th** day of **JANUARY 2021**.

G.M.A ONGONDO

JUDGE

In presence of :-

Mr. Mulisa holding brief for G. S. Okoth for the plaintiff

Tom Maurice- Court Assistant