



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 39 OF 2019 (O.S)

MARGARET ADOYO OMUNE.....APPLICANT

VERSUS

GEORGE OWUOR OKIRI (Sued as the Administrator to the

Estate of MAURICE OKIRI YONGO, DECEASED).....RESPONDENT

JUDGMENT

A. Introduction

1. The instant suit concerns two (2) acres of land reference number Kanyadoto/Kabura/1277 measuring approximately four decimal eight hectares (4.8Ha) in area (The suit land herein). The same is contained in Registry Map Sheet number 4. The plaintiff is claiming adverse possession over the portion of the suit land which is located within Homa-Bay County.
2. The plaintiff, Margaret Adoyo Omune is represented by learned counsel, Quinter Adoyo of Quinter Adoyo and Company Advocates.
3. The defendant, George Owuor Okiri is represented by the firm of Odingo and Company Advocates further to a notice of appointment of Advocates dated 26th August 2019 duly filed in court on 13th September 2019.
4. On 20th July 2020, this court gave directions, inter alia;-

1) The Originating summons dated 13/6/2019 be treated as a plaint herein.

2) Any reply to the originating summons to be filed by the defendant/respondent within the next 60 days from this date, be treated as a statement of defence and be served accordingly.

3) Hearing of the suit by viva voce evidence on 2/12/2020.

4) The respondent's counsel to serve counsel Odingo for defendant.

B. THE GIST OF THE PLAINTIFF'S CASE

5. By the originating summons dated 13th January 2019, and duly filed in court on 14th January 2019 pursuant to Section 3A of the Civil Procedure Act, Section 38 (1, 2, and 4) of the Limitation of Actions Act, Cap 22 Laws of Kenya; Order 37 Rule 7 of the Civil Procedure Rules 2010, (The O.S), the plaintiff is seeking orders infra:-

a) The Honourable court be pleased to make an order that the applicant having been in continuous and uninterrupted possession and occupation of a portion of land parcel number Kanyadoto/Kabura/1277 containing by measurement 2 acres since July 1995, has thus acquired prescriptive right to a portion of the title thereto by adverse possession.

b) The Honourable court be pleased to order the Land Surveyor for the time being responsible for kanyadoto/Kabura registration area to survey Kanyadoto/Kabura/1277 and to curve out by clearly measured boundary a portion measuring 2 acres, that has been continuously occupied by the applicant since July 1995.

c) The Honourable court be pleased to order the Land Registrar for the time being responsible for Kanyadoto/Kabura registration area to delete the name of Maurice Okiri Yongo (deceased), the respondent's father and to issue fresh titles

thereby registering the applicant as the owner and proprietor of a portion of Kanyadoto/Kabura/1277 measuring 2 acres, absolutely.

d) The costs of this originating summons be in the cause.

6. The originating summons is supported by the plaintiff's eleven (11) paragraphed supporting affidavit sworn on the even date together with a copy of certificate of official search evenly dated and marked as "MAO-01" annexed thereto. The originating summons is also founded on grounds 1 to 7 set out on its face which are hereby noted accordingly.

7. Briefly, the plaintiff laments that the suit land is registered in the name of Maurice Okiri Yongo (deceased) 1) who was the father of the defendant. That in the year 1995, the plaintiff entered onto the portion of the suit land, established her homestead thereon and has remained in continuous and uninterrupted possession, occupation and use of the same. That the defendant is the administrator of the estate of deceased 1. Thus, it precipitated the present suit.

8. The testimony of plaintiff (PW1) was that the defendant sold the portion of the suit land to her in the year 1995. That she has possessed and occupied the same, since that year to date. She relied on the supporting affidavit, statement filed on 16th August 2019 and the certificate of official search stated in paragraph 6 herein above (PExhibit 1).

9. In a four (4) paged submissions dated 16th March 2021 filed on 17th March 2021, learned counsel for the plaintiff referred to orders sought in the originating summons framed four (4) issues for determination and presented a brief statement of facts. Counsel submitted that the defendant obtained a grant in Ndhiwa SRM's Court Succession Cause No. 53 of 2016 in respect of the estate of deceased 1. To fortify her submissions, counsel cited *Mtana Lewa vs Kahindi Ngala Mwangadi (2005) eKLR*, *Celina Muthoni Kithinji vs Safiya Binti Swaleh & 8 others (2018) e KLR*, *Wambugu vs Njuguna (1983) KLR 173* and *Mbira vs Gachuhi (2002)1 EALR 137*

C. The gist of the defendant's case

10. By a ten (10) paragraphed replying affidavit sworn on 6th September 2019 and filed in court on 19th December 2019, the defendant deposed inter alia, that PW1 and her deceased husband, Omune (Deceased 2) bought only one (1) acre of the suit land from his (defendant) mother Anjeline Ogotu Okiri (deceased 3). That the suit land was still registered in the name of deceased 1. That on 28th August 2016, deceased 3 passed on as shown in a copy of certificate of death marked as "G001" annexed to the replying affidavit. That deceased 3 sold the one (1) acre before carrying out succession in respect of the estate of deceased 1, hence the sale was null and void abinitio.

11. The defendant further deposed that the plaintiff and deceased 2 took possession of the one (1) acre of the suit land which deceased 2 fenced and the plaintiff is still in its occupation. That after the death of deceased 3, the plaintiff unilaterally and without consent of the family of deceased 1 extended the boundary of the one (1) acre. That the defendant reported the matter at Ndhiwa Police Station under OB Number 16/26/03/18 at about 11;14hours marked as "G0011" and annexed to the replying affidavit.

12. The defendants' counsel was duly served as revealed in affidavit of service sworn on 28th January 2021 and filed in court on 23rd February 2021 and as noted in the proceedings herein of 23rd February 2021. However, he declined to appear in court for hearing of the suit in spite of the latitude given to him thereof as held in **Ogada vs Mollin (2009) KLR 620** and provided for under **Articles 48 and 50 (1) of the Constitution of Kenya, 2010.**

D. Issues for Determination

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

14. I have carefully considered the entire originating summons, the replying affidavit in its entirety, the testimony of PW1 and the plaintiff's submissions herein. Therefore, the issues for determination are whether the plaintiff has established the requisite ingredients for adverse possession as well settled in **Salim vs Boyd (1971) EA 550**, **Wambugu vs Njuguna (1983) KLR 172** and **Elijah O. L. Opar vs Tobias Odhiambo Abach (2019) eKLR**, among other pronouncements.

15. Concisely and precisely, the plaintiff has to prove whether; -

(a) The suit property is registered in the name of a person other than the plaintiff.

(b) The plaintiff entered the suit property without permission of its registered owner and has been in open and notorious possession of the same for a period in excess of twelve (12) years.

(c) The plaintiff's possession of the suit property has dispossessed the registered owner and extinguished the owner's right and title thereto.

(d) The plaintiff is therefore, entitled to the reliefs sought on the face of the originating summons.

E. DISCUSSION AND DISPOSITION

16. In regard to issue number one, PW1 deposed at paragraph 5 of her supporting affidavit that the suit land is registered in the name of

deceased 1 who is the father to the defendant. That the fact of registration is shown in PExhibit 1 and thus, supports ground 1 of the originating summons.

17. Indeed, PExhibit 1 at part B- proprietorship section, reveals the name of the proprietor of the suit land as deceased 1 with effect from 7th October 1992. That title deed thereto was issued to the said proprietor on 28th November 2014.

18. Under part A-property section of PExhibit1, the approximate area shown therein is 4.8 Ha. It is essential that adverse possession should be of the whole or a defined portion of land; see **Muthuita =vs= Wamae & 2 others (2008) 1KLR (G&F) 1024** which applied the decision of Madan J (as he then was) in **Gatimu Kinguru =vs= Muya Gathengi (1976) KLR 253**.

19. Quite clearly, the suit land was registered under the Registered Land Act Chapter 300 Laws of Kenya (Repealed by the Land Registration Act, 2016 (2012)). Accordingly, I approved the standand point taken in **Wainaina =vs= Murai and others (1976-80) 1 KLR 283 at 289** where Simpson J (as he then) held that :-

“the land in question is registered under an Act cited in section 37.....”

20. At paragraph 2 of the replying affidavit, the defendant admitted the fact of registration of the suit land. It is therefore, established that the suit land is registered in the name of a person (deceased 1) other than PW1. In view of the foregoing, the first ingredient is established.

21. In respect of issue number two, PW1 deposed at paragraphs 3,4,6,7,8 and 9 of her supporting affidavit that she moved together with deceased 2 and other family members into the suit land where she established her only home in July 1995. That the remains of deceased 2 were interred therein. That she has since been in possession, occupation and use of the suit land without any dispute thereof.

22. In addition, her statement filed in court on 16th August 2019 which is part of her testimony, reveals in detail that she has been in possession and occupation of the suit land since the year 1995 without any interruption.

23. The defendant, at least, deposed that PW1 and deceased 2 were given possession of one (1) acre of the suit land registered in the name of deceased 1. That in the year 2018, after the death of deceased 3, PW1 unilaterally and without consent of the family of deceased 1, extended the boundary of the one (1) acre to make the same two (2) acres. It should be noted that right to and registration of property can be challenged on grounds including adverse possession; see sections 25 (1) (b) and 28 (h) of the Land Registration Act ,2016 (2012) and decision in **Salim =vs= Boyd (1971) EA 550**.

24. In the foregone, PW1 has been in possession and occupation of the suit land since 1995 as even confirmed by the defendant in paragraph 2 of the replying affidavit. So, issue number two is resolved accordingly.

25. Regarding issue number three, adverse possession is attained when possession is inconsistent with the title of the owner; see **Halsbury’s Laws of England 4th Edition Volume 28**.

26. It was the contention of PW1 that she moved into the suit land in 1995. That she established her home thereon and there has been no interruption thereof since that time. She asserted that the title of the defendant and any other person sued for and on behalf of the estate of deceased 1, has been ousted therefrom as recognized in **Gatimu Kinguru case (supra)**. Accordingly, the 3rd issue herein is resolved, too.

27. Notably, the defendant is sued as administrator of the estate of deceased 1 as envisaged under Order 4 Rule 4 and Order 24 Rule 5 of the Civil Procedure Rules,2010. The defendant’s assertion inclusive of documents marked as “G001” and “G0011” annexed to the replying affidavit, hereby taken into account. Nonetheless, the acquiescence of deceased 1, deceased 3 and the defendant regarding the plaintiff’s possession and occupation of the portion of the suit land as confirmed by the defendant is if in favour of the plaintiff through equity. The acquiescence does not make the entry of PW1 into the suit land null and void. This court is not precluded from applying the principles of equity captured under Article 10 (2) (b) of the Constitution of Kenya,2010 and the Court of Appeal decision in **William Kipsoi Sigei =vs= Kipkoech Arusei and another (2019) eKLR**, in favour of the plaintiff in the instant case.

28. Having weighed the entire replying affidavit against the originating summons and the evidence in support thereof, I find the defendant’s defence unsubstantiated hence, must fail. The plaintiff’s claim stand unchallenged and cogent in obtaining circumstances.

29. To that end, it is the finding of this court that the plaintiff has proved all the ingredients of adverse possession against the defendant to the requisite standards in the instant suit as held in **Ahmed Abdulkarim =vs= Members for Lands and Mines (1958) E A 436 at 441 and Murunga Kabangi and 2 others =vs= Hannah Wairimu Gitau and another (2019) eKLR**, among other pronouncements. So, she is entitled to the reliefs sought herein.

30. A fortiori, Judgment be and is hereby entered for the plaintiff against the defendant in terms of orders 1,2, and 3 sought in the originating summons dated 13th January 2019 and duly filed in court on 14th January 2019 and as stated in paragraph 5 hereinabove. The defendant shall bear the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 24TH DAY OF MARCH 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. E. Kichana holding brief for Quinter Adoyo learned counsel for the Plaintiff

Tom Maurice - Court assistant