



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 452 OF 2017

Formerly Kisii ELC case No. 514 of 2015 (O.S)

ROSE AUMA ONYANGO.....PLAINTIFF

VERSUS

GORDON JUMA MIGWAMBO (Suing as the legal Administrator

of the Estate of NGOMA MIGWAMBO(DECEASED).....RESPONDENT

JUDGMENT

A. Introduction

1. At the heart of the present dispute is the entire land reference number West Kasipul/Konuonga/162 measuring approximately zero decimal six hectares (0.6 Ha) in area located in Kasipul Sub County within Homa-Bay County (The suit property herein). The same is contained in Registry Map Sheet number 5. The plaintiff, **ROSE AUMA ONYANGO** is claiming to have acquired the suit property by way of adverse possession.
2. Originally, this suit was lodged before the Environment and Land Court at Kisii. On 19th April, 2016, the Court (Mutungi J) directed that the matter be heard by way of viva voce evidence and that the originating summons dated 20th November 2015 filed in court on 23rd November 2015 and the replying affidavit sworn on 1st February 2016 duly filed in court on the even date, be treated as a plaint and a statement of defence respectively. The suit was then transferred to this court for hearing and determination with effect from 4th April, 2017.
3. The plaintiff's represented by Messrs Oguttu Mboya, Ochwal and partners Advocates formerly, M/s Oguttu, Ochwangi, Ochwal and Company Advocates.
4. The defendant **GORDON JUMA MIGWAMBO** (suing as the legal administrator of the estate of Ngoma Migwambo, deceased) appears in person. Previously, Messrs O.M. Otieno and Company Advocates represented him herein.

B.The gist of the Plaintiff's case

5. By the originating summons, the plaintiff is seeking determination of issues infra;-

i. Declaration that the defendant's right to recover the whole of No. West Kasipul/Konuonga/162, is barred under the Limitations of Actions Act, Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peaceful and continuously been in possession of the foresaid parcel of land for a period exceeding 30 years.

ii. There be an Order that the plaintiff be registered as the proprietor of the whole of LR No. West Kasipul/Konuonga/162, in place of the defendant.

iii. The Deputy Registrar and/or the Executive Officer of this Honourable court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the suit property, that is LR No. West Kasipul/Konuonga/162, in favour of the plaintiff, in the event of the default on the part of the defendant.

iv. There be an order of permanent injunction, restraining the defendant either by himself agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit property, that is LR No. West Kasipul/Konuonga/162, in any manner whatsoever and/or howsoever.

v. Costs of this originating summons be borne by the defendant.

6. The originating summons is premised on the plaintiff's eighteen (18) paragraphed supporting affidavit of the even date and annexed documents marked as "RAO 1" and RAO2" namely a copy of green card/ land register and photographs respectively in respect of the suit property. The same is also premised on grounds (a) to (n) set out on it's face and noted accordingly.

7. It is the complaint of the plaintiff inter alia, that she is a daughter in law of one Odede Onyango (Deceased 1) having been married to the latter's son Samson Onyango Odede (Deceased 2) in the year 1983. That she found Deceased 1 ploughing and using the entire suit property. That Deceased 1 gave a portion of the suit property to deceased 2 and the plaintiff to cultivate to enable them derive a livelihood therefrom. That thereafter, deceased 2 and the plaintiff entered upon and started cultivating the said portion of land and the entire suit property even after the death of deceased 1. That they planted subsistence crops including maize, beans, potatoes, cassava and bananas, for own use and upkeep. That after the death of deceased 2, the plaintiff remained and continued to cultivate the entire suit property without interference from any person since the year 1984 hence, accrued adverse interest over the suit property.

8. On 3rd February 2016, the plaintiff filed a further supporting affidavit sworn on 2nd February 2016 in response to the defendant's replying affidavit sworn on 1st February 2016 and in furtherance to the originating summons. She deposed in part that when the defendant commenced succession proceedings in respect of the estate of deceased 1 without taking note of her accrued rights over the suit property, she lodged objective proceedings thereof as per document marked as "GSM2" attached to the replying affidavit.

9. The plaintiff (PW1) testified on 6th February 2018 to the effect that she has been in possession on occupation of the suit property since the year 1983 without any interruption from the defendant or any other person. She relied on the following documents; -

- a. Green card /register/record of 6th May 2014 in respect of the suit property (PEXhibit 1).
- b. A certificate of official search dated 24th November 2014 in regard to the suit property (PEXhibit 2).
- c. A certificate of death serial No. 0053969 issued on 13th June 2014 regarding deceased 2 (PEXhibit 3).
- d. Proceedings in Oyugis SPM's Court Succession Cause No. 107 of 2013 in respect of the estate of deceased 1 (PEXhibit 4).
- e. Photographs showing the plaintiff's crops grown on the suit property (PEXhibit 5).
- f. A letter dated 13th March 2017 by PW2, the area Chief, Joshua Oluso Otieno (PEXhibit 6).

10. PW2, the Chief Konyu location in Homa-Bay county testified that PW1 has been living and using the suit property even before the year 1995 without any complaint. He confirmed that he prepared PEXhibit 6 thereof.

11. In the submissions dated 19th February 2021 and filed in court on 22nd February, learned counsel for the plaintiff provided a brief background of the suit, framed four issues for determination including whether the plaintiff is entitled to the orders sought in the originating summons and analyzed them in favour of the plaintiff. To fortify the submissions, counsel relied on authorities namely **Wilson Njoroge Kamau =vs= Nganga Mucera Kamau (2020) eKLR**, **Celina Muthoni Kithinji =vs= Safiya Binti Swaleh and 8 others (2018) eKLR**, **Njuguna Ndatho =vs= Masai Itumo and 2 others (2002) eKLR** and sections 7 and 37 of the Limitation of Actions Act Chapter 22 Laws of Kenya.

C. The Defendants case in brief

12. By a sixteen (16) paragraphed replying affidavit sworn on 1st February 2016 and duly filed in court on the even date, the defendant opposed the originating summons and sought dismissal of the suit with costs in the best interest of justice. He deposed, inter alia, that the suit property belonged to his father, Ngoma Migwambo (deceased 3) pursuant to a first registration upon adjudication in the year 1979 as shown in the annexed green card marked as "GJM1" and that it's title has never changed therefrom to deceased 1 as alleged by the plaintiff. That deceased 2 never occupied and or cultivated the suit property and the plaintiff did not enter thereupon in the year 1984. That her entry into the suit property was with authority and permission of the family members of deceased 3 and the period of possession has been less than 10 years.

13. The defendant also deposed that the plaintiff is taking advantage of the kindness of the family of deceased 3 having allowed her to utilize the suit property for a moment but she is now seeking to alienate the family therefrom. That the plaintiff has her own parcel of land elsewhere and she is ill-bent to grab the suit property and render the defendant and dependents of deceased 3 landless. Nonetheless, he confirmed that PW1 objected to succession proceedings as shown in document marked as "GJM 2(a)" and the supporting affidavit thereof marked as "GJM2(b) and annexed to the replying affidavit.

14. The defendant filed a thirteen (13) paragraphed further affidavit sworn on 30th May 2016 where he reiterated his denial of the plaintiff's claim. Essentially, he deposed that the plaintiff's claim does not meet the threshold for adverse possession and should be dismissed with costs.

15. On 12th November 2019, the defendant (DW1) testified by seeking dismissal of the plaintiff's case with costs. He relied on his replying affidavit and further affidavit as well as his list of document dated 30th May 2016 serial Nos. 1 to 4 (DEXhibits 1 to 4).

16. **DW2, LAWRENCE OGWENO**, testified that he lives approximately 200 metres away from the suit property which belongs to DW1 and that he is not related to either PW1 or DW1. He relied on his statement dated 30th May 2016 as part of his evidence.

17. In a one (1) paged submission filed in court on 9th February 2021, the defendant termed the plaintiff's claim herein false and sought its dismissal with costs. That the suit property was registered in the name of deceased 3 in the year 1979. That he filed a succession cause at Oyugis Law Courts in the year 2013 and when it was finalized in the year 2015, he got registered as its owner.

D. Issues for Determination

18. It is settled law that the issues for determination in any suit generally flow either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Co. Ltd =vs= Falcon Grounds Ltd (2000) 2EA 385** applied in the case of **Great Lakes Transport Co. Ltd =vs= Kenya Revenue Authority (2009) KLR 720 at 732/733**.

19. I have anxiously considered the parties' respective pleadings, evidence in support thereof, rival submissions including the issues framed therein. I also note the statement of agreed issues (Plaintiff's version) dated 29th April, 2016 alongside leading pronouncements, inter alia, **Wambugu =vs= Njuguna (1983) KLR 172**, **Wilson Kazungu Katana & 101 others =vs= Salim Abdallah Bakshwein and another (2015) eKLR** and **Elijah O.L. Opar =vs= Tobias Odhiambo Abach (2019) eKLR**, on the ingredients of adverse possession.

20. In the foregone, the issues for determination herein are 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. Analysis and determination.

21. In respect of the first issue, in paragraph 12 of her supporting affidavit, PW1 deposed that the suit property was registered in the name of deceased 3. Entry number 1 in PExhibit 1 shows that the suit property was registered in the name of deceased 3 on 10th May 1979. Subsequently, the same was registered in the name of DW1 on 6th May 2014 as disclosed in PExhibits 1 and 2.

22. At paragraph 3 of his replying affidavit, DW1 deposed that the suit property was registered in the name of deceased 3 who was his father. That it was a first registration after adjudication in the year 1979 as revealed in the green card marked as "GJM1": (DEXhibit 1) herein.

23. It was the testimony of PW1 that PEXhibits 1 and 2 show that DW1 did register the suit property in his name. That at that time, she was in possession of the same. In further examination in chief, PW1 stated;-

".....the defendant registered it in his name....."

24. On his part, DW1 stated in examination in chief that the suit property is registered in the name of deceased 3 who died in the year 2003. During cross examination, DW1 maintained that:-

"..... The suit land was registered in the name of my father, Ngoma Migwambo who is deceased. DExhibit 1 shows my name and I rely on it....."

25. During further cross-examination, DW1 testified thus; -

"I am the registered proprietor of the suit land....."

26. DW2 relied on his statement dated 30th May 2016 which was adopted as part of evidence. At paragraph 3 thereof, he stated in part;-

"That land parcel known as LR. NO. KASIPUL/KONUONGA/162 belonged to my late father NGOMA MIGWAMBO whose title was pursuant to a first registration upon adjudication way back in 1979"

27. It follows that that the suit property was initially registered in the name of deceased 3 under the Registered Land Act Chapter 300 Laws of Kenya as observed by Simpson J (as he then was) in the case of **Wainaina =vs= Murai & others (1976-80) 1 KLR 283 at 289** which I endorse accordingly. Subsequently, the suit property was registered in the name of DW1 upon transmission pursuant to section 26 (1) of the Land Registration Act, 2016 (2012) as revealed in PExhibits 1, 2 and 4 as well as DExhibit 1. Thereby, the first issue is resolved being guided by the decision in **Wilson Katana case (supra)**.

28. As concerns the second issue, PW1 deposed in his supporting affidavit that deceased 1 showed her and deceased 2, the suit property on which she cultivates beans, maize, potatoes, cassava and bananas for own use and upkeep since the year 1983 to date as per PExhibit 5. That deceased 3 neither occupied and or utilized the suit property nor his estate took any steps towards recovering possession of the same.

29. During hearing, PW1 stated that PExhibits 5 and 6 show that he cultivates the suit land upon which he entered in the year 1983. That neither DW1 nor his brother had laid any claim thereto. That even the remains of deceased 2 were laid to rest in the land.

30. DW2 affirmed that he prepared PExhibit 6. In examination in chief this witness told the court that :-

“PW1 has lived on the suit land LR NO. West Kasipul/Kunuonga/162 even before year 1995. She has been using the land. I have never had a complaint between them over the suit land. I prepared letter dated 13th March 2017 (DExhibit 6)”

31. In cross examination, PW2 stated thus; -

“that PW1 has lived on the land for 30 years as per PExhibit 6.....”

32. The defendant filed further submissions of three (3) pages undated on 26th February 2021. Essentially, he gave the history of the suit property, the genesis of the present dispute, termed the plaintiff allegations false and urged the court to dismiss her case as she has no relationship with the family of deceased 3 and that he is the one entitled to the suit property, among things.

33. In his replying affidavit and further affidavit, DW1 deposed in part that deceased 1 never at any time owned and or utilized the suit property. That his (DW1) mother permitted PW1 to utilize a portion thereof in the year 2005 and upon demise of said mother, DW1 has refused to vacate the portion hence attempting to grab it.

34. According to DW1, he does not stay on the suit property. That he used to cultivate the same from the year 2003 until 2013. In cross examination he maintained that he has never and does not stay on the suit property. He further stated that :-

“PW1 cultivates the land.....”

35. It was the evidence of DW2 that PW1 was not permitted by deceased 1 to use the suit property. That she has not been evicted therefrom.

36. It is trite law that possession of the land in question can take different forms such as fencing or cultivation; see **Titus Ong’ang’a Nyachio =vs= Martin Okioma and 3 others (2017) eKLR**.

37. The pleadings and the evidence on record discern that the plaintiff’s claim is for the whole of the suit property. In **Gatimu Kinguru =vs= Muya Gathangi (1976-80) 1 KLR 317 and Godfrey Shimonya Peter & 3 others =vs= Mary Anyango Ameka & another (2018) eKLR**, among other pronouncements, it has been held that adverse possession be for the whole or a defined portion of the land in question. In the foregoing, PW1 has demonstrated that her entry into the suit property was nec vi, nec claim nec plecario (No force, no secrecy, no evasion) and that she has continuously possessed and occupied the same in excess of twelve (12) years without interruption.

38. In regard to the third issue, it is a cardinal principle that for adverse possession to triumph the applicant’s possession of the suit land must be in consistent with the title of the owner; see **Halsbury’s Laws of England 4th Edition volume 28**.

39. Additionally, rights and registration to laid can be challenged on grounds including adverse possession; see **Salim =vs= Boyd (1971) EA 550 and sections 25 (1) (b) and 28 (h) of the Land Registration Act, 2016 (2012)**.

40. In **Gatimu Kinguru case (supra)** at page 327 paragraph 2, it was held;-

“When there is a successful claim by adverse possession there is a total ouster of the owner from the title, there is no room for tenancy in common or a joint tenancy.”

41. In the instant suit, the plaintiff’s open and notorious possession and occupation of the suit property has discontinued the defendant’s possession since 1983. The defendant has been ousted therefrom followed by adverse possession, occupation, development and cultivation as shown in PExhibits 5 and 6 ; see **Gatimu Kinguru case (supra)**.

42. In the result, the plaintiff has established all the ingredients of adverse possession against the defendant to the requisite standards. She is entitled to the orders sought in the originating summons.

43. Wherefore, Judgment is hereby entered for the plaintiff against the defendant in terms of orders 1 to 5 sought on the face of the originating summons dated 20th November 2015 and duly filed in court on 23rd November 2015 and as set out in paragraph 5 hereinabove.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of March 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Titus Kipgetich learned counsel for plaintiff

The defendant in person

Tom Maurice - Court assistant