



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 48 OF 2020 (O.S)

SAMSON OTIENO OMUGA (suing as the legal administrator of

the estate of ADRIAN OMUGA

NGODHE (DECEASED).....PLAINTIFF

VERSUS

GEORGE HABEL NYAWACHA.....DEFENDANT

JUDGMENT

1. By an Originating summons dated 24th August 2020 and duly filed on 26th August 2020 commenced under Order 37 Rules 7 and 14 Civil Procedure Rules, 2010, Sections 7 and 38 of Limitation of Actions Act Chapter 22 Laws of Kenya, the plaintiff, **SAMSON OTIENO OMUGA** (suing as the legal administrator of the estate of Adrian **OMUGA NGODHE** alias **ADRIAN OMUGA NGODHE**, deceased) claims to have acquired the whole portion of the title in respect of LR NO. WEST KASIPUL/KODERA KARABACH/1219 measuring approximately one decimal six hectares (1.6 Ha) in area (the suit land herein) by adverse possession. So, he has sought determination of issues thus:-

- i. Declaration that the defendant's rights to recover the suit land is barred under the Limitations of Actions Act, chapter 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 40 years.
- ii. There be an order that the plaintiff be registered as the proprietor of the suit land in place of the defendant herein who currently holds title to the suit property.
- iii. There be an order restraining the defendant either by himself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of a land measuring 1.6 Ha out of the suit land in any manner whatsoever and/or howsoever.
- iv. The Deputy Registrar and/or the Executive Officer of the Honourable High court be directed and/or ordered to execute the transfer instruments and all attended documents, to facilitate the transfer and registration of the suit land in favour of the plaintiff, in the event of default by the defendant to execute the necessary transfer instrument.
- v. Costs of this originating summons be borne by the defendant.
- vi. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

2. The originating summons is premised on the plaintiff's twenty three (23) paragraphed supporting affidavit sworn on the even date together with documents marked as "S001 to S003 (c)" and annexed thereto as well as grounds (a) to (Z) set out on its face. Briefly, the plaintiff laments that he is the lawful administrator of the estate of the deceased, Adrian Omuga Ngodhe alias Adrian Omuga Ngodhe, who was adjudicated and registered as the proprietor of the original land, LR NO. West Kasipul/Kodera Karabach/159. That later, the defendant subdivided the original land into LR NO. Kasipul/Kodera/Karabach/1218 and the suit land registered in the name of the defendant who has never used the suit land. That the plaintiff together with his family has been living on the suit land for over 40 years without any interruption hence precipitating this suit.

3. The defendant was duly served herein as disclosed in the affidavits of service sworn on 28th August 2020 and 25th September 2020 by a duly authorized process server, Normael Okello G'Oganyo. However, he failed to enter appearance and or file a replying affidavit to the originating summons.

4. On 8th October, 2020, this court directed that the originating summons be treated as a plaint as envisaged under Order 37 Rule 19 of the Civil Procedure Rules, 2010. That the suit be heard by viva voce evidence.

5. Subsequently, the suit proceeded to hearing on 15th March 2020. The plaintiff (PW1) testified and made reference to the original land inclusive of the suit land, relied on his supporting affidavit and statement of even date. He stated inter alia, that he occupies the two subdivisions of the original land since the year 1994.

6. PW1 further relied on his list of documents of the even date (PEXhibits 1 to 6). He called one Charles Ngicho Omuga (PW2) to reinforce his testimony.

7. The plaintiff opted not to submit in this suit.

8. I have carefully considered the entire originating summons and the testimonies of PW1 and PW2 herein. On that account, the issues for determination are the ones set out on the face of the originating summons and as further crystallized in various pronouncements including, **Wilson Kazungu Katana and 101 others =s= Salim Abdallah Bakshwein and another (2015) eKLR and Elijah O.L. Opar =vs= Tobias Odhiambo Abach (2019) eKLR.**

9. Thus, the plaintiff has to prove on a balance of probabilities that ; -

- a) The suit land is registered in the name of person other than the plaintiff.
- b) The plaintiff entered the suit land without the permission of it's registered owner and has been in open and notorious possession of the same for over 12 years.
- c) The plaintiff has dispossessed the owner thereby and extinguished the owner's title thereto.

10. As regards issue number one, on ground number (c) of the originating summons and paragraph 4 of the plaintiff's supporting affidavit, reveal that the defendant is the registered proprietor of the suit land. PEXhibits 3 and 4 fortify that position.

11. PW1 and PW2 testified that the suit land is registered in the name of the defendant. In such cases, it is well settled that the land in question must be registered in the name of a person other than the applicant; see **Wilson Kazungu Katana case (supra).**

12. In respect of the second and third issues analysed herein simultaneously, the grounds of the originating summons, the supporting affidavit, the testimonies of PW1 and PW2 including PEXhibit 5, discern that PW1 has been in interrupted possession and occupation of the suit land for the prescribed period of time. Indeed, PW1 testified: -

“.....I still occupy the two (2) subdivisions since 1994.”

13. PEXhibit 1 reveals the fact of legal capacity on the part of PW1 to initiate this suit. In section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya, the term **“Legal representative”** is defined and I take into the said definition which is applicable to PEXhibit 1 herein.

14. This court is conscious of the protection of right to property as enshrined under **Article 40 (1) of the Constitution of Kenya,2010.** The term **“Property”** is clearly defined **under Article 260 of the same constitution.**

15. Besides, property rights and registration can be challenged on grounds including adverse possession as provided for under **Sections 25 (1) (b) and 28 (h) of the Land Registration Act, 2016 (2012)** and the decision in **Salim =vs= Boyd (1971) EA 550; see also Kimani Ruchine & another =v= Swift Rutherford Company Ltd and another (1976-80) I KLR 1500.**

16. This suit proceeded by way of formal proof. It is trite law that the burden was always on the plaintiff to prove his or her claim on a balance of probability and that burden is not lessened even if a case was heard by formal proof; see **Kirugi and another =vs= Kabiya and 3 others (1987) KLR 347.**

17. In the present suit, has the plaintiff proved the claim to the requisite standards as noted in **Githu =vs= Ndeete (1984) KLR 776 at 780 and Murunga Kabangi and 2 others =vs= Hannah Wairimu Gitau and another (2019) eKLR?** By the steadfast, unchallenged and cogent testimony of PW1 in support of the pleading herein, the finding is in the affirmative.

18. Wherefore, Judgment is hereby entered for the plaintiff against the defendant in terms of orders (a) to (e) set out on the face of the originating summons dated 24th August 2020 filed in court on 26th August 2020 and as stated in paragraph 1 hereinabove.

19. For the avoidance of doubt, order (c) as per the originating summons and granted herein is for a permanent injunction against the defendant as the plaintiff has met the threshold in **Giella =vs= Cassman Brown & Company Ltd (1973) EA 385** applied in **Nguruman Ltd =vs=Jan Bonde Nielsen and 2 others (2014) eKLR.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of MARCH 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

The Plaintiff in person

Non appearance for the Defendant

Tom Maurice - Court assistant