Gem & another v Jura & 3 others; Land Registrar, Bondo (Interested Party) (Enviromental and Land Originating Summons E002 of 2022) [2024] KEELC 1719 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1719 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2022

AY KOROSS, J

APRIL 4, 2024

BETWEEN

CHARLES OTIENO GEM ..... 1ST PLAINTIFF

ERICK OKOTH OTIENO ..... 2ND PLAINTIFF

AND

NICHOLUS OMONDI JURA ..... 1ST DEFENDANT

MICHAEL OTIENO JURA ..... 2ND DEFENDANT

MARIKO AJWALA JURA ..... 3RD DEFENDANT

RICHARD OKOTH JURA ..... 4TH DEFENDANT

AND

THE LAND REGISTRAR, BONDO ..... INTERESTED PARTY

JUDGMENT

1. The 1st and 2nd defendants are respectively father and son while the defendants are all brothers and the registered proprietors of land parcel no. Siaya/Usigu/1120 ('suit property').

2. In an originating summons dated 21/01/2022, the plaintiffs' contended they had acquired the suit property by adverse possession. It was supported by an affidavit deposed by the 2nd plaintiff on 21/01/2022 which had several documents annexed to it. The plaintiffs sought the following reliefs: -

    a. By virtue of Section 17 of the *Limitation of Actions Act*, it be declared they had acquired the entire suit property by adverse possession and that they should be registered as proprietors.

    b. Upon the defendants executing the transfer documents, the interested party do effect them and in default, the deputy registrar do execute, sign and endorse the transfer documents.

c. Prohibition from interference and eviction.

d. Costs.

3. By the firm of M.Korongo & Co. Advocates, the defendants filed a replying affidavit sworn on 21/4/2023 which was deposed by the 1st defendant and the defendants equally filed a counterclaim.

4. In the counterclaim, they sought for the plaintiffs' suit to be dismissed, a restoration of the suit property's beacons, a declaration they were the suit property's owners, vacant possession, permanent injunction and costs of the suit and of the counterclaim. It emerged the 2nd defendant died on 13/08/2023 which was in the course of these proceedings.

5. In opposition to the defendants pleadings, the plaintiffs filed a supplementary affidavit sworn on 23/05/2022 and a reply to defence dated 24/05/2022.It is noted that at the close of the parties' cases, the office of the attorney general entered appearance for the interested party.

Plaintiffs' Evidence

6. The plaintiffs respectively testified as PW1 and PW2. Their evidence was led by Joseph Odundo Nyabwa and Rose Auma Onyango who respectively testified as PW3 and PW4. All their evidence were contained in their witness statements and oral testimonies. In addition, the plaintiffs' Evidence were contained in their affidavits and produced documents.

7. In brief, it was PW1's testimony he had been in quiet, peaceful and uninterrupted occupation of the suit property from 1994 and he had lived thereupon with his family. He stated when he wanted to register the suit property in his name in 2021, he discovered it was registered in the defendants' name.

8. He testified attempts to resolve the stalemate with them reached a dead end and that another property known as Siaya Usigu/1252 (1252) which had erroneously been registered in his name was occupied by Bar Awendo Primary School.

9. It was his evidence a meeting with an assistant chief to resolve the impasse between the parties over the suit property was inconclusive. He further testified that a ground survey by the sub county surveyor office affirmed land parcel 1252 had erroneously been registered in his name. To buttress his position, he produced a bundle of photographs and an official search certificate of the suit property.

10. PW2's testimony corroborated PW1's testimony. In addition, he averred there were existing gravellier and blue gum trees on the suit property which he and his parents had planted.

11. PW3 and PW4's testimonies corroborated PW1's testimony and they stated the gravellier and blue gum trees which existed on the suit property were planted by the plaintiffs. They further stated the plaintiffs constructed homes on the suit property in 2008.

Defendants' Evidence

12. Their evidence was contained in their replying affidavit, witness statements, oral testimonies and documents that were produced by the 1st and 3rd defendants who respectively testified as DW1 and DW2.

13. It was DW1's testimony that the suit property was registered in their names by their grandmother Leonida Amenya Oriwa (Leonida) when they were minors. It was his position the 1st plaintiff had not bought the suit property from Leonida but rather had purchased 1252.

14. He further stated that because they (defendants) were registered therein as minors, he was not conversant with the suit property and it was only when he sought the services of the district land surveyor to establish the suit property's boundaries, that he discovered the plaintiffs occupied it.

15. It was his testimony parties had attempted to resolve the dispute via Alternative Justice System mechanism (AJS) in which they reached an agreement but the plaintiffs had failed to adhere to the terms thereof. He further testified that the plaintiffs' homes stood on the suit property.

16. On cross examination, it was his case he discovered the 1st plaintiff occupied the suit property when he was around 10-14 years of age and it was only when he went to the chief in 2022 when he was 30 years of age that he discovered the suit property did not belong to them (defendants).

17. DW2's evidence in chief corroborated DW1's evidence in chief and in addition, he testified that the 2nd defendant died on 13/08/2022. On cross examination, he testified he did not know where 1252 and the suit property stood.

18. However, when he was pressed to disclose his relationship with Leonida, he declined to disclose who his grandmother was and stated he did not want to be asked questions on Dex.12.

19. Further, DW2 fumbled in making disclosures on his age and stated that despite being born in 1988, as at 2009, he was a minor. He stated that it was only the district land surveyor who assisted the defendants to locate the suit property. He averred the plaintiffs occupied the suit property and had even developed it.

Land Registrar's Evidence.

20. After parties had closed their respective cases and the plaintiffs' counsel had filed their submissions, this court reserved the matter for judgment on 18/05/2023. However, pursuant to the provisions of Section 3A of the *Civil Procedure Act* and Section 173 (1) of the *Evidence Act*, it ordered the land registrar to visit the suit property, 1252 and land parcel no. Siaya/Usigu/3440 (3440) to establish their occupancy, use and encroachment (if any).

21. The Land Registrar filed a detailed report on 30/10/2023 and from it, it is deciphered the 1st plaintiff occupied the entire suit property and had put up a home on a portion of it while he farmed on the remaining portion.

22. It was his observation the suit property, 1252 and 3440 never bordered each other. Further, he observed that though 1252 and 3440 were 1st registrations and registered in the 1st plaintiff's name, the latter was occupied by Barawendo Secondary School- a public school and the latter by a 3rd Party.

Parties' submissions

23. The plaintiff's counsel on record M/s. Ombuya Owenga & Co. Advocates who are on record for the plaintiff filed written submissions dated 12/02/2023. Further, upon this court giving counsels an opportunity to file supplementary submissions on the land registrar's report, the plaintiffs' counsel filed theirs dated 14/11/2023.

24. Jointly, the submissions raised two combined issues which were whether the plaintiff had acquired the entire suit property by adverse possession and costs of the suit.

25. On the issue of adverse possession and relying on well cited decisions including *Mtana Lewa v Kahindi Ngala* (2015) eKLR, counsel submitted the plaintiff had met the threshold of adverse possession. This decision summarized the principles of adverse possession as follows: -

> " The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

26. Counsel submitted the land registrar's report was accurate and corroborated the plaintiffs' case that they were in exclusive occupation of the suit property which was registered in the defendants' name. The defendants' counsel did not file any submissions.

Issues for Determination

27. I have considered pleadings and evidence adduced by the parties, the plaintiffs' submissions and being guided by well cited provisions of law and judicial precedents, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim and the issues that arise for resolution are: -

    i. Whether the suit abated against the 2nd defendant.

    ii. If (I) is in the affirmative, can judgment be entered against his co-defendants who are tenants in common with him?

    iii. If (II) is in the affirmative, did the plaintiffs meet the threshold of adverse possession.

    iv. Whether the 1st, 3rd and 4th defendants' counterclaim was time barred.

    v. If (IV) is in the negative, did the 1st, 2nd and 3rd defendants prove their counterclaim.

    vi. What appropriate orders should be granted including an order as to costs.

Analysis and Determination

28. The issues that were earlier recognised as arising for determination shall be addressed herein in a sequential manner: -

    i. Whether the suit abated against the 2nd defendant

29. DW2's evidence that the 2nd defendant died 13/08/2022 was not controverted. Since the cause of action involved land which survived the 2nd defendant and a suit subsists against living persons, it was incumbent upon the plaintiffs to substitute the 2nd defendant within one year from the date of his demise.

30. The legal framework for such substitution of a deceased defendant is found in Order 24 Rule 4 of the *Civil Procedure Rules* which provides thus: -

> " (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant." Emphasis added.

31. Therefore, upon the 2nd defendant's demise, he ought to have been substituted by on or before 13/08/2023.

32. From the record, the 2nd defendant has not been substituted to date which is a period of over one year from his date of demise and consequently, the suit ceased to exist against him. On this limb, I conclude, find and hold the suit against the 2nd defendant abated.

II. If (I) in the Affirmative, can Judgment be Entered Against his Co-defendants Who Are Tenants in Common with Him?

33. Section 91 of the *Land Registration Act* sets out some of the inherent features of a tenancy in common thus: it is registered in the name of two or more persons (Section 91 (1), each tenant is entitled to have an undivided share in the whole (Section 91 (5), upon death of a common tenant, his undivided share forms part of his estate (Section 91 (5) and lastly, a common tenant cannot deal with his undivided share in favour of any person other than another tenant in common, except with consent in writing of the remaining tenants (Section 91 (6).

34. The Apex court charted the characteristics of a tenancy in common in the case of *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2021] eKLR when it stated thus: -

> " Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land. (See Megarry and Wade, '*The Law of Real Property*' 6th Edition Pages 477 and 480)."

35. It is settled law claims of adverse possession are made against registered owners and as I have earlier illustrated, from the features of a tenancy in common, the defendants interests in the suit property including that of the 2nd defendant were held in undivided shares and even if the plaintiffs could have proved their claim of adverse possession, it is impractical for this court to enter judgment in their favour in the absence of a subsisting suit against the 2nd defendant who owns a ¼ of the suit property.

36. Put another way, for the plaintiffs' claim of adverse possession to succeed, it had to be against all the defendants as tenants in common since it is unrealistic to determine which particular portion of the suit property belonged to which defendant. I adopt the Apex court's decision in the case of *John Mbogua Getao* (*supra*) (See also *Saiqua Sultana Hassan Haroon & 2 others v Abdul Malik* [2016] eKLR) which stated as follows:-

> " Applying these principles to the dispute at hand, we cannot see the legal basis upon which the appellant could lay claim to the parcel of land in question, to the exclusion of any other member of the group ranch. For as long as the group ranch remained undivided, his share in the land was equal to the other members of the group."

37. This was further explained in the persuasive decision of *Mudigo Wa Kuwanga v Ngumbao Kazungu & another* [2014] eKLR thus:-

> " The shares, until physically divided, only exist in relation to the metaphysically abstruct ownership of the land and not in the physical land itself. (See *Land Law, Sweet & Maxwell's Test book Series*, 4th Edition pg 364, 12-008.)
>
> As discussed by *Sweet & Maxwell's* (*supra*), the undivided nature of the shares and inability to demarcate the land physically flows from the fact that unity of possession remains a necessary requirement of a tenancy in common, thus entitling a tenant in common to possess every part of the land."

38. Therefore, I must find and hold that even though the plaintiffs appear to have a good case, in the absence of a subsisting suit against the 2nd defendant, this court cannot enter judgment against the 1st, 3rd and 4th defendants. On that basis, I hereby strike out the plaintiffs' suit against the 1st, 3rd and 4th defendants. This determination renders the resolution of issue (III) otiose.

III. Whether the 1st, 3rd and 4th Defendants' Counterclaim was Time Barred

39. In consideration of the characteristic of unity of possession in a tenancy of common whereby every tenant is entitled to possession of the whole of the land as tenant in common, any of the defendants as tenants in their individual capacities, had the right to sue notwithstanding the fact that they are eligible to a segment of the suit property. This unity of possession and ability to sue was explicated as follows in the case of *Mudigo Wa Kuwanga* (*supra*):-

> " ...It also does not matter that the Plaintiff's co-tenants are not parties to the suit. The Plaintiff has the right to file a suit against the Defendants because of the undivided nature of the shares in the land."

40. Thus, in claims such trespass as pleaded by the 1st, 3rd and 4th defendants in their counterclaim, any of them notwithstanding the absence of the 2nd defendant, could Counterclaim against the plaintiffs.

41. Given that the 1st, 3rd and 4th defendants had capacity, I now turn to determine whether their claim is time barred which touches on the jurisdiction of this court to determine their claim. The relevant statutory provision is section 7 of the *Limitation of Actions Act* which provides as follows on causes of action concerning land: -

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

42. These 1st, 3rd and 4th defendants neither disclosed when their cause of action of trespass accrued nor led evidence on this. As seen from DW2's evidence, it was clear he was not conversant with activities pertaining to the suit property and the plaintiffs' evidence that they entered the suit property in 1994 was unchallenged. Ultimately, this court finds the plaintiffs entered the suit property in 1994.

43. The defendants were registered as the owners of the suit property on 10/09/2009. Therefore, they had to file their claim against the plaintiffs by 10/09/2021 which is 12 years from when their cause of action accrued and on that basis, I find the 1st, 3rd and 4th defendants' counterclaim was time barred. I need not say more.

IV. What Appropriate Orders should be Granted Including an Order as to Costs.

44. In the end, I find that in the absence of a subsisting suit against the 2nd defendant, this court cannot enter judgment against the 1st, 3rd and 4th defendants. I also find the 1st, 3rd and 4th defendants' counterclaim against the plaintiffs is time barred. It is trite law costs follow the event and consequently, each party shall bear their respective costs. To this end, this court hereby makes the following final disposal orders: -

    a. The plaintiffs' suit against the 2nd defendant is hereby marked as abated.

    b. The plaintiffs' suit is hereby struck out against the 1st, 3rd and 4th defendants.

    c. The 1st, 3rd and 4th defendants' counterclaim against the plaintiffs is hereby struck out.

    d. Each party shall bear their respective costs.

    It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 4TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of;

Miss. Owenga for the Plaintiffs

Mr. Otieno h/b for Mr. Korongo for the Defendants

Miss Moraa h/b for Miss Essendi for the Interested Party

Court assistant: Ishmael Orwa