Mulongo v Okola (Environment & Land Case 153 of 2017) [2023] KEELC 18554 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18554 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 153 OF 2017

BN OLAO, J

JULY 6, 2023

BETWEEN

KENNETH MULONGO ..... PLAINTIFF

AND

JACOB OKOLA ..... DEFENDANT

JUDGMENT

1. Kenneth Mulongo (the Plaintiff herein and who later donated a Power of Attorney to his son Denis Ngweno Mulongo dated 9th September 2022) filed this suit on 28th August 2017 seeking the following remedy against Jacob Okola (the defendant):

    1) An order of injunction restraining the defendant from burying the remains of Catherine Nekesa on the land parcel No Marachi/Esikoma/1878.

    2) Costs of the suit be in the cause.

2. The basis of the plaintiff's claim is that he is the registered proprietor of the land parcel No Marachi/Esikoma/1878 (the suit land) measuring approximately 1.83 Hectares. That on or about August 2017 and without any colour of right and in violation of the plaintiff's proprietary rights, the defendant trespassed onto the suit land and began the process of burying the remains of one Catherine Nekesa thereon. An order of eviction should therefore issue against the defendant, his heirs, employees and all those claiming under him from occupying, cultivating, using or encroaching any part of the suit land after eviction.

3. The plaintiff filed a brief statement dated 28th August 2017 reiterating that whereas he is the registered proprietor of the suit land, the defendant had illegally trespassed thereon and was in the process of burying the remains of one Catherine Nekesa thereon.

4. The plaintiff filed two lists of documents. The first one dated 28th August 2017 contained the following documents:

    1) Green card for the land parcel No Marachi/Esikoma/1878.

    2) Certificate of Official Search for the land parcel No Marachi/Esikoma/1878.

    3) Title deed for the land parcel No Marachi/Esikoma/1878

    He also filed a further list of documents to which he annexed a Power of Attorney donated to his son Denis Ngweno Mulongo dated 9th September 2022.

5. The defendant filed an amended defence and counter-claim dated 21st March 2020 in which he denied that the plaintiff is the registered proprietor of the suit land. He added however that if the plaintiff is registered as proprietor of the suit land, he is holding it in trust for the defendant because it is family land.

6. In his counter-claim, the defendant pleaded that he was born on the land parcel No Marachi/Esikoma/852 which has since been sub-divided to create the land parcel No Marachi/Esikoma/1877 and the suit land. That he has occupied the suit land since 1969 continuously, peacefully, quietly and un-interrupted hence he qualifies to acquire it by way of adverse possession. On the other hand, the plaintiff has never been in occupation of the suit land. The defendant therefore sought the following orders in his counter-claim:

    1) An order directing the plaintiff to transfer to the defendant the land parcel No Marachi/Esikoma/1878 and in default, the Deputy Registrar be empowered to do so.

    2) Costs of the suit and the counter-claim.

    3) Any other relief the Honourable Court may deem just and fit to grant.

7. In his statement dated 22nd March 2022, the defendant averred that he was born in 1969 and that his father Paul Okolla Oganga was son to Ogonga Okudoi both of whom are now deceased. That Ogonga Okudoi was survived by seven (7) sons and two (2) daughters all of whom are also now deceased.

8. That Venacious Oloo Oganga filed Busia High Court Succession Cause No 55 of 1995 and sub-divided the land parcel No Marachi/Esikoma/852 to create the suit land and also land parcel No Marachi/Esikoma/1877. That he has been living on the suit land all his life since 1969 when he was born while the plaintiff has never been in occupation of the same. He therefore seeks an order that the suit land be transferred to him.

9. The defendant filed two (2) lists of documents. In the first list dated 27th February 2019, he annexed the following documents:

    1) Green Card for the land parcel No Marachi/Esikoma/852.

    2) Grant of Letters of Administration issued to Vernacious Oloo Oganga in respect to the Estate of Oganga Okutoi in Busia High Court Succession Cause No. 55 of 1995.

    He also filed a further list of documents dated 21st March 2022 containing the following:

        1) Copy of form P&A filed in Busia High Court Succession Cause No 55 of 1995.

        2) Copy of Certificate of Confirmation of Grant issued in Busia High Court Succession Cause No 55 of 1995.

3) Letter dated July 29, 2018 by Didmus Angweno Jacob.

4) Proceedings in Busia SRMC P&a Cause No 55 of 1995.

I must at this juncture point out that it is not clear whether the P&A Succession Cause No 55 of 1995 was filed in Busia High Court or Busia Senior Resident Magistrate's Court. The Grant of Letters of Administration issued on 5th August 1999 is headed both Senior Resident Magistrate's Court as well as Busia High Court. The proceedings of the probate cause NO 55 of 1995 dated 18th November 1999 were conducted by Hon. S. O. Omwega (resident Magistrate). On the other hand, the Confirmed Grant is signed by a Judge. It looks like the parties were prosecuting the succession process in any available Court and obtaining orders!

10. The hearing commenced on 16th February 2023 and the parties were the only witnesses who testified in support of their respective cases. They adopted as their evidence their statements whose contents I have already summarised above and also produced as their documentary evidence, the documents filed herein. Denis Ngweno Mulongo (PW1) adopted the statement of his father Kenneth Mulongo.

11. Submissions were thereafter filed both by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocates for the plaintiff and by Mr Ashioya Senior instructed by the firm of Ashioya & Company Advocates for the defendant.

12. I have considered the evidence by the parties and the submission by counsel.

13. In the course of the plenary hearing, I was curious to know if the remains of Catherine Nekesa were yet to be buried some six (6) years down the line taking into account the fact that the main remedy which the plaintiff seeks is to injunct the defendant from burying her remains on the suit land. I also notice from the record that on 29th August 2017, Kaniaru J had issued a temporary order of injunction restraining the defendant from burying those remains on the suit land. However, I was informed during the hearing, to my relief, that the defendant had interred those remains on another parcel of land.

14. It is not in dispute that the plaintiff is the registered proprietor of the suit land. Under Section 26 (1) of the *Land Registration Act*, his title is "prima facie evidence" that his ownership of the suit land is absolute and indefeasible. He is therefore entitled to the order of permanent injunction sought in his plaint to restrain the defendant from burying the remains of Catherine Nekesa thereon. However, that prayer has already been over-taken by events because at the commencement of the hearing, the parties confirmed to me that those remains were interred elsewhere. That remedy is therefore not available to the plaintiff.

15. Secondly, and most importantly, the plaintiff donated a Power of Attorney dated September 9, 2022 to his son Denis Ngweno Mulongo (PW1) who testified on his behalf. The said Power of Attorney was not registered as required by law. That issue was not canvassed during the trial. However, that is an issue of law which goes to the capacity of Denis Ngweno Mulongo PW1 to prosecute this case on behalf of the plaintiff. It is therefore an issue which this Court can raise suo moto.

16. The issue was also raised by counsel for the defendant in his submissions at page one (1) as follows:

> "Your Lordship, the Registration of *Land Act* in it's index, Section 4 and 108 has provided a format for the preparation of a Power of Attorney; the one filed by the plaintiff but produced by Dennis Mulongo was prepared in the plaintiff's advocate's office in the normal manner that we prepare agreements, it does not conform to the Statutory one; we are alive to the fact

that lack of form cannot vitiate the merit of a document; however, the document produced in Court as a Power of Attorney has not been registered in the Lands Office; it is therefore not competent for the intended purpose; registration of the same in the Lands Office is a mandatory requirement ..."

Section 4(1) of the *Registration of Documents Act* (CAP 285) reads, as far as is relevant, that:

4(1): "All documents conferring or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and shall be registered as hereinafter prescribed..." Emphasis mine.

Since the Power of Attorney was not registered as required, that means that Dennis Ngweno Mulongo (PW1) had no capacity to address this Court in prosecuting the plaintiff's suit.

17. On those two grounds, the plaintiff's suit is for dismissal.

18. The defendant's counter claim on the other hand is that he has lived on the suit land since he was born in 1969 and is therefore entitled to an order that the same be registered in his names by virtue of adverse possession. Section 38 of the Law of Limitation Act allows him to approach this Court for such an order. A party claiming land by way of adverse possession must therefore, of necessity, be in occupation and possession of the land which he claims. In *Kasuve -V- Mwaani Investment Ltd & Others* 2004 1 KLR 184, the Court held that:

> " And in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – Wanje v Saikwa (No 2) 1984 KLR 284."

19. I notice that simultaneously with the filing of his plaint, the plaintiff had obtained an ex-parte order of temporary injunction from Kaniaru J on 29th August 2017 restraining the defendant from burying the remains of Catherine Nekesa on the suit land. In his affidavit in support of that application for temporary injunction, Kenneth Mulongo the plaintiff averred in paragraph 4 as follows:

    4: "That the defendant has trespassed onto and occupied my land parcel NO Marachi/ Esikoma/1878 and is planning to bury the remains of Catherine Nekesa on the said parcel."

    The application was never canvassed inter-parte and so that averment was not rebutted. What concerns me is that in paragraph 7 of his further affidavit dated 22nd March 2022 which he filed as part of his testimony and which he adopted during the hearing, the defendant deposed:

    7: "That I have been living on the parcel of land now referred to as L.R No Marachi/ Esikoma/1878 for my entire life and since 1969 and for over 50 years."

    In his oral testimony when cross-examined by Mr Ashioya, the plaintiff reiterated that the defendant lives on his own land parcel No Marachi/Esikoma/1877 and not on the suit land. He said:

    > " The defendant does not live on the suit land. He lives on parcel No Marachi/ Esikoma/1877. It is true that the defendant buried his mother on the land parcel NO Marachi/Esikoma/1878 which is the land in dispute. It is not true that the defendant was born on the suit land but he came there when I was still young."

20. If the defendant was born on the suit land as he claims, and which is denied by the plaintiff, then he must have vacated it at some point and, perhaps, returned later. Otherwise, the plaintiff would not

have been seeking orders to restrain him. And although the plaintiff in paragraph 8 of his plaint, (and which is not among the final prayers sought), asked this court to evict the defendant from the suit land, the fact that he defendant buried Catherine Nekesa'sremains on another parcel of land can only lead to the inevitable conclusion that he (defendant) has never been in exclusive, open, notorious, peaceful and un-interrupted occupation of the suit land to warrant the grant of the orders of adverse possession sought. And if at all he ever was, he has not told us the period when he actually dispossessed the plaintiff of the suit land for the required period of 12 years. It must be remembered that "adverse possession is a fact to be observed upon the land. It is not to be seen in a title" – *Maweu v Liu Ranching & Farming Co-operative Society* 1985 eKLR. Further, in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it – *Wambugu v Njuguna* 1983 KLR 172. In the circumstances of this case, the defendant has been unable to demonstrate that for a period or 12 years or more, he had dispossessed the plaintiff of the suit land or any portion thereof. If anything, the evidence shows that the plaintiff has been resisting the defendant's attempts to enter the suit land.

21. The sum total of all the above is that the defendant's counter-claim to the suit land by way of adverse possession is devoid of merit and must be dismissed. That being the case, there can be no basis upon which to make any orders directing the plaintiff, and in default the Deputy Registrar to transfer the suit land to the defendant.

22. Ultimately therefore, and having considered all the evidence herein, I make the following disposal orders:

    1) The plaintiff's suit is dismissed. However, that dismissal has no effect to his title to the suit land or his occupation thereof.

    2) The defendant's counter-claim is also dismissed.

    3) Each party shall meet their own costs.

BOAZ N. OLAO

JUDGE

6TH JULY 2023

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL AT BUSIA ELC ON THIS 6TH DAY OF JULY 2023. RIGHT OF APPEAL.

BOAZ N. OLAO

JUDGE

6TH JULY 2023