



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

(Formerly Kisii ELC NO. 451 OF 2014)

ELC NO. 444 OF 2017

TIMOTHY OMANJO.....1ST PLAINTIFF
FRANCIS OTIENO OJOSH.....2ND PLAINTIFF
FREDRICK OTIENO O.....3RD PLAINTIFF
DONALD YURI OWINO.....4TH PLAINTIFF
EZEKIEL ONYANGO OMANJO & 5 OTHERS.....5TH PLAINTIFF

Versus

JOHN OWITI ODUKADO.....1ST DEFENDANT
SAMWEL ODERO.....2ND DEFENDANT
JOSEPH OTIENO ODUKADO.....3RD DEFENDANT
GEORGE ONYANGO ODUKADO.....4TH DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The suit land herein is Title number Kanyamkago / Kawere I / 4279 measuring approximately ten hectares (10. Ha) in area (The suit land herein). It is a partition of land reference number Kanyamkago / Kawere I/215 (The parent land). The same is contained in Registry Map Sheet number 50 and located in Migori County within the Republic of Kenya.
2. The 1st, 2nd, 3rd, 4th and 5th plaintiffs herein are represented by M/s Agure Odero and Company Advocates.
3. The original defendant was one Julius Odukado Owiti (deceased-1) who was represented by the firm of C. A. Okenye & Company Advocates vide a Memorandum of Appearance dated 30th December 2014 and duly filed in court on 16th December 2018.
4. On 24th February 2018, this court granted leave to John Owiti Odukado, Samwel Odero Adukado, Joseph Otieno Odukado and George Onyango Odukado to be enjoined as the current 1st, 2nd, 3rd, and 4th defendants respectively. They are represented by M/s Sam Onyango and Co Advocates pursuant to memorandum of appearance dated 16th February 2018 and duly filed herein on 19th February 2018.
5. Initially, this suit was lodged at Kisii Environment and Land Court. On 11th April, 2017, the same was transferred to this court, upon its establishment, for hearing and determination in the Spirit of **Articles 6(3) and 48 of the Constitution of Kenya, 2010.**

B. THE GIST OF THE PLAINTIFF'S CASE

6. By a plaint dated 15th September 2014 filed herein on 20th November 2014, amended on 27th February 2018 and further amended on 4th February 2019, the plaintiffs have sued the defendant's for orders;

- a) Declaration that the plaintiffs are the registered and or owner of **L.R NO. KANYAMKAGO/EAST/KAWERE I/4279** measuring 10 hectares.
- b) An Order for eviction to issue against the defendant to remove the structures built thereon albeit parcel **L.R NO.KANYAMKAGO /EAST/ KAWERE I/4279** measuring 10 hectares and permanent injunction thereof to issue against the defendants, agents, servants respectively from cultivating or building thereon or causing wanton destruction howsoever from the said parcel.
- c) An Order for exhumation of the body from parcel **L.R NO. KANYAMKAGO /EAST/KAWERE I/4279**, and body interred elsewhere from the said parcel, that on re-exhumation court may direct that the body be preserved at Migori County Referral Hospital Mortuary.
- d) Cost of the suit.
- e) Any other relief this court may deem fit to grant.

7. The Plaintiffs' claim as per the further amended Plaintiff is that they are the registered owners of one (1) acre each of the suit land which was acquired and transferred from Hesbon Otieno Omanjo (Deceased-2). That in early 2014, the defendants trespassed into the suit land and built thereon permanent structures as well as proceeded in contempt and buried the remains of the deceased-1 on a portion of the suit land. That the acts of the defendants have restricted and interfered with the plaintiffs' rights over the suit land hence it provoked the instant suit.

8. The plaintiffs' response to the defendants' joint statement of defence and counterclaim dated 31st October, 2019 duly filed on even date (infra) is dated 12th November, 2019 and filed on 21st July 2020. They denied that the defendants have been in occupation of the suit land since the year 1974. That the alleged overriding interests by the defendants do not apply to the suit land and prayed that the defendants' counterclaim against them be dismissed with costs.

9. The 1st plaintiff (PW1) testified and relied on his statement dated 20th November 2014 as part of his evidence herein. He further relied on PExhbs 1 to 5 namely a copy of title deed, a copy of green card, a copy of official Search, assorted photographs and another copy of green card respectively.

10. The 4th Plaintiff (PW2) entirely relied on his statement dated 20th November 2014 as part of his testimony. He stated that he is one of the proprietors of the suit land and identified PExhi1 thereof.

11. In his testimony, the 5th plaintiff (PW3) also identified PExhibts 1 to 5 to show that the defendants are strangers on the suit land. He further relied on his statement dated 20th November 2014 as part of his testimony.

12. Learned counsel for the plaintiffs filed submissions dated 1st March, 2021 on even date identifying four (4) issues for determination which include; whether the defendants and the plaintiffs are entitled to adverse possession and the reliefs sought in the suit respectively. Counsel discussed the issues in favour of the plaintiffs and against the defendants. Reliance was made on sections 35, 36(1), 37 (1) of the Land Registration Act, 2016 (2012)-The LRA, Sections 152 A and 1(i) of the Land Act 2016 (2012) Sections 107 and 108 of the Evidence Act Chapter 80 Laws of Kenya, Sections 7 and 13 of the Limitation of Actions Act Chapter 22 Laws of Kenya as well as authoritative pronouncement namely **Gladys Wanjiru Ngacha =vs= Terresa Chepsaat & 4 others (2013) eKLR, Moses Parantai and Peris Wanjiku Mukuru (suing as legal representatives of the estate of Sospeter Mukuru Mbeere –Deceased)=vs=Stephen Njoroge Macharia (2020) eKLR. Charles Ajwang Abeti (suing as the legal representative of Abeti Atinda-Deceased) =vs= Charles Ochoro Rabach (2019)eKLR and Kuria Kiarie & 2-others =vs= Sammy Magera (2018)eKLR**, among others .

C. THE GIST OF THE DEFENDANTS' CASE

13. By their joint statement of defence dated 31st October 2019 and filed on even date, the defendants denied the plaintiffs' claim. They stated, inter alia, that the plaintiffs' registration as proprietors of the suit land, which is denied, is subject to the overriding interests under Section 28 of the Land Registration Act (supra). That at the time of the purported transfer of the suit land to the plaintiffs, the rights of the previous proprietor had been extinguished by effluence of time and that the defendants had acquired the right of ownership by virtue of adverse possession, hence no transfer to third parties could be effective.

14. Simultaneously filed with the statement of defence, the defendants mounted the counter claim against the plaintiffs jointly and severally for;

- a) A declaration that the plaintiffs' right to recover the whole of land parcel No. KANYAMKAGO/KAWERE I/4279 is barred under the Limitation of Actions Act and their title thereto extinguished on the grounds that the defendants have been in actual, open, peaceful, continuous and uninterrupted occupation and possession of the suit parcel for a period exceeding 12 years.
- b) An order for the registration of the defendants as the joint proprietors of the suit parcel.
- c) Costs of the counterclaim
- d) Any other relief deemed appropriate by this Honourable Court

15. In the counter claim, the defendants stated that on or about 23rd November 1974, Deceased-2, the plaintiffs' father procured registration of the parent land in his name. That at that time the defendants and their deceased father were in actual occupation and possession of the parent land and had erected their homestead thereon as well as carried out farming and related activities on the same. That by 1st July 2013 and 20th February 2014, when the plaintiffs' father partitioned the parent land into the suit land alongside others and transferred the suit land to the plaintiffs respectively, the defendants' had acquired overriding interests as envisaged under Section 28 (supra) and the plaintiffs' right to recover the whole suit land is barred under the Limitation of Actions Act (supra).

16. The 2nd defendant (DW1), a retired Chef with Mount Kenya Safari Club relied on his statement dated 11th November 2019 as part of his evidence. He stated that he together with other defendants own the parent land. That the plaintiffs' claim is false and urged this court to dismiss the same and allow the orders sought in the counter claim.

17. DW2, Elam Mogosi Kisia, a farmer aged 87 years at the time of his testimony on 21st January 2021, relied on his statement dated 11th November 2019. It was adopted as part of his evidence.

18. DW3, MUSODA KISIGIRA ANDAGO, a farmer and a neighbour to the defendant, relied on his statement filed herein on 11th November 2019. The court adopted the same as part of his evidence.

19. The defendants' submissions, if any, are not on record herein.

D. POINTS FOR DETERMINATION

20. It is settled law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Great Lakes Transport Company (U) Ltd -vs- J. Kenya Revenue Authority (2009) KLR 720**.

21. I have anxiously studied the parties' respective pleadings, the evidence and the **plaintiffs' submissions** inclusive of all authorities relied thereupon. I also consider the agreed issues dated 18th October 2018, 15th April 2015 and 11th March, 2014 filed herein on 16th October 2018, 14th May 2015 as well as 12th March 2015 respectively filed by learned counsel for the 1st, 2nd, 3rd, 4th and 5th plaintiffs and all are the same in form and content.

22. In the foregone, I am of the considered view that the issues for determination are compressed thus;

a) Are the plaintiffs the proprietors of the suit land?

b) Have the defendants trespassed onto the suit land or acquired adverse possession over the same?

c) Have the parties proved their respective claims to the requisite standards to entitle them to orders sought in their respective pleadings herein?

E. ANALYSIS AND DETERMINATION.

23. Regarding the first issue, the plaintiffs asserted that they are the registered owners of the suit land since they were registered as such on 20th February 2014. That they acquired the suit land from deceased-2 who was the original registered owner of the parent land with effect from 1st July 2013.

24. PW1 testified in examination in chief inter alia, that he has title deed to the suit land measuring approximately 25 acres or 10 hectares in size. That the 2nd, 3rd, 4th and 5th plaintiffs together with himself are the registered owners of the suit land holding it in trust for the other five (5) plaintiffs as per PExhibit 1.

25. It was the evidence of PW2 that he is one of the registered proprietors of the suit land. During examination in chief, he stated that Deceased-2 transferred the suit land to them as revealed in PExhibit 1 herein.

26. In examination in chief, PW3 stated;

"I am a registered proprietor of the suit land. LR No. Kanyamkago/Kawere 1/ 4279 approximately 10 hectares....."

27. The defendants denied that the plaintiffs are the registered owners of the suit land. In cross examination, DW2 stated that;

".....I can't tell if 1st registration of the suit land was in the name of Hesbon Otieno Omanjo..."

28. Under section 2 of the LRA, the term "Proprietor" means:

a) "In relation to land or lease, the person named in the register as the proprietor; and

b) In relation to a charge of land....."

29. Interests conferred by registration and rights of a proprietor are captured under sections 24 and 25 of the LRA respectively. A certificate of title issued under section 30(1) of the LRA is to be held as conclusive evidence of proprietorship as stipulated in section 26 of the same Act subject to exceptions stated thereunder.

30. In **Moses Parantai case** (supra), the Court of Appeal noted that acquisition title to land by a registered proprietor must follow due process; See also the Court of Appeal decision in the case of **Munyu Maina-vs-Hiram Githiha Maina (2013) eKLR**.

31. In the instant suit, the plaintiffs have shown that they are the proprietors of the suit land as disclosed in PExhibits 1 to 3. Besides, is there anything to demonstrate that they acquired the same by fraud or misrepresentation or illegally, un-procedurally or through a corrupt scheme as set out in section 26 (1) (a) and (b) of the LRA?

32. On the second issue, the plaintiffs asserted that the defendants are trespassers on the suit land. They failed to set out the particulars of trespass on face of the amended plaint or at all.

33. Sections 3 of the Trespass Act and section 152A of the Land Act (supra) are borne in mind this case. **In the Concise Oxford English Dictionary 12th Edition at page 1539**, the term “Trespass” is defined as follows;

“Enter someone’s land or property without permission”

34. Similarly, in **Clerk and Lindsell on Torts 18th Edition paragraph 18-01**, “Trespass” means;

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass.”

35. Besides, the defendants vehemently denied the plaintiffs’ assertion and counter claimed that they have acquired overriding interests in form of adverse possession over the suit land. The procedure for asserting adverse possession claim is by an originating summons as envisaged under sections 7,13, 37 and 38 of the Limitation of Actions Act (supra) and authoritative pronouncements in **Salim-vs-Boyd (1971) EA 550** and **Gulam Mariam Noordin-vs-Julius Charo Karisa (2015) eKLR**, amongst others. The procedure is intended to enable simple matters to be settled by court without the expense of bringing an action in the usual way as held in **Re Giles (2) (1890) 43 ChD 391** and **Kibutiri-vs-Kibutiri (1983) eKLR**.

36. In the instant matter, the defendants have adopted the usual way of a counter claim in asserting adverse possession rights in respect of the suit land. Quite clearly, the procedure is tailored to meeting the best ends of justice as stipulated under sections **3 and 19 (1) of the Environment and Land Court Act, 2015 (2011)**, sections **1A, 1B, 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and Articles 48, 159 (2) (b), (d) and (e) of the Constitution of Kenya, 2010**. Further, bearing in mind the character of the plaintiffs’ claim, the plaintiffs are not to be prejudiced thereby; see also **Boyes-vs-Gathure (1969) EA 385** and **Bayete Company Ltd-vs-Kosgey (1998) LLR 813**.

37. Section 25(b) of the LRA states that the rights of a proprietor are subject to such liabilities, rights and interests as affect the same and are declared by section 28 of the LRA not to require noting on the register, unless the contrary is expressed in the register. It is crystal clear that adverse possession rights are overriding interests as stated in Section 28 (h) of the LRA.

38. The ingredients of adverse possession namely proof of entry by the applicant upon the land in question openly, peacefully, without the permission of the proprietor and continued in such possession for an uninterrupted period in excess of 12 years thereby dispossessing the proprietor and extinguishing the latter’s title thereto, are well settled: see **Wanje-vs-Saikwa (NO.2) (1984) KLR 284**, **Elijah O.L Opar-vs-Tobias Odhiambo Abach (2019) KLR**, **Salim and Noordin cases** (supra) and other authorities.

39. PW1 stated in examination in chief that the defendants trespassed into the suit land in the year 2014. That the defendants erected structures thereon in the year 2015. However, during cross examination by Mr Sam Onyango, learned counsel for the defendants, PW1 stated in part;

“...They (the defendants) built thereon and have permanent houses on the land....They also cultivate the land. They do so openly. The title is now mine....The 1st defendant is older than me. He erected his homestead in 1974. I also built on the land in 1974.....”
(Emphasis added)

40. In cross examination, DW1 testified that they stay on the suit land. That his younger brothers were born thereon and the plaintiffs possess and occupy part of the suit land.

41. PW2 testified that the defendants occupy the suit land illegally. That Deceased-1 erected buildings thereat and subsequently, his remains were interred in the suit land.

42. According to PW3, the defendants are strangers on the suit land. In cross examination, he stated that one cannot differentiate the homesteads of the plaintiffs and that of the defendants on the suit land owing to several structures erected thereon.

43. DW1 and DW2 maintained that they together with the other defendants possess and occupy the suit land. Thus, it is common baseline that the defendants have been in possession of the suit land in the form of tilling and erected homesteads on it as noted in **Titus Ong’ang’a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017)- see also Elijah Opar case** (supra).

44. Given that the defendants has been in open, peaceful and continuous possession and occupation of the suit land currently registered in the name of the 1st, 2nd, 3rd, 4th and 5th plaintiffs since the year 1974 as even revealed in paragraph 39 herein above, they have overriding interests in the form of adverse possession thereon as held in **Wanje, Charles Abeti, Nyachio and Opar cases** (supra) and as stipulated in sections 25 (b) and 28 (h) of the LRA, amongst others. Therefore, the defendants are not trespassers on the suit land as envisaged in section 152 A of the Land Act and defined in inter alia, the **Concise Oxford English Dictionary and Clerk and Lindsell** (supra).

45. In view of the above, it is the finding of this court that the plaintiffs have failed to establish their case against the defendants on a balance of probabilities. On that account, they are not entitled to the orders sought in the amended plaint. On the other hand, the defendants have proved their case against the plaintiffs to the requisite standards. So, they are entitled to the orders sought in their counterclaim.

46. A fortiori, I make final orders in this matter as hereunder;

a) The plaintiffs' claim mounted by way of dated 15th September 2014, amended on 27th February 2018 and further amended on 4th February 2019, be and is hereby dismissed with costs to the defendants

b) Judgment is hereby entered for the defendants against the plaintiffs in terms of the counter claim dated 31st October 2019 and duly filed on even date and as set out in paragraph 14 (a) to (c) hereinabove.

47. Orders accordingly.

DELIVERED, DATED and SIGNED at HOMA BAY via email as the parties were duly notified, this 28th September 2021

G M A ONGONDO

JUDGE