



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 409 OF 2014

JOHN NYACHIRO MOSWETA.....PLAINTIFF

VERSUS

PIUS OGWORA.....1ST DEFENDANT

PETER ONERI OGWORA.....2ND DEFENDANT

BENEDICT OGWORA.....3RD DEFENDANT

COSMAS ONG'ANG'A OGWORA.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit against the Defendants by way of a Plaint dated 27th October 2014 seeking the following reliefs:

- a) A permanent injunction to restrain the Defendants by themselves, their servants or agents or otherwise from remaining on, or continuing in occupation of the said land CENTRAL KITUTU/MONYERERO/128 and the possession of the said land be given to the Plaintiff.
- b) An order for recovery and restoration of proper boundaries of land title CENTRAL KITUTU/MONYERERO/128 and damages.
- c) Costs
- d) Interest.

2. The Defendants filed a Defence and Counterclaim. In the said Defence they admitted that the Plaintiff is the registered owner of the land parcel no. CENTRAL KITUTU/MONYERERO/128 (hereinafter referred to as the suit property) but denied that they had wrongfully entered the suit property in 2014 as alleged in the Plaint. Instead they contended that prior to their entry into the suit property, the Defendant's father namely Francis Ogwora Maraga-deceased was in possession thereof and had planted trees on the disputed portion. They further averred that they had been in occupation of the disputed portion of the suit property causing the Plaintiff to institute proceedings against their late father vide KISII HCCC No. 43 of 1991 which touched on and concerned the same subject matter.

3. The Defendants further contended that the suit was barred by the provisions of sections 4 and 7 of the Limitation of Actions Act. The Defendants also claimed that the suit was *res judicata* and the same was legally untenable.

4. In their Counterclaim, the Defendants contended that they had been in possession of the disputed portion of the suit property measuring 0.5 hectares for over 12 years after the judgement in Kisii HCCC No. 43 of 1991 was delivered against their late father on 26th June 1995. They therefore claimed that the Plaintiff's title to the suit property had been extinguished and that they had acquired prescriptive rights over the portion of the suit property measuring 0.5 hectares and the same ought to be excised and registered in their names jointly and severally.

5. The case proceeded for hearing on diverse dates between November 2019 and April 2021 when the parties testified and called their witnesses.

PLAINTIFF'S CASE

6. The Plaintiff who testified as PW1 stated that he was the registered owner of land parcel no. CENTRAL KITUTU/MONYERERO/128 measuring 0.8 hectares. He produced the title deed in respect of the suit property. It was his evidence that he bought the said parcel from Francis Ogwora Maraga in 1968 before the adjudication process. The said Francis Ogwora owned the neighbouring parcel of land. The Plaintiff testified that he immediately took possession of the land and planted tea bushes. He told the court that sometime in 1990 Francis Ogwora trespassed onto his land and planted tea bushes on a small portion thereof thus interfering with the boundary. He filed a case against Francis vide Kisii HCCC No. 49 of 1991 and obtained judgment against him.

7. He told the court that on 18.10.2014 the Defendants forcefully entered his land and erected a fence claiming that the land was theirs. He reported that matter to Rioma Police Station but the police did not arrest the Defendants and this is what prompted him to file this suit.

8. In cross examination he admitted that he filed a suit for trespass against Francis Ogwora-deceased who was the Defendant's father and the case was concluded in 1995 in his favour. He stated that he did not evict the Defendants' father after the case was decided and he allowed him to continue using the land and harvesting his trees. He admitted that the report filed by the Land Registrar indicated that there were mature trees on the suit property that were not planted by him. The report also said that there was a tea plantation on the land. He said he had sued the Defendants because they had trespassed on his land.

The Plaintiff did not call any witnesses.

9. The 1st Defendant testified on his own behalf and on behalf of his co-defendants. He adopted his witness statement and produced the documents in the Defendants' List of Documents as his exhibits. He testified that Francis Ogwora-deceased had occupied the Plaintiff's land and planted some trees and tea bushes which were still standing thereon. He stated that after his father's death, him and his brothers continued tending to the trees and tea bushes. He told the court that the Plaintiff has all along been aware that they have been utilizing his land since 1990.

10. In cross examination he stated that the Plaintiff has only been in occupation of 0.3 hectares, while about 0.5 hectares of the suit property has been in the Defendants' occupation and use since 1990. He reiterated that they continued using the land after their father died and that it was not true that they trespassed on the land in 2014.

11. The Defendants called one witness Nathan Mainga Michuki who testified as DW2. He told the court that the Defendants' father had been utilizing a large portion the suit property and that he had planted trees and tea bushes thereon. He confirmed that the Defendant's family had used the land for almost 30 years.

12. In cross examination he explained that the Plaintiff had bought the suit property from the late Francis Ogwora, but the Plaintiff only occupied a portion of what he bought while the rest of the land remained in the possession of the deceased.

13. After the close of the Defendants' case the parties were granted time to file their submissions and both parties complied.

ISSUES FOR DETERMINATION

- i. Whether the Plaintiff is the registered owner of the suit property.
- ii. Whether the Defendants have trespassed on the Plaintiff's property.
- iii. Whether the Plaintiff's suit is *res judicata*
- iv. Whether the Defendants are entitled to a portion of the suit property measuring 0.5 hectares by way of adverse possession.

ANALYSIS AND DETERMINATION

14. It is common ground that the Plaintiff is the registered owner of land parcel number CENTRAL KITUTU/MONYERERO/128 measuring 0.8 Hectares. What is in contention is whether the Plaintiff has been in occupation of the entire parcel of land. According to the judgment in Kisii HCCC No. 49 of 1991, the Plaintiff was in occupation of only 0.3 hectares. It is also on record that even after the said judgment where the court held that the Defendants' father had trespassed on 0.5 hectares of the Plaintiff's land; the Plaintiff took no steps to evict him and allowed him to continue harvesting his trees. The report by the Land Registrar dated 2nd October 2017 confirmed that there were mature trees and tea bushes that were planted by the Defendants' father which were still standing on the suit property. Even though the Plaintiff testified that the Defendants entered the suit property in 2014, it is evident that they have been using the land continuously as the Plaintiff never evicted their father or uprooted his trees.

15. It is not in dispute that the Plaintiff filed suit against the Defendants' late father Francis Ogwora vide Kisii HCCC No. 49 of 1991. The said suit was in respect of the suit property herein. The court entered judgment in favour of the Plaintiff in 1995 and held that the deceased had trespassed onto a portion of the Plaintiff's land measuring 0.5 hectares.

16. However, even after he obtained a judgment in his favour the Plaintiff did not take any steps to evict the deceased and in accordance with section 4 (4) of the Limitation of Actions Act Cap 22 of the Laws of Kenya, the Plaintiff is barred from executing the said decree. The said section states as follows:

Section 4(4) “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered , or where the judgment or subsequent order directs any payment of money or delivery of any property to be made at a certain date or recurring periods) the date of default in making the payment or delivery in question and no arrears of interest in respect of a judgment may be recovered after the expiration of six years from the date on which the interest became due”

17. In the case of **M’Ikiara M’Rinkanya & Another v Gilbert Kabere M’Mbijiwe (2007) eKLR** the court held that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in Section 7 of the Act.

18. Even though the Plaintiff claims that the Defendants trespassed onto the suit property in 2014, the evidence on record clearly shows that the Defendants who are the sons of the late Francis Ogwora have been utilizing the suit property from the time their father was alive. That being the case, the Plaintiff’s suit is barred by the provisions of section 7 of the Civil Procedure Act.

The said section provides as follows:

“7. *Res judicata*

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

19. Even assuming that the instant suit is separate and distinct from the previous suit between the Plaintiff and the Defendants’ late father, the evidence on record indicates that the acts of trespass commenced long before 2014. This was confirmed by the Plaintiff who admitted that he allowed the Defendant’s father to continue using his land and harvesting his trees. The Land Registrar’s report also confirmed that the mature trees and tea bushes planted by the deceased were still in place. The suit is therefore barred under the provisions of section 7 of the Limitation of Actions Act which states that

Section 7.

“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”.

20. This brings me to the next issue for determination which is whether the Defendants are entitled to the suit property by way of adverse possession.

The Defendants testified that they have been using a portion of the Plaintiff’s land measuring 0.5 Ha from the time their father was alive. It is common ground that the trees and tea bushes that were planted by their late father in the 90s are still in place and prior to the filing of this suit, the Plaintiff had taken no steps to evict the deceased or the Defendants. The Defendants were in open, continuous and uninterrupted occupation of a portion the suit property measuring 0.5 Ha for a period in excess of 12 years after the judgment in HCCC No. 49 of 1995. Consequently, by the time the Plaintiff filed this suit, his right to the portion in dispute had been extinguished.

21. In the case of **Chevron (K) Limited v Harrison Charo Washutu (2016) eKLR** the court held that:

“The courts have since this decision held that a claim by adverse possession can be brought by a plaintiff, See **Mariba v Mariba Civil Appeals No. 188 of 2002**, Defence or counterclaim as was the case here. See **Wabala v Okumu (1997 LLR 607 CAK)**.

In **Gulam Mariam v Julius Charo Karisa, Civil Appeal No. 26 of 2015**, where the claim was raised in the Defence, the court in rejecting the objection stated the law as follows:

“Where a party like the Respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a Defence or Defence and Counterclaim. It is only when the party applies to be registered as the proprietor of land by adverse possession that order 37 Rule 7 requires such a claim to be brought by Originating Summons. It has also been held that the procedure of Originating Summons is not suitable for resolving complex and contentious questions of fact and law”

Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala v Okumu (1997 LLR 609 (CAK)** which like in this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd v Kosgey (1998) LLR 813** where the Plaintiff made no specific plea of adverse possession, the plea was nonetheless granted”.

22. Based on the above-mentioned decisions with which I concur, it is my finding that the Defendants are entitled to a portion of the suit property measuring 0.5 Ha by way of adverse possession.

23. In the final result, the Plaintiff’s claim fails while the Defendants’ Counterclaim succeeds. Accordingly, I dismiss the Plaintiff’s suit with costs to the Defendants and enter judgment for the Defendants on the Counterclaim and make the following final orders:

a) A declaration is hereby issued that the Plaintiff’s title and/or rights over a portion measuring 0.5 Hectares of L.R No. CENTRAL

KITUTU/MONYERERO/128 has been extinguished on account of the longevity of the Defendants' occupation thereof.

b) A declaration is hereby issued that the Defendants have acquired prescriptive rights over and in respect of the portion measuring 0.5 Hectares over L.R No. CENTRAL KITUTU/MONYERERO/128 and the said portion shall be excised from the suit property and transferred to the Defendants jointly and severally.

c) A permanent injunction is hereby issued restraining the Plaintiff either by himself, his agents, servants and/or anyone claiming under him from entering, trespassing onto, cultivating, building on, selling, transferring or interfering with the Defendants' occupation of the portion measuring 0.5 Hectares of L.R No. CENTRAL KITUTU/MONYERERO/128.

d) The costs of the Counterclaim shall be borne by the Plaintiff.

Dated, Signed and Delivered at Kisii this 17th day of November, 2021

J.M ONYANGO

JUDGE