



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 151 OF 2013

VALENTINE OMOLLO ONGESO.....PLAINTIFF

VERSUS

KENNEDY ONDENGHE.....DEFENDANT

JUDGEMENT

Valentine Omollo Ongeso (hereinafter referred to as the Plaintiff) has sued Kennedy Ondenge hereinafter referred to as the defendant claiming that **the plaintiff is the registered proprietor of Land parcel No. Kabondo/Kodumo East/357 measuring about 0.9 Hectares. The Plaintiff inherited the said land from his late on step father who had a levirate union with his mother known as Joseph Asewe through succession full particulars of which are well known to the defendant. The defendant who is not related to the plaintiff entered the said land and constructed his 2 separate homesteads within the land in question thereby preventing the plaintiff from quiet use and or enjoyment of the same. The defendant has persisted in his illegal action of using and or retaining the said land in question unless he is physically and or forcefully evicted from therein by a court order. The plaintiff avers that apart from the present case there was KISUMU PMC CC.NO. 506 OF 2003 between the parties which was dismissed for want of jurisdiction and he does not have a case of a similar nature pending and or filed in any other court of same jurisdiction other than the present case.**

In spite of notice of intention to sue having been issued to the defendant he has refused, neglected and or rejected to leave vacant possession of the land in question rendering this suit necessary. The cause of action lies within the jurisdiction of this court.

The Plaintiff prays for an order of eviction to forcefully remove the defendant, himself, his agents, family and or servants from the said land parcel no. Kabondo/Kokumo East/357 for vacant possession by the plaintiff. The plaintiff prays for costs.

The defendant on his part states that the plaintiff is not the registered owner of the suit property. The defendant states the deceased Joseph Asewe was his grandfather and that he is the only surviving heir of the said parcel of land for 16 years and therefore owns the land by way of adverse possession. The defendant contends that he has constructed on the parcel of land.

When the matter came up for hearing, the plaintiff testified that he is a farmer at Kabondo Kodumo. He states that he came from the same area with the defendant but not related. The claim by the plaintiff is based on the fact that her mother was inherited by the defendant's grandfather and had two children who died at infancy. His mother gave Joseph Asewe part of the family land which was demarcated and put in the name of Joseph Asewe as Kabondo/Kokumo East/357. Before the plaintiff's biological father's death, he had let the land to the deceased Joseph Asewe who had been running a local kiosk on the land. When the plaintiff's father died, Joseph Asewe the defendant's grandfather inherited his mother. He also got another woman known as Norah Asewe and the plaintiff's mother gave them another portion to settle.

The plaintiff testified that he was the one to inherit the land. The plaintiff claims that he did succession of the Estate of Joseph Asewe. The defendant never filed any objection. The defendant has been residing on the land since 1998. Norah was the defendant's grandmother and left the defendant living on the land.

PW2 James Odhiambo testified that the land in question belonged to the plaintiff who is his uncle in the clan. The plaintiff's late mother Marren Akumu gave Joseph Asewe part of their family land as an inheritor. Mother to the plaintiff gave birth to 2 children for Joseph Asewe the inheritor but both died. The defendant came into possession in 1998. The defendant did not tender any evidence.

I have considered the pleadings , evidence on record and do observe that the indisputable facts of this case are that the plaintiff was registered on the 28/8/2002 as the proprietor of the suit property after a Succession. There is no evidence that he was fraudulently registered as the proprietor of the land. The defendant took possession in 1998. The above fact demonstrates that the doctrine of adverse possession does not apply as the same doctrine operates alongside the title. The 12 years period applicable on adverse possession in Kenya began running on the 28/8/2002 and could only have become ripe on the 28/8/2014. This suit was filed prematurely on 13th June 2013.

I do dismiss any claim or defence based on adverse possession. The principle of adverse possession is envisaged by **Section 7 of Limitation**

of Action Act Cap 22 Laws of Kenya that provides:

“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.”

Section 24 of the Land Registration Act 2012 provides that:

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. Rights of a proprietor.”

Section 25 provides:

“25.(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. Certificate of title to be held as conclusive evidence of proprietorship.”

Section 26 provides:

“26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

I do find that the plaintiff has established on a balance of probabilities that he is the registered owner of the suit property hence entitled to all rights and privileges appurtenant thereto. I do grant the following orders thus an order of eviction to forcefully remove the defendant, himself, his agents, family and or servants from the said land parcel No. KABONDO/ODUMO EAST/357 for vacant possession by the plaintiff the defendant to be given a 90 day notice. The defendant be condemned to pay costs of the suit. Orders accordingly.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30th DAY OF January, 2020.

In the presence of:

NYANGA FOR PLAINTIFF

N/A FOR DEFENDANT

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE