



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 48 OF 2018 (O.S)**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION OVER LAND PARCEL NO. KABUOCH/KACHIENG/224**

**BETWEEN**

**SHADRACK OGADA ONGONGA.....PLAINTIFF**

**VERSUS**

**MARTIN ODHIAMBO OKAMBO.....DEFENDANT**

**JUDGMENT**

1. The property in dispute in the present suit is a parcel of land measuring approximately three (3) acres in area (The suit land herein) part of land parcel number Kebuoch/Kachieng/224 which is approximately 7.6 hectares in area (the parent land herein) situate in Homabay County within the Republic of Kenya.
2. The plaintiff, Shadrack Ogada Ongonga who is represented by learned counsel, Nancy Nyarige of G.S. Okoth and company Advocates has sued the defendant, Martin Odhiambo Okambo by way of an originating summons dated 26<sup>th</sup> March, 2018 and filed in court on 17<sup>th</sup> April, 2018. He is claiming to be entitled to the suit land having acquired title to the land by way of adverse possession. In particular, he is seeking determination of issues numbered 1 to 6 set out on the face of the originating summons and I need not to reproduce them as they all relate to adverse possession.
3. The originating summons is premised on the plaintiff's supporting affidavit of even date. The plaintiff deposed inter alia; that during land adjudication in the area, the parent land was registered in the names of two (2) brothers namely Joseph Owuor OKambo (deceased) and the defendant as proprietors in common of undivided shares. That the said two (2) brothers sold the suit land to the plaintiff and put him in possession thereof in February 1991. That the two (2) brothers then moved away to in Tanzania where the deceased passed on. That the plaintiff cultivated the suit land which he developed for more than 26 years without any interruption or at all.
4. The plaintiff further deposed that in the year 2015, the defendant returned from Tanzania, obtained letters of administration in respect of the estate of the deceased and registered the whole parent land including the suit land in his own name. That in February 2017 and on several occasions, the defendant told the plaintiff to vacate the suit land and threatened him with dire consequences in case the plaintiff failed to vacate the same thus participating the present suit.
5. Annexed to the plaintiff's affidavit is a copy of the register of the parent land which shows that its title was issued on 10<sup>th</sup> September 2007. That three (3) proprietors including the defendant, own 1/3 share each of the parent land.
6. The defendant was duly served on 18<sup>th</sup> June, 2018 as per the affidavit of service filed in court on 13<sup>th</sup> September, 2018 and sworn by Osir Jacob Caleb, a licensed process server. He was also duly served on 28<sup>th</sup> February, 2019 as shown in the affidavit of service sworn by the said process server on 1<sup>st</sup> March, 2019 and filed in court on 5<sup>th</sup> March, 2019. Again, the defendant was duly served by the same process server as revealed in his affidavit of service sworn on 2<sup>nd</sup> October, 2019.
7. The defendant failed to either enter appearance or file any statement of defence within the stipulated period of time or at all.
8. On 17<sup>th</sup> December, 2019, learned counsel for the plaintiff filed submissions dated 16<sup>th</sup> December, 2019 pursuant to the directions of this court given on 15<sup>th</sup> December, 2019 and extended on 25<sup>th</sup> November.2019. Briefly, counsel gave facts of this case and submitted that the case has been proved by the plaintiff against the defendant on a balance of probabilities and that judgment be entered as prayed in the originating submissions.
9. Counsel relied on **sections 7 and 13(1) of the Limitation of Actions Act (Cap 22)** on which adverse possessions doctrine is premised.

Counsel also relied on authorities including **Wambugu-vs- Njuguna (1985) &KLR 172 and Mbira –vs- Kachuhi (2002) 1 EALR 137** that a claimant in the case of adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom that person claims for the statutory period of time without interruption.

10. It was the testimony of the plaintiff (PW1) that he is entitled to ownership of the suit land out of the parent land. He relied on the parent land register (PEXhibit 1) and a demand letter dated 29<sup>th</sup> May, 2017 (PEXh 2), in support of his testimony.

11. PW2, Lazaro Ouma Okamba testified, inter alia, that the defendant sold the suit land measuring three (3) acres to the PW1 who has used it since 1991. That the defendant has not allowed PW1 to use the suit land since the year 2018.

12. I have duly studied the entire originating summons, the testimonies of PW1 and PW2 as well as the plaintiff's submissions. Therefore, has the plaintiff proved the ingredients of adverse possession against the defendant as emphatically held by the Court of Appeal in the case of **Wanje –vs- Saikwa (No.2) (1984) KLR 284** and restated in the case of **Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another (2015) eKLR?**

13. On the issue of whether the suit land is registered in the name of a person other than the plaintiff, I note paragraph 3 of the plaintiff's affidavit in support of the originating summons. The plaintiff deposed thereof that the suit land was registered in the name of Joseph Owuor Okambo (deceased) and the defendant as proprietors in common.

14. The plaintiff referred to and produced the suit land register (PEXhibit 1) which shows that on 15<sup>th</sup> November 2002, the deceased and the defendant were registered as proprietors in common each owning at 1/3 share of the land. The other co-proprietor shown therein is Lazaro Ouma Okambo (PW2).

15. PEXhibit 1 reveals that title deed to the suit land was issued to said proprietors in common on 10<sup>th</sup> September 2007. The suit land was registered under **sections 27 and 28 of the Registered Land Act Chapter 300 Laws of Kenya (the Repealed Act).**

16. Notably, PW1 relied on PEXhibit 1 and he testified, inter alia;-

***“ I rely on my supporting affidavit sworn on even date and register (PEXhibit 1). I have lived on the land since February 1991.” (Emphasis added)***

17. In the case of **Kimani Ruchine and another –vs- Shift Rutherford Company Limited (1976-80) 1 KLR 1500**, Kneller J, held that registration of land can be challenged on grounds including fraud and adverse possession. I endorse the said decision in view of the fact that the plaintiff has a challenged the defendant's right and registration in respect of the suit land herein.

18. The 2<sup>nd</sup> issue is whether the applicant (plaintiff) has been in open and exclusive possession of the suit land in adverse manner to the title of the defendant and other proprietors in common. Paragraphs 4,6,8 and 9 of the plaintiffs affidavit in support of the originating summons are clear pointers to the plaintiff's open and exclusive possession of the parent land by way of cultivation and development of the same.

19. In that regard, I approve the decision in **Gatimu Kunguru –vs- Muya Gathangi (1976) KLR 253** whereby Madan, J (as he then was) held in part that;-

***“The defendant's possession was open and notorious.....There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant.”***

20. Moreover, it is trite law that possession may take different forms such as fencing or cultivating of the land in dispute; see **Titus Ong'ang'a Nyachio –vs- Martin Okioma and Nyauma and 3 others (2017) eKLR** which applied the decision in **Kimani Ruchine case (supra).**

21. PW1 stated clearly, that he bought the suit land from the deceased and his brother (defendant) in 1991. That he planted exotic trees and fruits trees on the suit land without any interruption until 2017.

22. Concerning, the 3<sup>rd</sup> issue namely the period of possession and dispossession of the owner of the suit land, PW1 stated that the defendant stopped him from use of the land in the year 2018. That he had been in occupation and possession of the land since 1991 without any dispute and disturbance.

23. The testimony of PW2 did reinforce the evidence of PW1 that the latter has been in occupation and possession of the parent land for 26 years. Reference is also made to paragraphs 4, 8 and 9 of the supporting affidavit of PW1 in this suit.

24. In the case of **West Bank Estate Limited –vs- Arthur (1966) 3 WLR 750**, it was held that evidence of cultivation should be definite as to the area and **time; see also Muthuita –vs- Wanoe and 2 others (2008) KLR (G &F) 1024.**

25. PW1 was succinct that he bought three (3) acres of the suit land from the defendant and the deceased in 1991. That he has peacefully, and openly been in occupation and possession of the same.

26. In the end, I find that the authorities including **Wambugu and Ambira cases (supra)** are applicable herein. The plaintiff has proved the ingredients of adverse possession against the defendant on the balance of probabilities thus he is entitled to ownership of the suit land by way

of adverse possession.

27. Accordingly, I enter Judgment for the plaintiff against the defendant in the following terms:-

*a) A declaration that the plaintiff has acquired by adverse possession an absolute title to the suit land measuring three (3) acres of LR NO. Kabuoch/Kachieng/224 which he has possessed and occupied for a period in excess of 26 years and the defendant's title thereto extinguished thereby.*

*b) A declaration that the plaintiff is entitled to an order under section 38 of the Law of Limitations Act (Cap 22) to be registered as proprietor of the suit land in place of the defendant who shall execute a valid transfer in favour of the plaintiff free from any encumbrances forthwith in default the Deputy Registrar of this court to execute the transfer accordingly.*

*c) The defendants shall bear the costs of the suit.*

**DATED, SIGNED and DELIVERED at MIGORI this day of 29<sup>TH</sup> JANUARY 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In the presence of:-**

Plaintiff –Absent – Non appearance for plaintiff

Defendant – Absent -Non appearance for defendant

Court Assistant – Tom Maurice.