



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 717 OF 2017

(Formerly Kisii ELC case No. 440 of 2013) (OS)

IN THE MATTER OF LIMITATION OF ACTIONS CAP 22 OF LAWS OF KENYA

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION PURSUANT TO

SECTION 38 OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

CREISTINA OGUR OGOT.....PLAINTIFF

VERSUS

JOSHUA NYANGACHA ABONYO.....1ST DEFENDANT

CLEMENT MILTON OUMA.....2ND DEFENDANT

MAURICE OTIENO OJUOK.....3RD DEFENDANT

JOSHUA OJUOK.....4TH DEFENDANT

KENNEDY ODHIAMBO OJUO.....5TH DEFENDANT

GEORGE OJUOK.....6TH DEFENDANT

JUDGMENT

A. Introduction :

1. The suit property herein is a portion of land measuring approximately eight (8) acres of the original title number Kanyamkago/Kamgundho/7 measuring approximately twenty one decimal five zero (21.50) hectares in area. The suit property is situate within Migori County, Kenya.

2. On 5th March 2014, Okongo J. sitting at Kisii Environment and Land court directed that the plaintiff's originating summons dated 4th November 2013 filed in court on even date and the 1st defendant's replying affidavit sworn on 19th November 2013 filed on even date be treated as a plaint and a statement of defence respectively. That this suit be heard by way of viva voce evidence. This was pursuant to a consent of counsel for the respective parties made before the court on the said date.

3. Subsequently, on 12th June 2017 the court (Mutungi J) ordered that the instant suit be transferred from Kisii Environment and Land Court to this court for hearing and determination.

4. The plaintiff is represented by learned counsel, Mr. Sam Onyango. The defendants are represented by learned counsel, Mr. Kwanga

Mboya.

B.The gist of the plaintiff's case

5. By the originating summons the plaintiff claims to have acquired title to the suit property land by way of adverse possession for the determination of five (5) issues namely;-

a) Declaration that the defendants' rights to recover a portion of LR number Kanyamkago/Kamgundho/7 measuring 8 acres is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya and their title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully, and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 12 years as at the filling of the instant proceedings.

b) There be an order that the plaintiff be registered as the proprietor of a portion of land parcel No. Kanyamkago/Kamgundho/7 measuring 8 acres in place of the defendants.

c) There be an order restraining the defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said portion of land that is Kanyamkago/Kamgundho/7, in any manner whatsoever and/or however.

d) Costs of this originating summons be borne by the defendants.

e) Such further and/or other be made as the court may deem fit and expedient in the circumstances of this case.

6. The originating summons is anchored on grounds 1 to 7 set out on its face and the plaintiff's 14 paragraphed supporting affidavit of even date and annexures including a copy of a limited grant of administration Ad Litem under **section 54 and the 5th schedule of the Law of succession Act Cap 160 Laws of Kenya** issued to the 1st defendant on 4th November 2015 in respect of the estate of the deceased Abonyo Ochola marked as "COG1" (MFI- 3) , a copy of the register in respect of the original land marked as "COG2" (PEXhibit 1) and a copy of a certificate of official search dated 11th September 2013 thereof (PEXhibit 2). The plaintiff deposed inter alia, that in the year 1959, she got married to her deceased husband, Petro Got who was residing on the suit property where they lived until he died in the year 1975 leaving her and her children staying thereon. That the plaintiff and her son, Charles Owuor Got have cultivated and erected permanent homesteads on the suit property peacefully, openly and without any interruption until the year 2013 when the defendants claimed the land thus provoking the instant suit.

7. The plaintiff (PW1) adduced evidence on 4th December 2017 to the effect that she has stayed on the suit property which is not registered in her name but in the name of deceased since 1959 and that she has never vacated the same. She referred to and identified PEXhibits 1 and 2 as well as PFMI- 3 herein.

8. **PW2, CORNEL ODONGO ORWA**, a farmer stated that he knows PW1. He relied on his (PW2) statement filed on 4th November 2013 (PEXhibit 4) which is noted herein.

9. **PW3, ISAIHAH ODONGO GARY**, a step brother of PW1 relied on his statement filed in court on 4th November 2013 (PEXhibit 5) and hereby noted accordingly.

10. Another witness, **CHARLES OWUOR GOT (PW 4)** testified in support of the evidence of PW1 and relied on his (PW4) statement filed on 4th November 2013 (PEXhibit 6). The same is hereby noted, too.

11. Learned counsel for the plaintiff filed submissions dated 16th December 2019 whereby he made reference to the issues for determination set out on the originating summons , analysed the evidence in this suit and cited **Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya and section 28 (h) of the Land Registration Act (LRA) 2016 (2012)**. Counsel further relied on **Mate Gitabi –vs- Jane Kabubu Muga and another Nyeri Civil Appeal No. 43 of 2015 (UR) and Murunga Kabanga and 2 others –vs- Hannah Wairimu Gitau and another (2019) eKLR**, in support of his submissions.

C.The gist of the defendants' case

12. In the 1st defendant's replying affidavit the defendants averred, inter alia that his co-defendants have duly authorized him to swear the affidavit on his own behalf and their behalf. The authority to plead and swear affidavit is dated 19th November 2013 and annexed thereto. He further averred that the suit property was jointly registered in the names of the deceased father of the 1st defendant and the 2nd defendant, Clement Milton Ouma alias Kilimesh Ochola. On 1st April, 1977 and has remained so to date as shown in a certificate of official search marked as "JNA1". (DEXhibit 2). That the plaintiff's possession of the suit property has not been by consent and licence of the defendants. They relied on DEXhibit 1 as well as DEXhibits 2 to 10 in this suit.

13. The defendants further deposed that the plaintiff's occupation of the suit property has not been peaceful as their dispute has been arbitrated by the area chief and the District Commissioner and now the County Commissioner as shown in a copy of letter marked as "JNA2". (DEXhibit 4) That the 5th defendant has established a homestead on the suit property as shown in a document marked as "JNA4" (DEXhibit 5). That the plaintiff has no capacity to commence the current proceedings against the 2nd to 6th defendants who have no requisite locus standi to be sued herein. That the plaintiff has not occupied and possessed the suit property for the prescribed period of time. They opposed the plaintiff's claim and termed the same baseless, empty, vexatious and want of cause of action.

14. The 1st defendant (DW1) and the 3rd defendant (DW2) testified on 13th November 2018. The 2nd defendant (DW3), the 4th defendant (DW4) and the 6th defendant (DW5) adduced their evidence on 8th December 2018. I note that DExhibits 1 to 10 are in evidence.

15. On 14th December 2019, learned counsel for the defendant filed submissions dated 2nd June 2019 whereby he referred to the orders sought in the originating summons, analysed the case and issues (i) to (vii) framed therein. To buttress his submissions, counsel cited the Court of Appeal decision in the case of **Titus Kigoro Munyi –vs- Peter Mburu Kimani (2015) eKLR** and sought dismissal with costs.

D. Issues for determination:

16. I have carefully considered the originating summons, the 1st defendant's replying affidavit, the testimonies of PW1 to PW4 and the evidence of DW1 to DW 5. I further consider the rival submissions including all the issues for determination duly framed and the authorities cited therein.

17. It is trite law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see the case of **Galaxy Paints Company Ltd –vs- Falcon Grounds Ltd (2002) 2 EA 385** restated in **Great Lakes Transport Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720**.

18. On the foregone summary, I am of the considered opinion that the issues for determination herein are considered as restated by the Court of Appeal in **Godfrey Shimonya Peter and 3 others –vs- Mary Anyango Ameka and another (2018) eKLR** that :-

“ The doctrine of adverse possession dictates that firstly, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having discontinuance of possession by the owner. See Wilson Kazungu Katana and 101 other –vs- Salim Abdalla Bakshwein and another Civil Appeal 11 of 2014 (2015) eKLR.” (Emphasis of issues herein)

19. Regarding the first issue, PW1 deposed at paragraphs 11 and 12 of her affidavit in support of the originating summons that the suit property is registered in the name of Abonyo Ochola (deceased) and the 2nd defendant (DW3) each entitled to ½ half share as shown in PExhibits 1 and 2. That the suit property occupied by PW1, is situate within the ½ share as shown in PExhibits 1 and 2. That the suit property occupied by the PW1, is situate within the ½ share of the deceased, the father of the 1st defendant. There is not dispute that the 1st defendant (DW1) is the legal representatives of the estate of the deceased as disclosed in DExhibit 6.

20. Moreover, PW1 stated in examination in chief, inter alia;-

“I went to Lands office and confirmed that Abonyo Ocholla (deceased) and Clement Ocholla are registered owners of it. This is a copy of the register, green card entry 1 of the 1/4/2017 (PExhibit 1) and copy of official search dated 11/9/2013 (PExhibit 2).”

21. PW3 stated that the suit property occupied by PW1 belonged to the deceased. His statement was reinforced by PW4 who stated that the suit property is registered in the name of the deceased and DW2 each having half share of the land but they occupy the deceased's half share thereof.

22. The 1st defendant (DW1) deposed at paragraph 6 of his affidavit that the original title is registered in the name of the deceased who was his father and DW3 with effect from 1st April, 1977 as shown on DExhibit 2. He affirmed that position at paragraph 3 of his statement (DExhibit 1).

23. DW 2, DW3, DW4 and DW5 did confirm that the original title is registered in the name of the deceased and DW3. Clearly, DExhibits 1,2,3,8,9 and 10 speak to that position of registration.

24. Notably, the suit property was registered under the **Registered Land Act Cap 300 Laws of Kenya (the repealed Act)**. I am also mindful of **sections 27 and 28 of the Repealed Act** in respect of the rights and registration of land.

25. As the suit property is registered in the name of the deceased legally represented by the 1st defendant as per DExhibit 6 and DW3, there is no doubt that the registration of a title to land is a creation of the law; see **Gatimu Kinguru –vs- Muya Gathangi (1976) KLR 253**.

26. Besides, rights and registration of land can be challenged on grounds including adverse possession and fraud as held in **Tayebali Adamji Alibhai –vs- Abdulhussein Adamji Alibhai (1938) 5 EACA 1**. Furthermore, **section 28 (h) of the LRA and the decision in Salim –vs- Boyd (1971) EA 550**, speak to adverse possession as an overriding interest on registered land.

27. This court has noted that the original title is registered in the name of DW1 and DW3 and not in the name of PW1. So, what is the take on the 2nd and 3rd issues herein bearing in mind **Godfrey Shimoya, Peter and Salim Abdalla Bakswein in cases (supra)**.

28. It was the evidence of PW1 that her deceased husband built a house for her on the suit property which has clear demarcations of sisal plants and trees. That after the death of her husband in the year 1975, she erected a permanent house thereon as her son Charles Owuor Got put up his homestead on the same land. That she cultivates sugarcane and keeps livestock on the suit land. This position is revealed at paragraphs 5 to 9 of her supporting affidavit and in her oral testimony before this court.

29. PW2 deposed at paragraphs 2 and 10 of her supporting affidavit that she has occupied the suit property in a peaceful, open and uninterrupted manner since 1959. In examination in chief she stated:-

“I have never vacated the land since 1859”

30. According to PW2, PW3 and PW4, the suit property has been occupied by PW1 since the year 1972. That issues arose thereof in the year 2013. Therefore the said testimonies are in support of the plaintiff’s claim in this suit.

31. In the words of DW 1, the late Ojuok Otieno brought PW1 to the suit property in the year 1972. He testified in examination in chief that :-

“PW1 is my neighbour. My brother the late Ojuok Otieno brought her to the suit land in 1972. I have never evicted her therefrom. She occupies eight acres and less.”

32. In the case of **Virginia Wanjiku Mwangi –vs- David Mwangi Jotham Kamau (2013) eKLR**, it was held that the claimant had been given permission by the owner to be in possession of the land in question. Thus, there was no adverse possession in favour of the claimant in the circumstances.

33. Be that as it may, PW1 did maintain during cross- examination that :-

“ I have lived on the land openly and peacefully.....”

34. DW2 was very clear in his testimony that PW1 has occupied the suit property which has clear boundaries since the year 1972. DW 3 stated that PW1 has occupied the suit property on which she (PW1) has put up her homestead together with that of her son and cultivates the land since 1961. Furthermore, DW4 told this court that for over 30 years, PW1 has continued to cultivate the suit property where she has a homestead and the remains of her deceased husband were interred.

35. Essentially, evidence regarding adverse possession should be definite as to the area and time as held in **West Bank Estate Ltd –vs- Arthur (1966) 3 WLR 750**; see also **Muthuita –vs- Wanoe and 2 others (2008) 1 KLR (G&F) 1024** and **Murunga Kabangi and Titus Munyi cases (supra)**.

36. It follows that the plaintiff has established that she has been in open and notorious possession and occupation of the suit property for a period in excess of 12 years. The 2nd defendant’s title to the suit property has been extinguished thereby bearing in mind the cited authorities and guided by the decision in **Githu –vs- Ndeete (1984) KLR 776 at 780** where the Court of Appeal endorsed the position stated in **Halsbury’s Laws of England, 3rd Edition Volume 22 at page 252**.

37. It is the finding of this court that to some extent, the evidence of DW2 to DW5, render support to the plaintiff’s claim. Nonetheless, the defendant’s case substantially fails. The plaintiff is entitled to the orders including a permanent injunctive remedy as envisaged and sought in her originating summons which she proved against the defendants jointly and severally on the balance of probabilities.

38. In the result, Judgment is hereby entered for the plaintiff against the defendants jointly and severally in the instant suit for:-

a) Declaration that the defendants’ rights to recover a portion of LR NO. KANYAMKAGO/KAMGUNDHO/7 measuring 8 acres is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya and their title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the foresaid parcel of land for a period exceeding 12 years as at the filling of the instant proceedings.

b) There be an order that the plaintiff be registered as the proprietor a portion of land parcel No. Kanyamkago/Kamgukndho/7 measuring 8 acres in place of the defendant. The 1st defendant who is the legal representative of the estate of the deceased as per DExhibit 6 and the 2nd defendant shall forthwith execute a valid transfer of the suit property in favour of the plaintiff in default the Deputy Registrar of this court to execute accordingly.

c) There be a permanent injunction restraining the defendants either by themselves, agents servants and/or employees from interfering with the plaintiff’s peaceful possession and occupation of the said portion of land that Kanyamkago/Kamgundho/7 in any manner whatsoever and/or however.

d) Costs of this originating summons be borne by the defendants.

39. It is ordered accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 12th day of FEBRUARY 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. O.M. Otieno holding brief for Kwanga mboya learned counsel for defendants

Mr. Sam Onyango learned counsel for the plaintiff.

Court Assistant – Tom Maurice