



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 613 OF 2017 (O.S)

IN THE MATTER OF SECTIONS 7, 37 AND 38 OF

THE LIMITATION OF ACTIONS ACT, CAP 22

AND

IN THE MATTER OF : SECTION 30 (G) OF

THE REGISTERED LAND ACT,CAP 300 (REPEALED)

AND

IN THE MATTER OF; CLAIM FOR ADVERSE POSSESSION

PURSUANT TO SECTION 38 OF LIMITATION OF ACTIONS ACT

BETWEEN

NORAH ATIENO OTONDO.....PLAINTIFF

VERSUS

POLYCARP OKINYI MBORI.....1ST DEFENDANT

JAMES EZEKIEL MBORI.....2ND DEFENDANT

JUDGMENT

A. Introduction

1. The property in dispute in the present suit in title number CENTRAL KASIPUL/ KADIENG/622 measuring approximately seven decimal five (7.5) acres in area (the suit land herein). It is situate within Homa-Bay County, Kenya. The same is currently registered in the name of the 1st defendant, Polycarp Okinyi Mbori with effect from 15th November 2010.
2. The plaintiff, Norah Atieno Otondo is represented by the firm of M/s Oguttu, Ochwangi, Ochwal and Company Advocates formerly M/s Oguttu Mboya and Company Advocates.
3. The said 1st defendant and the 2nd defendant, James Ezekiel Mbori are presented by the firm of Kerario Marwa and Company Advocates.
4. Before it's transfer to this court, the present suit was partly heard by Okongo J at Kisii Environment and Land Court whereby the plaintiff (PW!) adduced evidence in support of her case.

B.The gist of the plaintiff' case

5. By an originating summons dated 29th July, 2011 and filed in court on 1st August 2011 under **Order 37 Rules 7 and 14 Civil Procedure**

Rules, 2010 Sections 1A, B and 3A of the Civil Procedure Act, Cap 21 and section 38 of Limitation of Actions Act (Cap 22) the plaintiff claims to have acquired title to the suit land by way of adverse possession. She is seeking reliefs (1) to (5) as set out on face of the originating summons which I do take into account in this suit. The reliefs include a declaration and an order that the registration of the suit land be in the name of the plaintiff in lieu of the 1st defendant in the instant suit.

6. The originating summons rests upon grounds (a) to (w) set out on its face and a 25 paragraphed supporting affidavit sworn on even date by the plaintiff (PW1) together with the plaintiff's bundle of documents of even date. PW1 averred inter alia, that in or about the year 1980, she was married to her deceased husband, Hezekiah Otondo Omoro who was residing at his homestead on the suit land. That subsequently, her husband passed on and he was buried thereon. That she has openly, continuously and peacefully occupied and cultivated the whole of the suit land for over 30 years hence precipitating the instant suit.

7. On 13th March 2014, PW1 testified that she stays on the suit land where she was married in 1980 and settled. That her husband and their three (3) children died and were buried on the suit land. She produced PExhibits 1 to 11 as per bundle of documents dated 15/6/2013 which include copies of green card (PExhibit 1) a certificate of official search (PExhibit 2) both in respect of the suit and a plaint dated 7th July, 1993 in Kisii HCCC No. 9 of 1993 between her deceased father in law namely Habakuk Omoro Omboche –v- Nyangweso Ondiek and James Mbori, the 2nd defendant herein (PExhibits 3) and a counterclaim mounted by the 2nd defendant in that suit (PExhibit 4), in support of her claim.

8. PW1 called PW2, PHILEMON CORNEY ALIMON KAOL, a farmer, an ex-teacher and Senior Chief, who stated inter alia, that PW1 was married to the late Hezekiah Otondo Omollo. That during his (PW2) time as Senior Chief of the area, he did not receive any complaint from the defendants regarding the suit land.

9. Learned counsel for the plaintiff filed 7-paged submissions dated 16th November 2019 on 10th November 2019 whereby counsel gave a brief background of the dispute, identified and analysed seven (7) issues for determination relating to plaintiff's entry and occupation of the suit land, in favour of the plaintiff. Counsel **cited section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya, section 107 of the Evidence Act Cap 80 Laws of Kenya, the case of Godfrey Shimonya Peter and 3 others –vs- Mary Ayango Ameka and another (2018) eKLR, Wanje –vs- Saikwa (1984) eKLR, Kairu –vs- Gacheru (1988) eKLR, Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi and another (2014) eKLR and Mwinyi Hamisi Ali –vs- Attorney General and another (1997) eKLR**, to reinforce the submissions.

C The defendants' case in brief

10. In their replying affidavits of nine (9) paragraphs and 14 paragraphs of even date, the 1st and 2nd defendants respectively, opposed the originating summons, termed the same misconceived, an abuse of the court process and sought dismissal of the suit. They deposed in their respective affidavits that the 2nd defendant acquired the suit land from Nyangweso Ondiek in the year 1971 and transferred the same to the 1st defendant.

11. The defendants further deposed that the 2nd defendant employed the deceased husband of PW1 as his farm hand and security man up to the time of his death and the plaintiff's husband was buried on the suit land with the permission of the 2nd defendant. That PW1 and her deceased husband have been residing on the suit land with the 2nd defendant's permission and licence.

12. On 30th July, 2019, Mr. Mwita Kerario learned counsel for the defendants informed the court inter alia:-

“There is last adjournment on record. The defendants are absent. I fully rely on the 2nd defendants' replying affidavit sworn on 22nd May 2012 and annexed documents in the defendants 'case.’” (Emphasis laid)

13. This court took into account the foregoing remark and marked the defendants' case duly closed. Counsel for the respective parties were then directed to file and exchange written submissions in this suit.

14. By submissions dated 19th December 2019, and filed in court on even date, learned counsel for the defendants gave a brief background and the evidence adduced therein, framed and analysed four (4) issues for determination including whether the plaintiff entered and occupied the suit land with the consent of the defendants and whether this honourable court can grant the Orders sought in this suit. Counsel relied on the Court of Appeal decision in **Titus Kigoro Munyi –vs- Peter Mburu Kimani (2015) eKLR**, to fortify the submissions and urged this court to dismiss the suit with costs.

D. Issues for determination

15. I have thoroughly considered the entire pleadings alongside the evidence of PW1 and PW2. I also note the rival submissions including all the authorities cited and the issues framed therein.

16. 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 (2000) 2 EA 385 restated in Great Lakes Transport Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720**.

17. In view of the foregoing summary, I am of the considered view that the issues for determination herein as restated by the Court of Appeal in **Godfrey Shimonya Peter case (supra) 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 others –vs- Salim Abdalla Bakshwein and another Civil Appeal 11 of 2014 (2015) eKLR.” (Issues emphasized)

18. On the first issue, PW1 deposed at paragraph 2 of her supporting affidavit that the suit land was registered in the name of the 2nd defendant. That the suit land was subsequently transferred and registered in the name of the 1st defendant and title deed thereto was issued on 15th November 2010 as revealed in PExhibits 1 and 2.

19. Furthermore, in her testimony, PW1 stated that the suit land which she occupies, was previously registered in the name of the 2nd defendant and currently in the name of the 1st defendant. She referred to and identified PExhibits 1 and 2 in this suit.

20. During cross –examination, this witness (PW1) maintained thus:-

“ I knew in the year 2011 that the suit property is registered in the name of the defendants”

21. I also note that during cross-examination PW2, too, stated:-

“ The suit land is in the name of the 1st defendant.”

22. The 1st defendant acknowledged that the suit land was transferred to him by the 2nd defendant in the year 2010 and he received title documents thereof. That position is revealed at paragraphs 3 and 4 of the 1st defendant’s replying affidavit.

23. Similarly, the 2nd defendant stated at paragraphs 3 and 12 of his replying affidavit that he did transfer the suit land to the 1st defendant. It thus affirms the evidence of PW1, PW2 and the 1st defendant that proprietorship of the suit land is in the name of the 1st defendant.

24. This court is aware of the meaning of the term “Proprietor” under **section 2 of the Land Registration Act (LRA), 2016 (2012)**. I further consider **sections 24,25 and 26 of the same Act** regarding interest conferred on registration, rights of a proprietor and certificate of title to be held as conclusive evidence of proprietorship respectively.

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

26. Since the suit land is registered in the of the 1st defendant, there is no doubt that the registration of title to the land is a creation of the law; see **Gatimu Kinguru –vs- Muya Gathangi (1976) KLR 253**.

27. Be that as it may, 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.

28. That being the position, the second and third issues dealt with together lead this court to the contention of the plaintiff that she has been residing together with her deceased husband on the suit land from the year 1980. That she has cultivated the suit land for over 30 years.

29. PExhibit’s 1 and 2 reveal that the area of the suit land is approximately 7.5 acres. PW1 relied on the said exhibits to show the definite size of the suit land which she has occupied and possessed.

30. It is essential that adverse possession should be of the whole or a definite portion of land; see **Muthuita –vs- Wanoe and 2 others (2008) 1 KLR (G&F) 1024** which applied the decision in **Gatimu Kinguru case (supra)**

31. The 1st defendant deposed at the paragraph 5 of his replying affidavit that the 2nd defendant allowed PW1 to occupy the suit land. The 1st defendant’s position was reinforced by 2nd defendant at paragraphs 4,5,7,8 and 10 of his replying affidavit.

32. In **Virginia Wanjiku Mwangi –vs- David Mwangi Totham Kamau (2013) eKLR**, It was observed that the claimant had been given permission by the owner to be in possession of the land in question. Thus, adverse possession was not construed thereby.

33. It is trite law possession can take different forms such as fencing and cultivation of the land in dispute; see **Kimani Ruchine Titus On’gang’a Nyachieo –vs- Martin Okioma Nyauma and 3 others (2017) eKLR** which applied the decision in **Kimani Ruchine and another –v- Swift Rutherford Company Limited and another (1976-80) 1 KLR 1500**.

34. In the instant suit, do the defendants’ assertion that the 2nd defendant permitted PW1 to occupy the suit land dislodge the plaintiff’s contention especially based on ground (a) of the originating summons and at paragraph 16 of his supporting affidavit thereof? On the strength of the testimonies of PW1 and PW2 coupled with PExhibits 1 to 11 in this suit, the defendants’ assertion that they permitted the plaintiff (PW2) to occupy and possess the suit land is rendered spiritless.

35. Quite clearly, the testimonies of PW1 and PW2 stand firm and are hereby treated as cogent and reliable. The defendant's allegation that they permitted the plaintiff (PW1) to occupy and possess the suit land is a figment of imagination in the circumstances.

36. It is evident that PW1 has been in open and exclusive possession of the suit land for a period in excess of twelve (12) years in adverse manner to the title of the 1st defendant and both defendants are dispossessed thereby. The defendants' replying affidavits are not substantiated and must fail as the plaintiff's sufficient evidence is unchallenged; see also the decision of G.V. Odunga J in **Linus Ng'ang'a Kiongo –vs- Town Council of Kikuyu (2012) eKLR** which I hereby endorse accordingly.

37. In the end, it is the finding of this court that the plaintiff has proved her claim against the defendants jointly and severally on the balance of probabilities as observed in **Ahmed Abdulkarim –vs- Members for Land and Mines (1958) EA 436 at 441**. Therefore the plaintiff is entitled to orders including a permanent injunction as sought in the originating summons.

38. Thus, Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in terms of orders (1) to (4) as sought in the originating summons dated 29th July, 2011 and filed in court on 1st August 2011 namely;-

a) A declaration that the defendants right to recover the whole of LR NO. Central Kasipul/Kachieng/622 is barred under the provisions of sections 37 and 38 of 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 31 years, as at the time of filling the instant proceedings.

b) There be an order that the plaintiff be registered as the proprietor of the whole LR NO. Central Kasipul/Kachieng/622 in lieu of the defendants, more particularly the 1st defendant, who currently holds the title of the suit land. The 1st defendant shall execute transfer of the suit land in favour of the plaintiff free from any encumbrances 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 parcel of land, that is LR NO. Central Kasipul/Kachieng/622, in any manner whatsoever and/or howsoever,

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

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 12TH DAY OF FEBRUARY 2020.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. P. O. Ochwangi learned counsel for the plaintiff

Court Assistant – Tom Maurice