



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 12 OF 2018 (O.S)

JUDITH WALEKHW A.....PLAINTIFF

VERSUS

RONALD OLUNGA.....1ST DEFENDANT

HILLARY EMMANUEL OLUNGA.....2ND DEFENDANT

JAMES OBIERO OLUNGA.....3RD DEFENDANT

J U D G M E N T

JUDITH WALEKHW A (the plaintiff herein) moved this Court by her Originating Summons dated 10th April 2018 and filed herein on 11th April 2018 seeking a determination of the following issues as against **RONALD OLUNGA**, **HILARY EMMANUEL OLUNGA** and **JAMES OBIERO OLUNGA** (the 1st, 2nd and 3rd defendants respectively) with respect to land parcels **NO BUNGOMA/ KAMAKOIWA/1314, 1315 and 1316** (the suit land herein):-

- 1. Whether the plaintiff has been in occupation of the suit land openly peacefully and continuously for a period exceeding 12 years.**
- 2. Whether the defendant's right to recover the suit land is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya.**
- 3. Whether the defendants' titles to the suit land have been extinguished by operation of the law.**
- 4. Whether the plaintiff should be registered as the proprietor of the suit land in place of the defendants by way of adverse possession.**
- 5. Whether an order can be issued restraining the defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit land in any manner whatsoever and/or howsoever.**
- 6. The Deputy Registrar and/or Executive Officer of this Honourable High Court be directed and/or ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the suit land in favour of the plaintiff in the event of default by the defendants to execute the necessary transfer instrument.**

The Originating Summons is premised on the grounds set out therein and is also supported by the plaintiff's affidavit dated 10th April 2018 and filed herein on 11th April 2018.

Briefly, it is the plaintiff's case that she and her late husband **GABRIEL WALEKHW A OLUNGA** (the deceased) have lived on the suit land since 1981 the same having been bought by the deceased's father **OLUNGA MAKOBA** from the Settlement Fund Trustee in 1965. That the said **OLUNGA MAKOBA** had three (3) wives and his third wife who is the mother to the deceased was settled on the suit land where he lived with the plaintiff until his death on 7th July 2016. That the plaintiff and her children have continued to live thereon peacefully, openly, notoriously, continuously and un – interrupted upto the time this suit was filed.

That in 1983, **ANZELIMO RAPANDO OLUNGA** (herein referred to as **ANZELIMO**) registered himself as the proprietor of the suit land but he has not interfered with the plaintiff's occupation of the same. Instead, the said **ANZELIMO RAPANDO OLUNGA** filed

KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988 against the deceased which suit was dismissed on 30th March 1998 for want of prosecution. That the said **ANZELIMO RAPANDO OLUNGA** had fraudulently registered himself as the proprietor of the suit land and the defendants have caused it to be sub – divided into various portions but that notwithstanding, the plaintiff has continued to occupy the suit land for more than 37 years and therefore the defendants rights have been extinguished by effluxion of time and the plaintiff has acquired the same by way of adverse possession. Annexed to the Originating Summons are various documents including the Green Card to the original land parcel **NO BUNGOMA/KAMAKOIWA 536** before it's sub – division to give rise to the suit land herein, the Green Cards to the suit land, the proceedings in **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** and proceedings in the **LAND DISPUTES TRIBUNAL AT TONGAREN DIVISION** dated 6th November 1990.

The plaintiff also filed a witness statement dated 21st July 2018 in the same terms as her supporting statement. She also filed witness statements by her witnesses **ALFAYO KHWATENGE KASAYA (PW 2)** and **RAPHAEL MUMIA OLUNGA (PW 3)** also dated 21st July 2018.

In his statement **ALFAYO KHWATENGE KASAYA (PW 2)** stated that the father of the deceased (one **HILARY OLUNGA**) and his family had settled on land parcel **NO BUNGOMA/KAMAKOIWA/536** which neighbours his land **NO BUNGOMA/KAMAKOIWA/534**. That the deceased late married the plaintiff in 1981 and brought her to the land and in 1990, the witness was summoned to an arbitration meeting in a case filed by **ANZELIMO** against the deceased and the plaintiff. It was then that he learnt that **ANZELIMO** had filed a case at **KAKAMEGA HIGH COURT**. Prior to that, the village elder one **PATROBA NAMASAMBU** had summoned **ANZELIMO** to a meeting in 1985 over claims that he had wanted to evict the deceased and the plaintiff. However, **ANZELIMO** did not show up and instead filed a case at the **KAKAMEGA HIGH COURT**. The witness added that **ANZELIMO** has never lived on the suit land and instead, it is the plaintiff, the deceased and their children who have lived thereon since 1981.

In his statement, **RAPHAEL MUMIA OLUNGA (PW 3)** stated that his late father had three wives one of whom was the mother to deceased. That his late father died in 1972 having settled in **KIMININI SETTLEMENT SCHEME** and that following his death, **ANZELIMO** cultivated the suit land to enable him educate the deceased through Secondary Education although for quite a while, the deceased and his mother blocked him from cultivating the suit land. However, neither **ANZELIMO** nor anybody else claiming under him has cultivated the suit land and the plaintiff has been living thereon since 1981 when she married the deceased.

In opposing the Originating Summons, the 1st defendant (**RONALD OLUNGA**) on behalf of the 2nd and 3rd defendants (**HILARY OLUNGA** and **JAMES OLUNGA**) filed a replying affidavit dated 10th May 2018 in which he has deponed, inter alia, that the filing of **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** confirms the existence of hostility between the parties and this Originating Summons does not meet the requirements for the grant of the orders sought herein. That he has sought the audience of the family of the deceased to settle the boundary of the parcels sub – divided from the original land parcel **NO BUNGOMA/KAMAKOIWA/536** but instead, attacks have been lodged against him. That this Originating Summons should be dismissed. Annexed to the replying affidavit are various documents including the Green Card to the original land parcel **NO BUNGOMA/KAMAKOIWA/536**, proceedings in **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** in which **ANZELIMO** had sued the deceased and **RUTH OLUNGA** seeking damages for trespass to the land parcel **NO BUNGOMA/KAMAKOIWA/536** and a Decree issued on 17th June 1992 showing that a consent order was issued in the said **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** to the effect that the plaintiff therein gets 10 acres and the defendants therein 6 acres.

The defendants also called as their witness **CATHERINE MUNYEFU (DW 2)** the Executive Officer **KAKAMEGA HIGH COURT** who produced the record in **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** as part of the defendant's exhibit.

Submissions were thereafter filed both by **MR MALOBA** instructed by **HAMMERTON MALOBA & COMPANY ADVOCATES** for the plaintiff and **MR OBILO** instructed by the firm of **ABOK ODHIAMBO & COMPANY ADVOCATES** for the defendants.

I have considered the evidence adduced by both parties and the submissions by counsel.

The plaintiff's case is hinged on a claim to be registered as the proprietor of the suit land by way of adverse possession. It is not in dispute that the defendants are the registered proprietors of the suit land. What this Court has to determine is whether or not the plaintiff has met the threshold to warrant the orders that she be registered as the proprietor of the suit land in place of the defendants whose rights thereto have been extinguished by operation of the law.

Section 38(1) of the Limitation of Actions Act allows a person who is in occupation of land for the statutory period of twelve years to apply to Court to be registered as the proprietor thereof.

It states that: -

38(1) "where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land."

In **KASUVE .V. MWAANI INVESTMENTS LTD & 4 OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a person claiming to be entitled to land by adverse possession must prove. It said: -

"In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition"

See also **WANJE .V. SAIKWA 1984 KLR 284**. It is now well settled that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1999**. This suit was filed in 2018 and the new land laws following the promulgation of the 2010 Constitution recognize the doctrine of adverse possession. **Section 28(h) of the Land Registration Act 2012** identifies some of the overriding interests in land as: -

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Section 7 of the Land Act 2012 on the other hand provides that: -

“Title to land may be acquired through

(a) –

(b) –

(c) –

(d) Prescription.”

And as **LORD HOFFMAN** put it in **R. V. OXFORDSHIRE CC EXPARTE SUNNINGWELL PARISH COUNCIL 1999 3 ALL E.R 391**, the Claimant must also show that he had used the land in dispute not by force or stealth or the licence of the owner – nec vi nec clam nec precario. See also **KIMANI BUCHINE .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**.

The occupation must also be peaceful. In **GRACE WAIRUMU SOROMA .V. CHAKA LTD & OTHERS 2017 eKLR** the Court of Appeal held that: -

“What the Appellant needed to prove was that her occupation was continuous, open and peaceful without the permission of the owner.” Emphasis added

In **MTANA LEWA .V. KAHINDI NGALA MWANGANDI C.A CIVIL APPEAL NO 56 OF 2014 (2015 eKLR)**, the Court of Appeal described the doctrine of adverse possession in the following terms: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya it is twelve (12) years. The process springs into action essentially by default or inaction of the owner.

The essential pre requisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7y of the Limitation of Actions Act which is in these terms: -

“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 though whom he claims, to that person.”

Finally, time for purposes of adverse possession ceases to run when the owner of the land in dispute asserts his right by taking legal action or by an effective entry or when his right is admitted by the adverse possessor – **GITHU .V. NDEETE 1984 KLR 776**.

Those are the principles that shall guide this Court in determining this dispute.

Counsel for the defendants has submitted that the plaintiff has not availed any evidence that she has authority to file this suit on behalf of the Estate of the deceased. The plaintiff has filed this suit on her own behalf as a party who has been in occupation of the suit land since 1981 when she was married to the deceased. She has not moved to this Court in any capacity as the Administrator of the Estate of the deceased. The Originating Summons is very clear on that. She is named as the plaintiff. If she had moved to this Court as an Administrator of the Estate of the deceased, then her suit would have met the fate set out in **WAMBUI .V. OUGO & ANOTHER 1982 – 88 KAR [1987 eKLR]**, for lack of a grant of Letters of Administration in respect to the Estate of the deceased.

Counsel for the defendants has also submitted that with reference to the land parcel **NO BUNGOMA/KAMAKOIWA/1315**, it was only registered in the names of the 3rd defendant in 2017 and since this suit was filed in 2018, the twelve (12) years limitation period had not lapsed. For that proposition, counsel has cited my decision in **MURIITHI JEREMIAH .V. NELSON KINGURU KERUGOYA ELC CASE NO 818 OF 2013 (O.S)**.

However, the **MURIITHI JEREMIAH** case (supra) is distinguishable because the suit land had only been registered a year before the suit was filed. In this case, the land parcel **BUNGOMA/KAMAKOIWA/1315** together with parcels **NO 1314** and **1316** were originally part of

the land parcel **NO BUNGOMA KAMAKOIWA/536** which, according to the Green Card, was first registered in the names of the **SETTLEMENT FUND TRUSTEES** on 3rd May 1982 before being registered in the names of **ANZELIMO** on 18th April 1983 before the title was issued to him on 21st April 1983. Discounting the period when the said land was registered in the names of the **SETTLEMENT FUND TRUSTEES**, it is clear that the original land parcel **NO BUNGOMA KAMAKOIWA/536** was first registered in the names of **ANZELIMO** on 18th April 1983 when time started running. This suit was filed on 11th April 2018 some thirty five (35) years after the land had first been registered.

The case of **MURIITHI JEREMIAH** (supra) is distinguishable and it is well established on the authority of **GITHU .V. NDEETE** (supra) that the change of ownership does not interrupt a claim for adverse possession. It cannot therefore be correct, as counsel for the defendants has submitted, that this suit ought to have been filed prior to the death of **ANZELIMO**.

It is however, clear from the plaintiff's pleadings that her claim to the suit land is hinged on the fact that she has been in occupation thereof since 1981 when she was married to the deceased. This is what she has stated in paragraph two (2) of her supporting affidavit dated 10th April 2018: -

2: "That I have been a resident residing on L.R NOS BUNGOMA/KAMAKOIWA/1314, BUNGOMA/KAMAKOIWA/1315 and BUNGOMA/KAMAKOIWA/1316 formerly known as BUNGOMA/KAMAKOIWA/536 measuring 6.4 HA (hereinafter referred to as the suit land) since 1981 when I got married to GABRIEL WALEKHWA OLUNGA (now deceased)"

She repeated this when she was re – examined by her counsel **MR MALOBA** and said: -

"I have been living on the suit land since 1981 with my children. The defendants have never come to the suit land to interfere with my occupation. The land belonged to my late husband but ANZELIMO OLUNGA was stopped from utilizing it by the mother in law called KWEYO OLUNGA because he was not paying for it as agreed. He was harvesting the crops but not paying. The land was bought for my late husband but ANZELIMO OLUNGA fraudulently registered himself as the owner."

While the plaintiff's occupation of the suit land since 1981 is not in doubt, it is clear from the record herein that the occupation was interrupted in 1988 when **ANZELIMO**, as the proprietor of the original land parcel **NO BUNGOMA/KAMAKOWA/536** filed **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** against the deceased and her mother **RUTH OLUNGA**. By the time **ANZELIMO** filed **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988**, the plaintiff had only been in occupation of the suit land for seven (7) years well short of the statutory period of twelve (12) years and that suit effectively brought to a stop the running of the limitation period. Given that un – disputed fact, the plaintiff's claim to the suit land by way of adverse possession cannot be sustained because she was on the suit land by virtue of her marriage to the deceased against whom the **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** had been filed. In that suit, **ANZELIMO** sought damages against the deceased and his mother **RUTH OLUNGA** for interfering with his use of the original land parcel **NO BUNGOMA/KAMAKOIWA/536** and clearly, that claim also affected the plaintiff as a spouse of the deceased because she must also have been utilizing the land and therefore, whereas the plaintiff has not moved this Court as an Administrator of the deceased's Estate, she cannot divorce herself from the fact that her occupation of the suit land and that of her late husband are intertwined because if she was not the spouse to the deceased, she would have no capacity to be on the suit land.

It is also clear that the deceased and his family which includes the plaintiff herein, have not lived on the suit land peacefully. Even after the filing of **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988**, the deceased and **ANZELIMO** were involved in another dispute over the suit land this time at the **LAND DISPUTES TRIBUNAL AT TONGAREN DIVISION** which was filed on 6th November 1990.

There is also evidence that on 18th January 1986, the land dispute between the deceased and **ANZELIMO** was arbitrated over by the Assistant Chief Milimu Sub – Location. This is clear from the copy of letter which is part of the plaintiff's documents as annexed to her supporting affidavit – annexure **JW II**. That confirms the averment by the defendant in paragraph 4(b) of his replying affidavit dated 10th May 2018 that the occupation of the suit land by the deceased has been characterized with **"hostility"**. Clearly therefore, the occupation of the suit land by the deceased and his family which includes the plaintiff herein has not been peaceful. And as is clear from **GRACE WAIRIMU SOROMA .V. CHAKA LTD** (supra), a key element in the doctrine of adverse possession is that the occupation of the land must be peaceful. Where that element is missing, a claim for adverse possession cannot succeed. The plaintiff's witness **ALFAYO KHWATENGE KASAYA (PW 2)** also confirmed that the dispute between the deceased and **ANZELIMO** had been handled by the elders. This is what he said in cross – examination by **MR ABOK** counsel for the defendant: -

"I am aware that there was a dispute between GABRIEL OLUNGA and ANZELIMO RAPANDO OLUNGA. The elders decided that the land belonged to GABRIEL OLUNGA. I was present when the elders heard the case. I was a witness in those proceedings."

In the course of the trial, the Executive officer **KAKAMEGA HIGH COURT CATHERINE MUNYEFU (DW 2)** produced the record in **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988 – ANZELIMO RAPANDO OLUNGA .V. GABRIEL WAKEKHWA OLUNGA and RUTH OLUNGA**. It turned out that there were two versions of the final orders issued by two different Judges in that case. First these are two orders both dated 17th June 1992 one issued by Justice **TANUI** and the other by Justice **OSIEMO**. Both orders read as follows: -

"MUKELE: The award is ready and signed by elders. We wish Judgment to be recorded by consent.

The plaintiff to get 10 acres and the defendant to remain in 6 acres of L.R NO BUNGOMA/ KAMAKOIWA/536.

Court: Order as prayed and the area D.O to be informed accordingly."

A Decree was subsequently extracted in those terms on 17th June 1992.

Then there is another order by **TANUI J** dated 30th March 1998 which reads:-

“30.3.98

Coram: TANUI J

N/A for parties

Chesang C.C

Order: Suit dismissed for want of prosecution.”

MS MUNYEFU (DW 2) could of course not be of much help with regard to the conflicting orders issued in **KAKAMEGA HIGH COURT CIVIL CASE NO 82 OF 1988** and it is not within the jurisdiction of this Court to try and determine which of those orders is genuine and which one is not. What I can say is that it is strange that two Judges made the same orders in one file on the same day and one of those two Judges later went on to dismiss the suit. If there was a consent recorded in the terms mentioned above, I don't see why the said consent was not pursued to it's logical conclusion. That should have been the most obvious route to be pursued by the parties herein. Those orders do not serve any useful purpose in this matter.

The up – shot of the above is that the plaintiff has not met the threshold of a claim to the suit land in adverse possession. Not only was the occupation interrupted through a suit but it has also not been peaceful.

With regard to costs, the parties are related. It is in the interest of justice that each meets their own costs.

Ultimately therefore, this Court makes the following orders: -

1. The plaintiff's suit is dismissed.

2. Each party to meet their own costs.

Boaz N. Olao.

J U D G E

12th March 2020.

Judgment dated, delivered and signed in Open Court this 12th day of March 2020 at Bungoma.

Mr Maloba for the plaintiff present

Mr Wamalwa for Mr Obilo for the defendants present

Joy – Court Assistant

Right of Appeal explained.

Boaz N. Olao.

J U D G E

12th March 2020.