



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 97 OF 2007

EVANS ONGUSO.....1ST PLAINTIFF

SHADRACK ONGUSO2ND PLAINTIFF

HENRY ONGUSO3RD PLAINTIFF

VERSUS

PETER MBUGA.....1ST DEFENDANT

DICKSON NYABERI.....2ND DEFENDANT

ABNER TAI3RD DEFENDANT

JANE ATITA.....4TH DEFENDANT

SABINA OTATO.....5TH DEFENDANT

J U D G E M E N T

1. The plaintiffs are the registered proprietors of land parcel **North Mugirango/Bomwagumo/90** (“the suit property”) The plaintiffs vide a plaint dated 13th August 2007 filed in Court on 22nd August 2007 alleged that the defendants, Nyamonuri DEB Primary School had continually been in trespass of the suit property as from 24th April 2007 or thereabouts without the plaintiffs consent or permission. The plaintiffs prayed for judgment against the defendants for:-

(a) A permanent injunction restraining the Defendants either by themselves, agents, servants employee or any of them whomsoever from trespassing and continuing to trespass upon the Plaintiffs’ parcel of land North Murirango/Bomwagumo/90

(b) General damages for trespass

(c) Costs of this suit

(d) Interest on (b) and (c) above.

2. The defendants upon being served entered appearance through the office of the Attorney General and filed a defence on 30th June 2009. In the statement of defence the defendants averred that Nyamonuri Primary School was established in 1980 through a Community initiative where members of the community voluntarily donated portions of their land for the construction of the school. One Mitema Onguso, a brother of the plaintiffs, was one of the Community members who donated a portion of his land for the School Project.

3. The defendants contended that the late brother of the plaintiffs voluntarily surrendered his portion of land to the school and that the school had continuously been in possession of the land donated and any efforts at recovery of the land by the plaintiffs was time barred under the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya.

3. The suit was part heard before Okongo, J who took the evidence of the three plaintiffs. The hearing continued before me and I took the evidence of PW4 Caribus Nyangweh, a surveyor who was called by the plaintiffs to testify on their behalf. I further took the evidence of

the 3 witnesses who were called by the defence. Before PW4 testified the Court at the request of the parties visited the locus in quo and made a record of the findings at the site.

4. The facts in this matter are quite straight forward. The Plaintiffs evidence at the trial was to the effect that they were the joint registered owners of the suit property together with their deceased elder brother Mitema Onguso. It was the plaintiff's evidence that they (4 brothers) each held an undivided (¼) share of the suit property. The plaintiffs produced a certificate of official search "PEXI" dated 22nd March 2007 which affirmed that indeed Mitema Onguso, Onguso Onguso, Rogito Onguso and Kiago Onguso were on 7th June 1973 registered as the joint owners of land parcel **North Murigango/Bomwagamo/90** as joint tenants in common holding ¼ share each. The plaintiffs evidence which was materially the same was that the school (defendants) in 2007 or there about encroached onto a portion of their land without their permission. In cross examination however the 1st and 2nd plaintiffs conceded that the School was started in 1984 and that the encroachment started then though they filed the suit in 2007. Pw1 in his evidence stated:-

"The School started in 1984. It is now about 29 years old. Mitema onguso died in 1995. We complained about encroachment even when Mitema Onguso was still alive.."

5. The plaintiffs denied that their late elder brother Mitema Onguso donated any land to the school. The 1st plaintiff (PW1) in his evidence stated that the area which was occupied by the school was not donated to them (school) by any of the plaintiffs. Further PW2 stated in his evidence thus:-

"- our late brother did not give a portion of the suit property to the school. In 1973 I was a minor although I was registered as a Co-owner of the suit property. My brother was an adult. In 1984 when the school started encroaching onto our lands, I was an adult. My brother could not have given out land that was owned jointly. My brother did not give out his interest in the suit property".

6. The plaintiffs testified that the defendants have shifted the road from where it was provided for by the survey maps to their property and the school further constructed staff houses on the suit property. Pw2 stated that the road was shifted in 2007 but the structures were constructed earlier from 1984. PW3 literally adopted the evidence given by his brothers, PW1 and PW2.

7. PW4 the surveyor called to testify on behalf of the plaintiffs affirmed that the road of access which measured 8 metres and was cutting across the school ground was shifted into parcel 90. He stated that 5 staff houses are constructed on plot No.90 and occupy an area of 0.27Ha while the road had taken an area of 0.09 Ha aggregating to an area of 0.36 Ha that the school has encroached on in regard to land parcel 90.

8. DW1 Charles Ongeri Ombogo the headmaster of the defendant school testified that the school was started following a clamour by the community as there was no other school nearby. He stated the members of the Community donated land on which the School was started. He said that in 1984 when it became necessary to expand the school, the community came together and 5 land owners within the proximity of the school each donated land for the school. The land owners were **Kwamboka Okorogo, Ocharo Maoyo, Nyariche Nyambese, Nyagesora and Mitema Onguso.**

9. DW1 testified that all the donors who gave land to the School had all died. He stated Mitema Onguso was the brother of the plaintiffs and that the portion of the land that he donated was where the school had erected 5 permanent classrooms and 5 teachers houses. It was his evidence that Mitema Onguso voluntarily donated the land and that no complaint whatsoever arose during his life time stating that his brothers raised the complaint after he had died. He said none of the other donors have ever raised a complaint. He stated that the 2nd plaintiff infact served as the patron of the school for some time while the 1st plaintiff was the foreman when the constructions of the classrooms was being undertaken from 1984. He stated the children of the plaintiffs had all attended the school. The witness further stated that initially there was a road running across the school but after the school expansion, the road was relocated so that the school was enclosed. The witness produced in evidence minutes of the meeting held in 1984 and minutes of the Committee meeting of 3rd November 2011 at which the issue of the donation of the land made to the school was discussed. The witness however admitted in cross examination that he did not know what interests the plaintiff had in the suit land. He further stated he did not know whether Mitema Onguso was the owner of the land he donated. He nonetheless maintained that the community had a consensus to have the school established where it stands. He stated the people who donated the land for the school agreed to have the road relocated to its present location.

10. DW2 Bathelomeyo Nyangete was the Chief of the area where the defendant School was established and was the convenor of the Community meeting in 1984 where the issue of the expansion of the school was deliberated. He confirmed that 5 people donated land towards the expansion of the school and that Mitema Onguso who was a brother of the plaintiffs was one of the 5 donors. He testified that it is the community who decided they need a school as there was no school nearby.

12. He stated that the 5 donors gave the land freely and voluntarily. He said the plaintiffs had served in the school committee at various times and that there was no issue at all before Mitema Onguso died. He said all the 5 persons who donated land were present at the meeting in 1984 and that after the donations were made, no person who may have had any interest in the land donated to the school came forward to raise any issue or complaint. He stated that the school committee actualized and gave effect to the donation. The witness affirmed no complaint was raised with the office of the Chief and that he only became aware of the dispute/complaint by the plaintiffs when the matter came to court.

13. DW3 Robert Tika Torori the surveyor, Nyamira testified that he visited the locus in quo on the Court's direction on 14th September 2017 and on 22nd September 2017 when the Court visited the site. He prepared a report that was filed in court. As per the report the school occupies a portion measuring approximately 1.8Ha and the disputed portion measures approximately 0.3Ha. He stated that the school had occupied the disputed area over a long period as the buildings thereon were old. He stated the land occupied by the school had not been formalized through excision and the same comprised portions of land parcels 4-5, 46 and 90. He further stated that presently there was no road passing through the school. He stated that he had indicated in his report there was no encroachment since the buildings in the disputed

portion were old. He further affirmed that as per the Registry Index Map (RIM) there was a road but it was not on the ground as it was shifted. He explained that must have been the road that was shifted to the left as a road could not pass through a school.

14. The parties filed written submission after the close of the trial. The plaintiffs submissions were filed on 16th August 2019 and the defendant's submissions on 27th September 2019. I have reviewed the pleadings, the evidence and I have considered the submissions made on behalf of the parties. The following issues arise for determination.

(i) Whether the plaintiffs late brother Mitema Onguso donated a portion of land parcel North Mugirango Bomwagumo/90 to the defendant for the construction of a school, and if so, whether such donation was valid and took effect?

(ii) Whether the defendants occupy a portion of the suit land as trespassers?

(iii) Whether the plaintiffs suit is statute barred under the Limitation of Actions Act, Cap 22 Laws of Kenya

(iv) Who bears the costs of the suit?

15. It is not in dispute that the plaintiffs together with their deceased brother Mitema Onguso were the registered owners of **LR. No. North Mugirango /Bomwagumo/90** jointly in common in equal shares. The certificate of official search ("**PEX1**") tendered in evidence confirms the plaintiffs were so registered on 7th June 1973. PW2 stated that as at the time the property was registered in their names he was a minor and hence by deduction PW3 who is younger than him must equally have been a minor. This puts to question how they could get registered if they were minors and there was no notation on the register that they were minors. Mitema Onguso was the oldest of the plaintiffs and perhaps that could explain how he was the person who supposedly dealt with the suit property when the issue of donating land for the school was discussed.

16. Both the plaintiffs and the defendants are agreed that Nyamonuri DEB Primary School was started in the 1980s. The witnesses who testified for the defence stated that the community came together and agreed to start a school since there was no school nearby and to get to the nearest school, children had to cross a river which posed a danger particularly when it got flooded during the rainy season. The evidence that was not controverted was that members of the community donated land on which the school was constructed. The school started in 1980/1981 from standard 1-3 and in 1984 there was need to expand the school so that it could accommodate pupils upto standard 8. DW2 who was the Chief of the area in 1984 testified that he convened a meeting at which the expansion of the school was discussed and that 5 people including Mitema Onguso whose land bordered the school agreed to donate land to the school.

17. In the course of the proceedings, the Court deemed it necessary to have the government surveyor visit the site and to file a report depicting the positioning of the school in relation to the suit property. The Court on 15th May 2017 directed the County Surveyor, Nyamira County to visit the site and to establish and delineate the boundary of the land occupied by the school and to prepare a sketch plan showing how the school land relates with the adjacent parcels of land bordering the school. The surveyor in compliance with the Court's direction visited the site in the company of the County Land Registrar and prepared and filed a report dated 19th September 2017 on 20th September 2017. The Land Registrar also filed a report. He stated that the school occupied land which had been donated by the community and although well delineated, the school land has no title/number since the various persons who gave out land for the school had not excised the portions they had given from their parcels of land. The report by the surveyor annexed an illustrated sketch showing the land occupied by the school and a RIM showing the parcels of land bordering the School and from the RIM it appears the school. From the owners of land parcels 45,46,1405 and 90.

18. The report by the land registrar affirmed that the disputed area was approximately 0.30Ha (0.75 Acre) with teachers quarters (five temporary houses) built around 1983. The report further stated that the plaintiffs indicated that the disputed portion of land belonged to them but the person who donated the land to the school (their elder brother) was not there to explain. The report further stated that the elders confirmed the school had never encroached as it only occupied the land that was donated to it since it was established.

19. The Court visited the site on 22nd September 2017 and all parties were present. The Court made observations which were not any different from the observations on the reports made by the Land Registrar and the Surveyors on the disputed portion. There were old teachers houses and a classroom on the disputed portion. There was clear evidence that the road that would otherwise be cutting through the school was re-routed to pass around the school boundary having regard to the aggregated land that had been donated for purposes of the school.

20. On the evidence it is clear that no public land had been set aside for Nyamonuri DEB Primary School and that the school stands and was established on land donated by members of the public. I am satisfied on the evidence that the late Mitema Onguso donated to the school the portion (now disputed) where the teachers houses were constructed. The evidence by the Chief (DW2) that indeed Mitema Onguso was present at the 1984 meeting where 5 Community members agreed to donate land for the expansion of the school was not rebutted and I accept it. The question that that arises is whether the said Mitema Onguso could legally donate any portion of the suit land since the land was jointly owned by him and his brothers who are the plaintiffs herein.

21. The plaintiffs have submitted that their deceased brother could not lawfully donate a portion of the suit land which they held jointly in common in equal shares without their consent. The plaintiffs rely on section 101(1) of the Registered Land Act, Cap 300 Laws of Kenya (Repealed) and cite the cases of **Isabel Chelangat –vs- Samuel Tiro Rotich & 5 others (2012) eKLR** and **Moses Bii –vs- Kericho Land Registrar & Another (2015) eKLR** in support of their submissions. Section 101 of the RLA merely provided for registration of more than one proprietor. It is section 103 of the Act that placed restriction on what a proprietor in a proprietorship in common could do or not do in regard to the property.

22. Section 103 of the Registered Land Act (repealed) was in the following terms:-

103. (1) Where any land, lease or charge is owned in common each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

23. Following the repeal of the Registered Land Act, the same provisions were re-enacted under section 91 (5) & (6) of the Land Registration Act No.3 of 2012. Although no copy of the Title Deed for the suit property was tendered in evidence, the certificate of official search produced showed that the suit property was registered in the names of the late Mitema Onguso and the plaintiffs. I therefore, accept that the ownership of the suit property was a proprietorship in common and therefore the late Mitema Onguso could not have properly and lawfully disposed of any interest in the suit land without the consent of the other Co-owners of the property .

24. The defendant however took the donation as valid and effectively acted on the same. That is how the defendant took occupation of the donated portion of land and proceeded to erect teacher's houses, classrooms and to shift the road from inside the school after taking account of the 'donated' land. Evidence was led by the defendant that the land for expansion of the School was donated by the community in 1984 and part of the land was the portion given (donated) by Mitema Onguso out of land parcel No.90. The sketch plan and the illustrated RIM produced by DW3 showed that the land occupied by the School straddle on land parcels 45,46,90 and 1405. The Land Registrar in his report stated that the school's land had not been excised as the various portions donated by members had not as yet been surrendered to the school through excision. The defendant as from 1984 occupied all the land donated by the community and effected developments as the owners for all intent and purposes the defendant was exercising ownership rights of the land as from 1984. The defendant fenced the land, erected teachers houses, relocated the road and constructed permanent classrooms on part of the land now being disputed by the plaintiffs and where the road used to pass before it was relocated. Thus even though the donation/gift may not have been perfected through the registration of an instrument, the actions and conduct of the parties made it clear that the donation /gift was intended to take effect and indeed the defendant's actions leave no doubt that they accepted the donations/gift and give effect to the objective the donation was intended for .

25. I am conscious that the donation/gift did not satisfy the requirement that a gift inter-vivos need to satisfy to be valid. On the law on gift inter-vivos I am content to refer to the case of *Estate of M'Raiji Kithiano (Deceased) eKLR Meru HC Succ.Cause No. 419 of 2006* where Gikonyo, J exhaustively discussed the issue. In his judgment at paragraph 14 the judge interalia stated: -

“—A gift inter Vivos should be complete in order to be valid. Ordinarily a gift in land should be effected through a written memoranda or transfer on a declaration of trust in writing showing that the land was gifted

--But, if a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise.”

26. Nyamweya, J in the case of the *Estate of the late Gedion Manthi Nzioka (deceased) (2015) eKLR* stated as follows concerning gifts inter vivos:-

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa)....

For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

27. From the above exposition of the law on gifts it is evident where there is an imperfect gift having regard to the requirements of the necessity for the same to be by way of written memorandum, registered transfer and or declaration of trust in writing , the gift may nonetheless be perfected by the conduct of the parties.

28. In the instance case, even though I have held the plaintiff's deceased brother could not have made a valid donation/gift without the consent of the plaintiffs who were his Co owners of the land, the conduct of the deceased and the plaintiffs in my view suggests the plaintiffs acquiesced to the actions of their deceased brother. None of the plaintiffs protested when the teachers houses were constructed on the disputed portion in 1984. Infact the 1st plaintiff acted as foreman when the houses were being erected. The plaintiffs have served in the school committee before the present suit was initiated. The defendant had before the institution of the present suit in August 2007 openly occupied the disputed portion of the plaintiffs land parcel 90 from 1984 (over 20 years). In those circumstances the defendant would not be

said to have been in occupation as trespasser. The defendants were clear, they were occupying the land as owners pursuant to a donation given to them. The plaintiffs did nothing to prevent the gift/donations from taking effect.

29. The defendants have in their submissions argued that the plaintiffs suit was statute barred by limitation and therefore unsustainable. Although the defendants have submitted the defendants occupation and possession was adverse to the rights and interests of the plaintiffs as the registered owners, adverse possession was not pleaded. Parties are bound by their pleadings and thus the Court will not make any findings on the issue of adverse possession as it was not pleaded.

30. On the issue whether the plaintiffs suit is statute barred there is credible and uncontroverted evidence that the defendants occupied the disputed portion of the plaintiffs land in 1984. The staff houses (5 in number) are on this portion. The evidence adduced was that the houses were constructed in 1984. If the plaintiffs had not consented to the construction of the houses on the portion, then definitely that constituted an adverse act against the interest and right of the registered owners. Hence a right of action accrued in favour of the plaintiffs to sue the defendants for trespass and to seek their eviction. The plaintiffs did not take any action until 22nd August 2007 when they filed the present suit.

31. Section 7 of the Limitation of Actions Act, Cap 22 provides:-

7. 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.

32. The present action by the plaintiffs is analogous to a claim to recover land although it has been couched as a claim for trespass and the plaintiffs seek a permanent injunctive relief. The evidence has shown the defendants have had possession of the disputed portion of land since 1984. They have houses that had stood on the portion for over 20 years before the suit was instituted. The defendants cannot be restrained without being evicted and their houses demolished. That would amount to the plaintiffs recovering the land from the defendants. The plaintiffs in terms of section 7 of the Limitation of Actions Act, could only have brought a suit for recovery of the land within 12 years from the date of the accrual of the cause of action. The cause of action accrued on 1984 and hence any recovery action ought to have been commenced by 1996 when the period of limitation expired. The suit commenced by the plaintiffs Vide the plaint dated 13th August 2007 filed on 22nd August 2007 was time barred and therefore unsustainable.

33. The net result is that the plaintiffs have failed to prove their case on a balance of probabilities and I accordingly dismiss the suit. Having regard to the genesis and the circumstances giving rise to this suit I am not inclined to burden any party with costs and I order that each party bears their own costs of the suit.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 21ST DAY OF FEBRUARY 2020

J M MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 5th DAY OF MARCH 2020

J ONYANGO

JUDGE