



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 375 OF 2017

(Formerly Kisii Elcc No. 1076 of 2016)

JOSHUA ALUM BWANA

JASON MIRUKA BWANA PLAINTIFFS

VERSUS

JOSEPH ADONGO OGAL

JOSEPHAT OREMBE DEYA.....DEFENDANTS

JUDGMENT

1. On 2nd November 2012, the applicants (plaintiffs) namely JOSHUA OLUM BWANA (1st plaintiff) and JASON MIRUKA BWANA (2nd plaintiff) through learned counsel Mr. J. O Soire, sued the respondents (defendants) namely JOSEPH ODONGO OGAL and JOSEPHAT OREMBE DEYA by way of an Originating Summons dated 20th November 2012 pursuant to Order 37 Rule 7 of the Civil Procedure Rules, 2010 and sections 37 and 38 of the Limitations of Actions Act (Cap22 laws of Kenya). The plaintiffs claim to have acquired title to the 1st and 2nd suit land parcels namely L.R Nos. Kanyamkago /Kajulu/1253 and Kanyamkago /Kajulu/ 1318 respectively by adverse possession.

2. The originating summons is premised on the 1st plaintiff's supporting affidavit sworn on 20th November 2012 and annexed documents marked JAB 1 to 7 which include copies of registers/ green cards of the suit land parcels. Pursuant to Order 1 Rule 13(2) of the Civil Procedure Rules 2010 whereby the 2nd plaintiff filed an authority to sign pleadings dated 20th November 2012 in support of the Originating Summons.

3. The gist of the plaintiffs' claim is that they are sons of Karan Onyango (deceased) who bought a piece of land then registered as LR NO. Kanyamkago/Kajulu/209 (the original suit land) from the 1st defendant together with his late mother Teresa Nyamunde and the 1st defendant's deceased brother James Oduk Ogal. That in the year 1987 after the death of Teresa Nyamunde, the 1st defendant and his deceased brother obtained a grant of letters of administration in respect of their late mother's estate. They then subdivided the original suit land into the 1st suit land parcel and LR NO. Kanyamkago/ Kajulu/ 1252 in the names of the 1st defendant and his deceased brother respectively. That the said deceased brother of the 1st defendant further subdivided his parcel of land into LR NO. Kanyamkago/Kajulu/1319 and the 2nd suit land parcel. That the plaintiffs have lived on the 1st and 2nd suit land parcels for now a period in excess of 12 years since the demise of their father, Karan Onyango hence the defendants' titles to the suit land parcels have been extinguished by the operation of law.

4. The defendants who were initially represented by Okong'o Wandago and co advocates and currently by Odhiambo Kenyangi and Co. advocates, opposed the Originating Summons by way of the defendants' replying affidavits sworn on 6th December 2012. The defendants separately averred that the 1st defendant, his deceased brother namely James Oduk Ogal and their deceased mother, Teresa Nyamunde owned the original suit land in equal shares at a ratio of a third thereof. That upon the death of their mother, the land was transferred in the joint names of the 1st defendant and his deceased brother as the land was subdivided into the 1st suit land parcel and LR NO. Kanyamkago / Kajulu / 1253 respectively. They did not dispute that the 1st defendant's deceased brother further subdivided his parcel of land into the 2nd suit land parcel and LR NO. 1319. That the 2nd defendant bought the 2nd suit land parcel from the deceased brother at Ksh 42,000 in year 1999. That the late Karan Onyango whose family live on LR No.Kanyamkago/Kajulu/ 1252, died in the year 2006 and his body was interred in a neighbouring land namely LR NO. Kanyamkago/ Kajulu / 207 owned by one Mr. Ogeta.

5. On 11th November 2013, by consent of the parties to the suit, the court did direct that the Originating summons and the replying affidavit be treated as a plaint and a statement of defence respectively and the suit be heard through vive voce evidence. I note that interlocutory

applications dated 20th August 2016 and 7th November 2016 were determined on 4th October 2016 and 1st December 2016 respectively before the instant suit was transferred from Kisii Environment and Land Court to this court for hearing and determination.

6. The 1st plaintiff (PW1) testified on 3rd May 2018 and he referred to land registers (PExhibits 1 to 4). He stated that there was Kisii HCCC NO. 56 of 1985 whereby his deceased father sued the 1st defendant together with his deceased brother and their deceased mother Teresa Nyamunde. That the defendants do not occupy the suit land parcels since the 1970.

7. According to the defendants' (DW1 and DW 2), whereas there was Kisii ELCC NO. 56 of 1985 between him and the family of the late Karan Onyango, DExhbs 1 to 5 support their defence to the instant suit. That they have owned the suit land parcels with the plaintiffs' homesteads thereon since the year 1990.

8. Learned counsel for the plaintiffs filed submissions dated 18th July 2018 whereby he highlighted the pleadings and testimonies of the parties. Counsel identified four (4) issues for determination. Firstly, whether or not the suit land parcels are registered in the 1st and 2nd respondent's names respectively. Secondly, whether the applicant and his family have been in an uninterrupted and open occupation of the same over a period of 12 years and if so, have "they" acquired adverse possession over the same? Thirdly, can the respondents now be compelled to transfer the said titles to the applicants herein? Fourthly, who should pay costs of this suit?

9. Counsel further analyzed the issues for determination and sought an order to compel each defendant to transfer their respective suit land parcels to the plaintiff's. In support of his submissions, counsel relied on the case of **Wambugu vs Njuguna (1983) KLR 172.**

10. Learned counsel for the defendants filed his submissions dated 17th July 2018. It is pretty clear that the submissions exceeded 10 pages without leave of the court as provided for under practice direction No. 33(b) of the Environment and Land Court Practice Directions, 2014 which is a mandatory legal requirement.

11. Be that as it may, I bear in mind Articles 50(1) and 159(2)(d) of the Constitution of Kenya, 2010 as read with section 19(1) of the Environment and Land Court Act, 2015 (2011). Therefore, I consider 10 pages of the submissions.

12. Counsel for the defendants basically submitted on the pleadings as well as the analysis of the evidence and the relevant law. He argued that adverse possession should meet a minimum of five basic conditions, among them, the plaintiffs' open and notorious use of the property together with actual possession of the property. Counsel cited authorities which include the case of **Zachariah Okoth Obado vs Edward Akong'o Oyugi and 2 others (2014) eKLR** to fortify his submissions.

13. I have carefully examined the entire pleadings, evidence and submissions on record. In the case of **Great Lakes Transport Co (U) Ltd vs Kenya Revenue Authority (2009) KLR 720**, it was held that issues for determination in a suit generally flow from either the pleadings or such issues as the parties had framed for the court's determination. I take into account the four (4) issues for determination as identified in the submissions by the plaintiffs' counsel and threshold for adverse possession as shown in the submissions by the defendants' counsel. To that extent, I embrace the issues and questions for determination on the face of the originating summons dated 20th November 2012. They are as follows:

(i) Have the applicants herein been in open and an uninterrupted occupation of land parcels No. Kanyamkago/Kajulu/1253 and 1318 a forestated hereinabove for a period of more than 12 years.

(ii) If so, have the said open an uninterrupted occupations and/or possession been adverse to the title of the said land parcels Nos. Kanyamkago/Kajulu/1253 and 1318?

(iii) Have the applicants therefore acquired title to the said land parcels Nos. Kanyamkago/Kajulu/1253 and 1318 by adverse possession under the law of Limitations of Actions Act, against the registered proprietors?

(v) Can the respondents now be compelled to transfer the said land parcels to the applicants herein?

(vi) Who bears costs of this suit?

14. PW1 stated at paragraphs 17 and 18 of his supporting affidavit that the plaintiffs have been in occupation of the suit land parcels for a period of over 12 years thus titles of the land parcels have been extinguished by the operation of the law. In that regard, the plaintiffs claim that they have acquired the suit land parcels by adverse possession.

15. It was the testimony of PW1 that his deceased father, Karan Onyango bought the original suit land in November 1970 from Teresa Nyamunde (deceased). That he learnt that the defendants took letters of administration in respect of the estate of the deceased and obtained new title numbers to the original suit land as per PExhibits 1 to 3. He testified that the defendants do not occupy the suit land parcels since 1970.

16. During cross examination, PW1 did maintain that his deceased father bought the original suit land and he has lived on the land since 1970. He testified, inter alia:

"I have lived in the land since 1970 to date. My late father was buried in the suit land.....The 1st defendant has never raised any complaint in regard to the suit land.....The 2nd defendant has never occupied the suit land."

17. On the other hand, the 1st defendant (DW1) stated, inter alia, that there is no sale agreement between his late mother and the late Karan Onyango with regard to the purported sale of land which otherwise has no legal effect in view of the provisions of the Land Control Act. That DW1 has never subdivided the 1st suit land parcel and that no one including the plaintiffs has ever occupied and or lived on the suit land parcels.

18. DW1 testified that a fight broke out between the plaintiffs and himself over the suit land parcels in the year 1987. As a result, DW1 killed the late Stephen Onyango, a brother to the plaintiffs after the latter teamed up with the plaintiffs to cultivate the 1st suit land parcel. DW1 testified that the family of the late Karan Onyango and not himself occupy the suit land parcels since 1990. In cross examination, he stated in part;

“The plaintiffs are in exclusive possession of the suit land. I can confirm that the 2nd defendant is not in possession of the land. The plaintiffs are in possession of the land since 1990 to-date.”

19. DW2 testified that he owns the 2nd suit land parcel which was sold to him by the late James Oduk in the presence of DW1 who owns the 1st suit land parcel. That he took possession of the 2nd suit land parcel, but the plaintiffs raised a complaint with the area District County Commissioner who stopped him from invading the land. He has not gone back to the land and that he saw homesteads of the plaintiffs thereon.

20. It is common ground that the defendants are the registered proprietors of the suit land parcels. They have interests and rights conferred by registration as envisaged under sections 24, 25 and 26 of the Land Registration Act, 2012.

21. It is also common baseline that the plaintiffs are in occupation and possession of the suit land parcels. They erected homesteads on the same and cultivated the suit land parcels. In **Titus Ong’ang’a Nyachieo -vs Martin Okioma Nyauma and 3 others (2017) eKLR**, the Court of Appeal restated the position that possession can take different forms such as a fencing or cultivation of the land in dispute.

22. In **Wambugu case** (supra), the Court of Appeal held that in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or having discontinued his possession of it. The court further held that possession of the proprietor that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose to which he intended to use it.

23. In the case of **Gatimu Kinguru v Muya Gathangi (2008) 1KLR 1007 at 1015**, Madan J (as he then was) pronounced himself on adverse possession, inter alia:

“The defendants’ possession was open and notorious.....There has been no discontinuation of possession by the defendant since 1959... There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant.”

24. In the present suit, it has not been disputed that the plaintiffs have been in open and notorious possession of the suit land parcels since the year 1970. Notably in 1987, DW1 killed Stephen Onyango who was a brother to PW1 following a dispute over the land parcels between the plaintiffs and the defendants herein. The fact that the defendants had not denounced the occupation or possession of the land parcels by the plaintiffs between 1970 and 1987, meant that the plaintiffs had acquired a title to the land by adverse possession of it for a period exceeding 12 years; see **Mwangi and another-Vs- Mwangi (1986) KLR 328, Nyachieo and Kinguru Cases (Supra)**.

25. In sum, the plaintiffs have established that they have been in open and notorious possession of the suit land parcels for a period in excess of 12 years between 1970 and 1987. They acquired title of the land parcels by adverse possession. The subdivision of the original land parcel NO. 209, the transfer of all the resultant subdivisions and change of ownership of the land parcel which was the subject matter of a claim for title under adverse possession cannot, per se, defeat that claim or at all as judicially recognized in the case of **Githu v Ndeete (1984) KLR 776**. Accordingly the plaintiffs have proved their claim against the defendants jointly and severally on a balance of probability.

26. A fortiori, I enter judgment for the plaintiffs against the defendants jointly and severally in the following terms:

a) A declaration that the plaintiffs have acquired by adverse possession on absolute title to the LR Nos. Kanyamkago/Kajulu/1253 and Kanyamkago/Kajulu/1318 (1st and 2nd suit land parcel respectively) which are in their possession and occupied by them.

b) A declaration that the plaintiffs are entitled to an order under Section 38 of the registered as proprietor of the 1st and 2nd suit land parcels in place of the 1st and 2nd defendants respectively and the defendants shall execute a valid transfer or assignment in favour of the plaintiffs free from encumbrances.

c) A declaration that the defendants hold the suit in land parcel instead of the plaintiffs who are lawful tenants in common in equal shares and the plaintiff’s names shall be entered in the land register accordingly.

d) The costs of the plaintiff’s suit shall be borne by the defendants jointly and severally.

DELIVERED, SIGNED and DATED in open court at MIGORI this 17th day of September, 2018.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mwita Kerario holding brief for Odhiambo Kanyangi for defendants.

1st plaintiff and defendants- Present

Tom – Court Assistant