



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 319 OF 2013

JOSEPH OWITI ODEMA.....PLAINTIFF

VERSUS

JAMES OKOKO KADU.....DEFENDANT

JUDGMENT

1. **Joseph Owiti Odema**, the Plaintiff, commenced this proceedings against **James Okoko Kadu**, the Defendant, through the Plaint dated the 18th November 2013, seeking for the following;

- (i) *Eviction of Defendant, his agents and or servants from Kisumu/Kochogo/935, the suit land.*
- (ii) *Permanent injunction restraining the Defendant, his agents and/or servants from trespassing and or encroaching onto the suit land.*
- (iii) *General damages for trespassing onto the suit land.*
- (iv) *Costs of the suit.*

The Plaintiff avers that he was at all material times the registered proprietor of the suit land measuring about 0.6 hectares. That on or about 2006, the Defendant by himself, his agents, and/or servants encroached onto a portion of the said land and erected a house that partly is on the public access road. That the said action interfered with the Plaintiff's use of, and access to the land, and has resulted to loss and damages and hence this suit.

2. The Defendant denied the Plaintiff's claim through his statement of defence and counterclaim dated the 5th December 2013 and amended on the 14th October, 2014. He avers that the Plaintiff himself, and or in collusion with Land Registry Officers fraudulently and unlawfully registered himself as the owner of the suit land. He also denied encroaching onto a portion of the suit land and public path on or about 2006 or that he has caused the Plaintiff loss and damages. The Defendant alternatively avers that on or about 1979, he purchased a portion of the suit land measuring about 79 metres by 26 metres from the Plaintiff's deceased brother named **Opolo Odemba** for Kshs.2,000, and have been using it since. That he established a homestead and other developments valued about Kshs.2,810,000 on the land and has interred the remains of his late sons, daughters, daughter-in-law and grandchildren thereon without any dispute. That the Plaintiff has not been appointed the administrator of his late brother's estate and has no *locus standi* to institute this suit. That the Defendant has acquired title on the portion of the suit land under his possession through adverse possession. The Defendant prays in the counterclaim for the following:

- (a) An order that the defendant has acquired title to the portion occupied by him as a beneficial owner and or by adverse possession.
- (b) An order that the title deed registered in the Plaintiff's name on 14th August, 2013 be cancelled and replaced with two titles, one in the name of the Defendant to the extent of the portion occupied by him, and the balance in the name of the Plaintiff.
- (c) General damages for disturbance and or interference of peaceful possession and enjoyment.
- (d) Costs of the suit.
- (e) Interest on (c) and (d) above at Court rates.

3. The Plaintiff opposed the Defendant's counterclaim through his reply to the Amended Defence and Defence to the counterclaim dated 2nd March, 2015. He denied colluding with the Land Registry Officers to fraudulently and unlawfully obtain registration with the suit land. He

denied the existence of any sale of land agreement between his late brother and the Defendant in 1979. The Plaintiff disputed that the Defendant has over 36 years been in possession of the portion of the suit land and that he had made developments thereon of over Kshs.2,810,000. He averred that the suit land was jointly owned by himself and his late brother and his acquisition of the title on the 14th August, 2013 was not fraudulent, illegal or unlawful. That the Defendant's counterclaim should be struck out.

4. The Plaintiff testified as PW1. He told the Court that he inherited the suit land from his late father. That he was away from home from 2003 and when he returned in 2006, he found the Defendant had moved onto a portion of the suit land and settled there blocking his access to the rest of the land. That his efforts to have the Defendant give vacant possessions in 2006 and 2013 has not been successful. He denied knowledge of his late brother, Paul Odemba, selling a portion of the suit land to the Defendant in 1979. He informed the Court that the late Paul Odemba's wife also passed on leaving two sons, one named **Peter Ochieng**. That Peter Ochieng's wife also passed on. That he stays with the second son of the late Paul. That he does not know where Peter Ochieng stays but visits home occasionally. That Peter Ochieng knew of the land his late father sold and the one he left for him.

5. The Defendant testified as DW1. He told the Court that he bought the land he resides on in 1979 from Opolo Odemba, who is the Plaintiff's elder brother. That Opolo wanted money to pay dowry which he gave him in exchange for land. That he first gave Opolo Kshs.400 on 10th April, 1979 then Shs.400 in May, 1979 and Shs.1000 in July, 1979 in the presence of witnesses who have all passed on except one **Vitalis Matete** who is very old. That he moved onto the land in 1979 using a portion of about 73 by 30 metres, while the rest was used by Opolo and his family. That Opolo and his wife were buried on that portion after their death and their son called Ochieng lives in a rented house at Ahero. The Defendant produced a valuation report as exhibit. That though he bought the land about 40 years ago, he never got the title as he found the suit land was registered with Opolo's younger father (uncle) called Obongo Onyango. DW1 told the Court that he paid a total of Kshs.2,100 and not Shs.2,000 for the land and that the houses on the valuation reports were constructed in 1997 and 2018. That he got to know the land did not belong to Opolo about three years after buying it, but did not file any case as they came from the same clan, and there was no dispute over the use of the land. The Defendant called **Phillip Odongo Kabita, Henry Ochieng Okoko, Gilbert Ogotu** and **Jacob Owiti Ako**, who testified as **DW2 to DW5** respectively. DW2, a licenced valuer confirmed doing a valuation on a portion of land occupied by Defendant measuring 73 by 30 metres. There were three (3) houses, trees, graves and life fence of about 10 to 20 years and gave their valuation as about Kshs.1,120,000 and proposed a disturbance allowance of about Kshs.158,000. That the valuation did not include the land as its ownership was in dispute. **DW3** is a son to the Defendant and told the Court that he was 15 years old when his father bought the land from the late Paul Odemba and took possession in 1979. That they have lived on the land since then but he left it and moved to Muhoroni in 2002. He told the court he could not tell who was registered with the suit land in 1979. That the late Paul Opolo passed on after 2000 and could not tell why the Defendant had not followed up on the title issue after the purchase agreement. DW4 and DW5 testified that the Defendant moved onto the suit land in 1979 and have lived on it peacefully until Plaintiff started claiming it.

6. The learned Counsel for the Plaintiff and Defendant filed the written submissions dated the 4th February, 2019 and 6th February, 2019 respectively. The Counsel for the Defendant filed further submissions dated the 12th March, 2019.

7. The following are the issues for the Court's determination;

(a) Whether the registration of the Plaintiff with the suit land was fraudulent and unlawful.

(b) Whether the Defendant has been in peaceful and open occupation of a portion of the suit land for over twelve years.

(c) Whether any of the parties is entitled to general damages and if so, how much?

(d) Whether eviction and permanent injunction orders should issue and if so, against who?

(e) Who pays the costs of the main suit and counterclaim.

8. The Court has carefully considered the oral and documentary evidence presented by **PW1, DW1 to DW5**, the pleadings, the written submissions by Counsel and the Superior Court's decisions cited therein and come to the following findings;

(a) That while the Plaintiff and Defendant did not file or produce a copy of the green card for Kisumu/Kochogo/935, the suit land, to give the history of the registration of the land, a copy is part of the valuation report prepared by DW2 and produced as exhibit D1. The said green card was issued on the 27th June, 2016 and shows the land was first registered on the 6th October, 1986 in the name of Owiti Odemba and that it measures 0.6 hectares. The green card further confirms that the proprietor changed the name to Joseph Owiti Odemba on the 14th August, 2013 and got the title deed issued on the same date. That the Plaintiff herein introduced himself through the pleadings and when testifying in Court as PW1 as Joseph Owiti Odema, the registered proprietor of the suit land. That as there is no evidence adduced by the Defendant to show that the Plaintiff's registration with the suit land on the 6th October, 1986 and the subsequent change of name on the 14th August, 2013 was procured through fraud, unlawfully or by collusion with Land Registry Officers as alleged in the statement of defence and counterclaim, the Court finds and holds that the Plaintiff has been the lawfully registered proprietor of the suit land since 6th October, 1986.

(b) That while the Plaintiff's position is that the Defendant settled on a portion of the suit land on or about 2006, the Defendant's position is that he took possession and occupation of the said portion upon buying it from the late Paul Opolo Odema in 1979. That he called DW4 and DW5 who are persons from the neighbourhood who confirmed that position in addition to DW3 who is his son and aged about 15 years at the time. That it is also instructive that the Plaintiff admitted to have been chased away from the suit land in the "1990's" after he "asked him why he had sold the land". That the Court has taken that reply to a question put to the Plaintiff during cross examination to be a confirmation that he knew as far back as the 1990's that his elder brother had sold part of the suit land but appear to have done nothing legally to challenge the sale, though the land was registered in his name. That the only times the Plaintiff stated he took some steps were in 2006 and 2013 when he did demand notices to the Defendant which the Defendant did

not comply with.

(c) That after analyzing and considering the testimonies given by the Plaintiff against that of the Defendant with DW3 to DW5, the Court finds and holds that the Defendant has been in possession and occupation of a portion of the suit land from 1979 pursuant to a land sale agreement with Paul Opolo Odema, elder brother to the Plaintiff, now deceased. That even through the Defendant discovered about three (3) years later that the land was not in the name of Paul Opolo Odema, he continued in occupation and possession of the said land and continued in possession up to the filing of this suit to to-date. That though the Plaintiff had sought to know from his elder brother why he had sold the land, he did not take any legal steps to reclaim possession. That even when he did a demand notice to the Defendant in 2006 and the Defendant declined to vacate, he did not initiate any legal steps to reclaim possession until in 2013 when he filed this suit.

(d) That the findings in (b) and (c) above leads the Court to the conclusion that the Defendant has been in open and continuous occupation and possession of a portion of the suit land from 1979, which means by the time this suit was filed in 2013, a period of about thirty-four (34) years had passed. That for the first three (3) years up to the time he discovered the late Paul Opolo Odema was not the registered proprietor, his occupation and possession was with permission of the said vendor. That after that discovery, he continued in possession and occupation of the same portion without violence, without secrecy and without permission *[nec vi nec clam nec precario]*.

(e) That it is apparent that the sale agreement between the Defendant and the late Paul Opolo Odema was of before the amendment of **Section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya in 2003**, which came into effect on 1st June, 2003 to provide that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. That in any case **subsection (7)** excludes the application of **subsection (3)** to contracts made before the commencement of the subsection. That the court of Appeal in *Peter Mbiri Michuki Vs Samuel Mugo Michuki [2014] eKLR* pronounced itself on a related matter as follows:

“25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the Plaintiff/Respondent had to satisfy the trial Court that he either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence, we concur with the finding of the learned Judge that the Plaintiff/Respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous...”

That applying that position to this case, and having found that the Defendant has proved that he has been in possession of the portion of the suit land since 1979, and has used it openly, uninterrupted and continuously, even burying his deceased family members thereon without any objections, the court finds he proved that he has been in adverse possession of the suit land for more than twelve (12) years.

(e) That the Defendant raised the defence of and claim of adverse possession in his Amended Statement of defence and counterclaim. That ordinarily a claim based on adverse possession is required by **Order 37 Rule 7 of the Civil Procedure Rules** to be initiated or commenced through originating summons. However, the Superior Courts have allowed adverse possessions claims initiated through counterclaims, filed with a defence to a suit commenced through a Plaint like in this matter. That the Court agrees with the position taken by the Court in *Kibutuk Arap Too Vs Peris Shanyasi Allulya & 4 Others [2017] eKLR*, where the court referred to the case of *Gulam Mariam Noordin Vs Julius Charo Karisa Civil Appeal No. 26 of 2015*, where the claim was raised in the defence and the Court in rejecting the objection to the procedure stated the law as follows;

*“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of Statute of Limitation by filing a defence or a defence and counterclaim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be by originating summons... We refer to the case of *Wabala Vs Okumu [1997] LLR 609 (CAK)*, which like this appeal the claim for adverse possession was in the form of defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure...”*

That the foregoing leads the Court to find and hold that the Defendant’s claim to the portion of the suit land under his possession and occupation, under adverse possession, through the counterclaim was lawfully initiated, and did not offend the provision of **Order 37 Rule 7 of the Civil Procedure Rules**.

(f) That though the Defendant claimed in his testimony in Court, that he was occupying a portion of about 73 by 30 metres of the suit land, his pleadings at paragraph 15 of the Defendant’s Amended Defence and Counterclaim gave the measurements as 79 metres by 26 metres. That the valuation Report by DW1 gave the portion occupied by the Defendant as measuring *“73m x 30 m approximately”*. That in the absence of a Land Surveyor’s report on the size of the portion occupied by Defendant, the Court will take the measurement given by DW1 and DW2 of 73m by 30 m as the portion of the suit land the Defendant is entitled to under adverse possession.

(g) That in view of the finding by the Court that the Defendant has equitable rights over the portion of 73 m by 30 m of the suit land, which has been under his occupation since 1979, it follows that he is not a trespasser on the said portion and the Plaintiff is not entitled to any damages for failure to use that part of the suit land.

(h) That though the Defendant claimed for general damages, he has not availed evidence of any loss or damage he actually suffered that is attributable to the Plaintiff’s action or omission. That as a matter of fact, the Defendant has continued to be in possession of the portion of the suit land he is entitled to from 1979 to the date he testified in Court.

(i) That in view of the relationship between the parties who are clanmates, and so to assist them forge a good relationship between them and for the benefits of their families, the Court is of the view that each party do bear his own costs in spite of the provision of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

9. That flowing from the foregoing, the Court makes the following orders:

(a) That the Plaintiff has failed to prove his claim against the Defendant to the standard of balance of probabilities. That the Plaintiff's claim against the Defendant in the main suit is therefore dismissed with each party bearing his own costs.

(b) That the Defendant has proved his claim against the Plaintiff in the counterclaim to the standard of balance of probabilities. The Court therefore, enters judgment for the Defendant against the Plaintiff in the counterclaim in the following terms;

(i) That the Defendant has been in adverse possession of a portion of land measuring about 73 metres by 30 metres of land parcel Kisumu/Kochogo/935, for more than twelve (12) years.

(ii) That the Plaintiff's title to that portion of the suit land described in (b)(i) above and in occupation of the Defendant has been extinguished under **Sections 7 and 37 of the Limitation of Actions Act Chapter 22 of Laws of Kenya.**

(iii) That the Plaintiff is directed to execute all documents necessary to survey and transfer the said portion described in (b)(i) above to the Defendant within ninety (90) days. The Defendant will meet the attendant fees and stamp duty.

(iv) Each party to bear his own costs of the counterclaim.

Orders accordingly.

Signed and dated at Eldoret this 9th day of April, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 8th of May, 2020.

A. O. OMBWAYO

JUDGE