



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**LAND CASE NO 647 OF 2017**

**(Formerly Kisii HCCC Number 308 of 2011 and Kisii ELCC Number 586 of 2016)**

**SARAH AUKO OKOTH.....PLAINTIFF**

**-VERSUS-**

**CHARLES ORWA OKECH.....DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. At the heart of the present dispute is a parcel of land known as Title number Kasgunga/ Kamreri/ 405 measuring approximately five decimal five eight (5.58) hectares in area (Hereinafter referred to the suit land). The same is situate within Mbita in Homa Bay County.
2. The plaintiff, Sarah Auko Okoth is represented by the firm of Nyauke and Company Advocates.
3. The defendant, Charles Orwa Okech is represented by the firm of G. S. Okoth and Company Advocates.
4. Initially, the instant suit was lodged in the High Court of Kenya at Kisii. It is noted that on 9<sup>th</sup> March, 2012, the court (Sitati J) gave directions inter alia, that the suit be heard by way of oral evidence. On 19<sup>th</sup> May 2017, the suit was transferred to this court for hearing and determination.

**B. THE GIST OF THE PLAINTIFF'S CASE**

5. The plaintiff initiated this suit by way of an originating summons dated 20<sup>th</sup> December 2011 and filed in court on 21<sup>st</sup> December 2011 pursuant to Order 37 Rule 7 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and section 38 (1), (2) and (4) of the Limitation of Actions Act (Cap 22 of the Laws of Kenya). She claims to have acquired the suit land by way of adverse possession. In that regard, she has sued the defendant for the following reliefs;

***a) The honorable court be pleased to order that the plaintiff having been in continuous and uninterrupted occupation of land parcel number Kasgunga/Kamreri/405, has thus acquired prescriptive right to the title thereto by adverse possession.***

***b) The honorable court be pleased to order the land registrar for the time being responsible for Kasgunga/Kamreri registration area to delete the name of the respondent Charles Orwa Okech and to register the name of the plaintiff herein Sarah Auko Okoth in the place thereof absolutely.***

***c) The costs of this originating summons be provided for and should be paid by the defendant to the plaintiff.***

6. The originating summons is premised on the plaintiff's supporting affidavit sworn on 20<sup>th</sup> December 2011 alongside grounds (a) to (e) set out on its face and the accompanying certificate of official search dated 7<sup>th</sup> December 2011, in respect of the suit land. The plaintiff deposed, inter alia, that she has had quiet and uninterrupted possession, use and occupation of the suit land since the year 1972. That her father in law showed her the land as her traditional home and she has not known any other home except the suit land since 1972.
7. The plaintiff further deposed that in November 2011, the defendant asked her to vacate the suit land claiming that the land belonged to him. She then carried out a search which revealed that the suit land is registered in the name of the defendant as shown in the certificate of official search marked as "SA01" annexed to the plaintiff's supporting affidavit. Thus, it precipitated the present suit.
8. On 15<sup>th</sup> July 2019, the plaintiff (PW1) testified and relied on her supporting affidavit as well as certificate of official search dated 7<sup>th</sup>

December 2011 and marked as SAO1 (PEXhibit1). To reinforce her claim, she called Paulus Odundo (PW2) and John Owala Opodi (PW3) as her witnesses

9. Learned counsel for the plaintiff failed to file submissions in this suit in spite of the latitude given to the parties on 3<sup>rd</sup> December 2019.

### **C. THE GIST OF THE DEFENDANT'S CASE**

10. The defendant opposed the originating summons by his replying affidavit sworn on 29<sup>th</sup> December, 2011 and filed in court on 30<sup>th</sup> December 2011 accompanied by a certificate of official search dated 20<sup>th</sup> December 2011 and marked as C0-1 (DEXhibit 1). He deposed, inter alia, that his father, Paulo Okech Orwa (Deceased1) settled on the suit land in the year 1974. That the suit land shares a common boundary with Land Reference number Kasgunga/Kamreri/404 registered in the name of Amon Okongo (Deceased2) who was the father of Alfred Okoth Okongo, the husband of PW1.

11. The defendant further stated that in the year 1978, he was registered as the sole proprietor of the suit land following the demise of Deceased 1 and his (Deceased 1) elder wives and after land adjudication in Kasgunga - Kamreri section. That PW1 and the defendant are in-laws since the latter's wife, Jane Atieno Orwa (Deceased 3), was the daughter of Ouma Kweri who is a cousin to the husband of PW1.

12. The defendant also stated that in the year 2008, the husband of PW1 trespassed into the suit land and erected his homestead on the upper portion of the land. That there are no circumstances that can give the plaintiff the right of acquiring the suit land by way of adverse possession.

13. On 3<sup>rd</sup> December 2019, the defendant (DW1) relied on his replying affidavit and testified in part that he is a neighbour to PW1. That he had allowed the husband of PW1 to occupy the suit land temporarily following ethnic clashes in the year 2008. He sought dismissal of the originating summons with costs.

14. By submissions dated 20<sup>th</sup> March 2020 and filed in court on 27<sup>th</sup> April 2020, learned counsel for DW1 urged this court to dismiss the instant suit with costs. Counsel gave brief facts and evidence of the case and submitted that the originating summons is incompetent hence should be struck out. To buttress his submissions, counsel cited Migori ELCC No 882 of 2017, (O.S) **Rose Akeyo Onyuka v Martin Omondi Ogweno** and Migori ELCC No 304 of 2017 (O.S) **Susan Wachara Achari v Maurice Adede Oduongi**.

15. Counsel further cited Black's Law Dictionary 9<sup>th</sup> Edition at page 62 on the definition of the terms "adverse", "adverse action" and "adverse possession". Counsel further relied on **Philip Odhiambo and 3 others-vs-Mathew** Kisumu Civil Appeal No 24 of 2014 (COA), **Waweru-vs- Richu (2007) 1EA 403 (CAK)** and section 27 (2) of the Civil Procedure Act Cap 21 Laws of Kenya to fortify the submissions.

### **D. ISSUES FOR DETERMINATION**

16. It is well settled 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 **Galaxy Paints Company Ltd-vs-Falcon Grounds Ltd (2000) EA 385**.

17. I have carefully considered the entire pleadings and evidence of the respective parties as well as the plaintiff's submissions inclusive of authorities cited therein. In that regard, the issues that fall for determination in the instant suit are whether the plaintiff has established her claim against the defendant in consonance with the decision in the case of **Wilson Kazungu Katana and 101 others-v Salim Abdallah Bakshwein and another (2015) eKLR**, where the Court of Appeal held that the doctrine of adverse possession dictates that:

- a) The land in question be registered in the name other than the applicant.
- b) The applicant is in open and exclusive possession of the land in adverse manner to the title of the owner.
- c) The applicant has been in peaceful occupation of the suit land for a period in excess of twelve (12) years having dispossessed the owner or discontinued the possession of the owner.

### **E. ANALYSIS AND DETERMINATION**

18. As regards the first issue or dictate, it is disclosed on ground (a) of the originating summons and paragraph 5 of the supporting affidavit that the suit land is registered in the name of DW1. Furthermore, Part B – proprietorship section of P Exhibit 1 reveals that DW1 is the proprietor of the suit land and title deed thereto was issued to him on 1<sup>st</sup> September 2008.

19. In her testimony, PW1 relied on her supporting affidavit as well as P Exhibit 1 and stated that DW1 is the registered owner of the suit land. In cross examination, she stated, inter alia;

***"The defendant is the registered proprietor of the suit land."***

20. At paragraph 2 of his replying affidavit, DW1 confirmed that she is the registered proprietor of the suit land. He fortified his averment by DEXhibit1 which shows that DW1 is the registered proprietor of the suit land and that its title deed was issued to him on 1<sup>st</sup> September 2008.

21. DW1 stated in cross examination that:

**“...whereby I was registered as the proprietor of the suit land...”**

22. During further cross examination, DW1 stated, inter alia;

**“...I have title deed to the suit land. The registration followed the adjudication process.”**

23. This court is not unconscious of section 2 of the Land Registration Act, 2016 (2012) which provides in part:

**“Proprietor” means-**

a) **In relation to land or a lease, the person named in the register as the proprietor, and**

b) **In relation to a charge of land.....**

24. In the case of **Wainaina-vs-Murai and others (1976-80) KLR 283 at 289 and 290**, Simpson J (as he then was) observed that the land in question was registered under the Registered Land Act chapter 300 Laws of Kenya (The repealed Act). In the present case, the suit land was registered under the repealed Act thus I find the said observation sound, relevant hereto and endorse the same accordingly.

25. It is therefore common baseline that the suit land is registered in the name of DW1 herein. The 1<sup>st</sup> issue for determination in this matter is resolved thereby.

26. The second issue is whether DW1 has been in open and exclusive possession of the suit land in an adverse manner to the title of PW1 as noted in **Wilson Kazungu Katana** (supra) and **Salim-vs-Boyd (1971) EA 510**. On that score, PW1 testified that she claims part of the suit land namely 5.55 hectares. That DW1 is not her neighbour.

27. Essentially, adverse possession should be of the whole or a defined portion of the land in dispute as noted in **Muthuita-vs-Wanoie and 2 others (2008) IKLR (G & F) 1024**; see also the decision of Madan J (as he then was) in **Gatimu Kinguru -vs- Muya Gathangi (1976-80) IKLR 317**.

28. PW1 also stated that she has resided on the suit land since the year 1982. That she has done so by virtue of the same being owned by her father in law (deceased 2) and that she has never been evicted therefrom.

29. Be that as it may, has PW1 established the definite portion of the suit land she claims to be in adverse possession? Clearly, she has failed to show the definite area and time of occupation and possession of the suit land. In **West Bank Estates Ltd-vs- Arthur (1966) 3WLR 750**, it was observed that even evidence of cultivation should be definite as to area and time.

30. It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute; see the Court of Appeal decision in **Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017)eKLR** which applied the case of **Kimani Ruchine and another -vs- Swift Rutherford company Limited and another (1976-80) IKLR 1500**.

31. Besides, it was the testimony of DW1 that he allowed the husband of PW1 to occupy part of the suit land. In examination in chief, DW1 stated in part:

**“The plaintiff (PW1) is my neighbour. I allowed her husband and he is Alfred Okoth Okongo.....I gave him consent to occupy the land...”**

32. During cross examination, PW1 did testify thus:

**“My husband used to be a businessman in Nairobi and we lived in Nairobi shortly. He came back home in the year 2010. I built on the suit land in 2010 and it is my home...” (Emphasis laid)**

33. In view of the foregone, it is quite evident that PW1 and her husband were given permission by DW1 to be in possession of part of the suit land in the year 2010. In that scenario, open and exclusive possession cannot arise ; see **Virginia Wanjiku Mwangi-vs-David Mwangi Jotham Kamau (2013) eKLR**.

34. In respect of the third issue, it has emerged from the evidence of PW1 that she used to live in Nairobi together with her husband prior to the year 2010 when they allegedly built on the suit land. PW2 and PW3 confirmed that PW1 stays on the suit from where she has not been evicted by DW1.

35. It is noted that the present suit was generated on 21<sup>st</sup> December, 2011. PW1 and her husband entered the suit land in the year 2010. Therefore, it can't be concluded that PW1 has been in occupation and possession of the suit land for a period in excess of twelve years.

36. Moreover, PW1 stated that the area chief attempted to resolve the instant dispute in vain. By DW1 asserting title to the suit land, the

alleged possession of the suit land by PW1, was not peaceful and time stopped from running for purpose of adverse possession; see also **Waweru case (supra)**. In the case of **Ndutho-vs-Itumo and 2 others (2002) KLR 637**, it was observed that filing of a complaint stopped time from running in adverse possession.

37. To that end, he who alleges adverse possession must prove it as provided for under sections 107 and 108 of the Evidence Act (Cap 80 Laws of Kenya) and per **Katana case (supra)**. The plaintiff has failed to demonstrate on a balance of probabilities that she has been in open, exclusive, peaceful, continuous possession of the suit land for the prescribed period of time and that the defendant has been dispossessed thereby.

38. A fortiori, the instant suit commenced by way of an originating summons dated 20<sup>th</sup> December 2011 and filed in court on 21<sup>st</sup> December 2011 be and is hereby dismissed with costs to the defendant.

**Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 3<sup>RD</sup> day of JUNE , 2020.**

**G.M.A. ONGONDO**

**JUDGE**