



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

LAND CASE NO 90 OF 2017

(FORMERLY KISII ELC CASE NO. 471 OF 2015)

BENSON AKUMU PIEMO.....PLAINTIFF

-VERSUS -

HANNIE NAFUTUTU ONDAYE

FELIX ODUOR ALUOCH.....DEFENDANTS

JUDGMENT

A. INTRODUCTION

1. The instant dispute involves the whole of land parcel number Central Karachuonyo/Konyango/589 measuring approximately zero decimal one four hectares (0.14 Ha) in area (the suit property). The same is contained in Registry Map Sheet number 5 and it is located within Homa Bay County.
2. The plaintiff, Benson Akumu Opiemo is represented by Ogutu Mboya and company Advocates, now, Oguttu, Ochwangi, Ochwal and Company Advocates.
3. The 1st and 2nd defendants, Hannie Nafututu Ondaye and Felix Oduor Aluoch respectively, are represented by G.S Okoth and Company Advocates.
4. This suit was originally lodged at Kisii Environment and Land Court. On 15th February 2017, the same was transferred to this court upon its constitution, for hearing and determination.
5. Notably, on 11th April, 2016, the court (Mutungi, J) ordered and directed thus:

“The originating summons be deemed to be a plaint and the affidavits in support will be the plaint and the replying affidavit the defence. Hearing will be by way of viva voce evidence.....”

B. THE GIST OF THE PLAINTIFF’S CASE

6. By an originating summons dated 19th October 2015 duly filed in court on 21st October 2015, the plaintiff claims to have acquired title over the suit property by adverse possession and or prescription for the determination of the following six (6) issues:
 - i. A declaration that the 2nd rights to recover the whole of LR NO. Central Karachuonyo/Konyango/589, is barred under the extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of parcel of land herein for a period exceeding 25 years.
 - ii. There be an order that the plaintiff be registered as the proprietor of the whole of LR NO. Central Karachuonyo/Konyango/589 , in place of the 2nd defendant who currently holds the title in respect of the suit property, following (sic) the transfer and registration thereof in his name on the 22nd day of April, 2015.
 - iii. There be an order restraining the defendants jointly and severally, either by themselves, agents, servants and/or employees from

interfering with the plaintiffs' peaceful possession and occupation of the whole of LR NO. Central Karachuonyo/Konyango/589, in the manner whatsoever and/or howsoever.

iv. The Deputy Registrar and/or the Executive officer of the Honourable High court be directed and/or ordered to execute the transfer instrument and all attendant documents to facilitate the transfer and registration of the whole of LR NO. Central Karachuonyo/Konyango/589, in favour of the plaintiff.

v. Costs of this originating summons be borne by the defendants.

vi. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

7. The originating summons is anchored on grounds (a) to (f) set out on its face, a 21-paragraphed supporting affidavit sworn on even date and documents annexed thereto and marked as "BAP1" to "BAP6" which include copies of sale of land agreement, green card and photographs in respect of the suit property. Briefly, the plaintiff states that on 15th April 1990, he entered into a sale of land agreement (PEXhibit 1) with one Stephen Ondaye Adwe also known as Ondaye Adwe (Deceased) and the 1st defendant alias Anna Nafututu Ondaye who sold to him the suit property registered in the name of the deceased as shown in the green card (PEXhibit 2). That subsequently, the plaintiff took possession of the suit property and developed it as disclosed in the photographs (PEXhibit 4).

8. The plaintiff further states that deceased and the 1st defendant failed to transfer and register the suit property to the plaintiff but in lieu thereof the 1st defendant caused the same to be transferred and registered in her name as shown in PEXhibit 2- green card. That after the death of the deceased, the 1st defendant sought and obtained consent and proceeded to transfer the suit property in the name of the 2nd defendant as revealed in a certificate of official search dated 9th October 2015 (PEXhibit 5) hence precipitating the present suit.

9. On 4th April 2017, the plaintiff (PW1) testified and presented in evidence, PEXhibit 1 to 6, to fortify his claim. He called PW2, Benjamin Oliech Onyango, his clan mate and a retired nurse, who stated that he witnessed PEXhibit 2 between the deceased (vendor) and PW1(purchaser) with regard to the sale of the suit property.

10. In their six (6) paged submissions dated 19th March 2020 and filed in court on 4th June 2020, learned counsel for PW1 made reference to the pleadings and evidence of the respective parties herein and analysed the evidence in favour of PW1. To buttress the submissions, counsel cited the Court of Appeal decisions in **Harrison Ngige Kaara and another –vs- Shadrack Njanja Kaara Civil Appeal No. 79 of 1996, at Nairobi, Mwinyi Hamisi Ali –vs- Philemon Mwaisaka Wawaka Civil Appeal No. 125 of 1997 at Mombasa and Githu v Ndeete (1984)KLR 776** as well as a persuasive authority namely NBI HCCC No. 2360 Of 1995; **Wanjiku Kinuthia and another –vs- Stephen Kinooro Kamau and another.**

C. THE GIST OF THE DEFENDANTS' CASE

11. By a 15-paragraphed replying affidavit sworn on 25th November 2015 and filed in court on 1st December 2015 with annexed documents marked as HO-1A, HO2, HO3,HO4 to HO7", the 1st defendant opposed the originating summons. He termed the plaintiff's allegations false and misconceived. She deposed, inter alia, that she is the widow of the deceased and the administrator of his estate as shown in copies of letter of grant of administration and a certificate of confirmation of grant (DEXhibits 3a and 3b). That the deceased never sold any portion of his land to anybody. That PEXhibit 2 is a forgery as PEXhibit 6 cannot be work done in 1990. That she lawfully transferred the suit property to the 2nd defendant.

12. In his 14-paragraphed replying affidavit sworn on 30th November 2015 and filed in court on 1st December 2015, with annexed documents marked as F01 to FO3, the 2nd defendant, too, denied the plaintiff's allegations. He deposed, inter alia, that he bought the suit property which had no developments thereon from the 1st defendant who had PEXhibits 3(a) and 3(b) as shown in sale of land agreement dated 14th January 2010 (DEXhibit2). That he lawfully purchased the suit property. That it cannot be understood why the land was never transferred to the plaintiff's name since the year 1990. That time started to run when the 1st defendant obtained PEXhibit 3a. He termed the plaintiff's allegations false.

13. The 1st defendant (DW1) relied on DEXhibits 1 to 6 in her evidence. She called Jack Ouma, a retired chief (DW2), her brother in law, Saleh Oluoch Adwe (DW3) and her friend and neighbour, Getrude Naswa Wekeza (DW4), to reinforce their case in opposing the plaintiff's allegations,her brother in law Saleh Oluoch Adwe (DW3) and her friend and neighbours,Getrude Naswa Wekeza (DW4), to reinforce their case in opposing the plaintiff's allegations.

14. On 24th October 2019, learned counsel for the 1st and 2nd defendant filed four (4) paged submissions dated 22nd October 2019 wherein reference was made to the pleadings of the respective parties in brief and framed four (4) issues for determination including whether (PEXhibit 2) is valid and whether PW1 is entitled to the suit property. In analyzing the issue of the negative, counsel cited section 38 of the Land Act 2016 (2012) , sections 6 and 8 of the Land Control Act (Cap 302 Laws of Kenya), Section 27 of the Civil Procedure Act Chapter 21 Laws of Kenya, **Mtana Lewas –vs- Kahindi Ngala Mwangandi (2015) e KLR, Teresa Wachuka Gachira-vs- Joseph Mwangi Gachira (2009) eKLR and John Mwatela Shiede –v- Vitahbhai Bhulabhai Patel (2010) eKLR.**

D. ISSUES FOR DETERMIANTION

15. It is established law 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 **Great Lakes Company (U) Ltd -vs- Kenya Revenue Authority (2009) KLR 720.**

16. I have carefully, considered the parties' respective pleadings, evidence and submissions including issues for determination and authorities cited therein, I also take into account the statement of issues (plaintiff's version) dated 22nd April 2018 and filed in Court on even date.

17. In view of the foregone, the central issues for determination herein are the ingredients of adverse possession as restated in the case of **Elijah O. L. Opar –vs- Tobias Odhambo Obach (2019) eKLR** where the Court of Appeal remarked:

“What we need to determined is whether.....evidence sufficient to prove on a balance of probabilities that he had entered upon the subject land openly, peacefully, without the permission of Opar and had continued in possession for an uninterrupted period of at least 12 years thereby, dispossessing Opar and extinguishing his right and title thereto. These are the ingredients of adverse possession as have been restated in a long line of authorities including **Wembugu –vs- Njuguna (1983) KLR 172; Ngati Farmers Company Cooperative Society Ltd –vs- Ledidi and 15 others (2009) KLR 331. Titus Nyacheo.....” (issues emphasized)**

E. DISCUSSION AND DISPOSITION

18. In regard to the first issues, this court takes into consideration grounds (a) to (d) of the originating summons as well as paragraph 5 of the plaintiff's supporting affidavit. PEXhibit 4 indicates that plaintiff entered into the suit property.

19. Registration of the suit property is not in dispute. Paragraphs 3 and 4 of the replying affidavit of DW1 and the 2nd defendant disclose the even ground thereof.

20. DW1 was emphatic that PW1 did invade the suit property. PEXhibit 2 reveals that proposition.

21. The claim raised by PW1 is for the whole suit land. In **Muthuita –vs- Wanoe and 2 others (2008)1 KLR. (G &F) 1024** which applied the decision of Madan J (as he then was) in **Gatimu Kinguru –vs- Muya Gathangi (2008) 1 KLR 1007 at 1015 (G&F)** and recently the decision in **Shimuya Peter and 3 others –vs- Mary Anyango Ameka and another (2018) eKLR**, it was held that it is essential that adverse possession should be of the whole or a defined portion of land.

22. The recorded evidence including PEXhibit 4 acutely point to the plaintiff's open and notorious possession of the suit property; see **Gatimu Kinguru case (supra)**.

23. On the second issue, I bear in mind grounds, (j) (L) and M of the originating summons. I also note paragraphs 8 ,13 17, and 18 of the plaintiff's supporting affidavit which speak to the period of occupation and possession of the suit property by PW1.

24. PW1 testified that he has occupied the suit property since the year 1990. During cross –examiantion,PW1 maintained that :-

“ I have lived on the suit land since 1990. My son lives on the land. My house built on the land appears on PEXhibit 4. I planted euphobia trees and erected cider posts on the lands boundary as shown on PEXhibit 4. They mark the boundary. I planted the trees in 1990.....”

25. PW2 affirmed the testimony of PW1 regarding the possession and occupation of the suit property. He stated that PW1 sank a latrine, a borehole and ploughed the suit property and planted crops thereon.

26. In cross-examination, PW2 told the court, inter alia;-

“.....PW1 moved to the land in 1991 and built a pit latrine, borehole and a structure. He stayed on the land. I witnessed the sale of land. PW1 ploughed the land and lived on it. I can see PW1 and structures on the photo.....”

27. The testimonies of DW1, DW2,DW3 and DW4 were only to the effect that DW1 owned the suit property and that she sold it to the 2nd defendant. Indeed, DW2 did prepare DEXhibit 2 and stated that DW1 is the rightful owner of the suit property.

28. In the light of the evidence of PW1 and PW2 hardly displaced by the testimonies of DW1 to DW4, there is sufficient evidence that there has been no discontinuance of PW1 by DW1 and 2nd defendant in respect of the suit property as noted in **Gatimu Kinguru case (supra)**. Therefore, PW1 has been in possession and occupation of the suit property for a period in excess of 12 years.

29. In regard to the third issue, I take into account grounds (N) (O), (P) (Q) (V) and (S) of the originating summons. I also do the same to the contents of paragraphs 14 to 20 of the plaintiff's supporting affidavit.

30. PEXhibit 4 reveals that PW1 is in possession and occupation of the suit land. The testimonies of PW1 and PW2 tell it all.

31. In cross-examiantion,DW1 stated:-

“.....I live near the suit land. I live on another land. I do not cultivate the suit land. I have no photos of the suit land, fenced or not. I did not report the matter to the police.....”

32. DW2, DW3 and DW4 merely gave evidence in relation to sale of the suit land to 2nd defendant by DW1. That DW1, who owns it, does live thereon.

33. DW1 and 2nd defendant claimed that PW1 did not obtain consent of the land Control board in respect of the alleged PEXhibit 1. Any money or consideration paid in the course of avoid transaction under section 7 of the Land Control Act (Cap 302 is recoverable as held in **Karuki-vs- Kariuki (1983) KLR 227**.

34. Be that as it may, it is trite law that the equitable doctrine of constructive trust and equitable estoppel apply to override the requirement for Land Control Board consent in a controlled transaction as it occurred in the present case; see the Court of Appeal decision in **William Kipsoi Sigei –vs- Kipkoech Arusei and another Civil Appeal No. 54 of 2014 at Nairobi (2019) eKLR**.

35. Clearly, DW1 transferred and registered the suit property in the name of the 2nd defendant. However, mere change of ownership does not interrupt adverse possession; see **Githu case (supra)**.

36. In view of the foregoing, there is clear ouster of DW1 and 2nd defendant from the suit property followed by adverse possession occupation, development and cultivation by the PW1 as shown in PEXhibit 4 and as held in **Kinguru case (supra)**.

37. The plaintiff has proved the ingredients of adverse possession against the defendant on a balance of probabilities in this suit; see **Ahmed Abdulkarim –vs- Member for Lands and Mines (1958) EA 436,441**

38. Accordingly, Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for orders (1),(2), (3).(4) and (5) sought in the originating summons dated 19th October 2015 and duly filed on 21st October 2015.

39. It is so ordered.

Delivered, Signed and Dated at Migori in open Court and 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 Corona Virus pandemic challenge this 28th day of JULY , 2020.

G.M.A ONGONDO

JUDGE

In Presence of :-

Ms. W. Ochwal learned counsel for the plaintiff

Tom Maurice – Court Assistant