



**REPUBLIC OF KENYA**

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

**AT MIGORI**

**ELC CASE NO 6 OF 2019**

**SAMWEL NYABICHERE MUCHUMERSON.....PLAINTIFF**

**VERSUS**

**DANIEL SERERIA MAKARA.....1<sup>ST</sup> DEFENDANT**

**JACOB GESASE MARWA.....2<sup>ND</sup> DEFENDANT**

**MUSA MARWA.....3<sup>RD</sup> DEFENDANT**

**RIOBA MARWA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The present dispute touches on a portion of land measuring five (5) acres out of land parcel number Bukira/Bwisaboka/823 (the suit land herein). The same is a subdivision of land parcel number Bukira/Bwisaboka/136 (the original land herein) situate within Migori County.
2. The plaintiff, Samwel Nyabichere Muchumerson is represented by learned counsel, Mr. Mwita Kerario of M/S Kerario Marwa and company Advocates.
3. The defendants, Daniel Sereria Makara, Jacob Gesase Marwa, Musa Marwa and Rioba Marwa are represented by learned counsel, Mr. G.S Okoth of G.S Okoth and company Advocates.
4. On 7<sup>th</sup> October 2019, pursuant to consent of counsel for the respective parties, it was ordered and directed that the originating summons and replying affidavit herein be treated as plaint and statement of defence respectively. That hearing of this suit be by way of *viva voce evidence*.

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

5. On 7<sup>th</sup> February 2019, the plaintiff commenced this suit by way of an originating summons of even date under Order 37(7) of the Civil Procedure Rules, 2010 as read with Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya. He is claiming to have acquired title to the five (5) acres, a portion of the suit land by way of adverse possession for determination of questions as follows:
  - a) Whether the applicant/plaintiff has resided on a portion of land measuring 5 acres out of land parcel No. Bukira/Bwisaboka/136 which is now Bwisaboka/825 for over 12 years.
  - b) Whether the applicant should be declared the owner of the said 5 acres to the exclusion of the respondent/defendants.
  - c) Whether this Honourable Court should direct the County Surveyor and Land Registrar Kuria to demarcate the said 5 acres and give them a number and register them in the name of the applicant.
  - d) Whether the respondents should pay the costs of this originating summons.
6. The originating summons is premised on a 14-paragraphed supporting affidavit sworn on even date by the plaintiff and copies of annexed

documents marked as “SNM 1(a) and (b)” to “SNM 6”. The said documents include; sale of land agreements (PEXhibits 1(a) and (b), agree card(PEXhibit 2) and a grant of letters of administration intestate issued to the 1<sup>st</sup> and 4<sup>th</sup> defendants on 10<sup>th</sup> January 2017 in Migori CM’s court Succession Cause No. 113 of 2017(PEXhibit 8). The plaintiff deposed inter alia, that in the years 1975 and the year 1977, he bought five (5) acres from one Makara Sereria Wangi alias Marwa Sereria (Deceased) out of the original land and consent of the area Land Control Board given accordingly as shown in PEXhibits 1(a) to 3. That he took possession of the portion of land, erected, a permanent home thereon as well as cultivated the land.

7. The plaintiff further deposed that the deceased died before he could transfer the portion of the suit land to him. That prior to the death of the deceased, the plaintiff had filed Kisii HCCC No. 3 of 1994 against the deceased to compel him to transfer the said portion of the suit land to him, but the suit abated. That thereafter, the plaintiff filed a citation, Migori High Court Misc Succession Cause No. 4 of 2017 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the appointed administrators of the estate of the deceased as revealed in PEXhibits 4 to 8 herein. They failed to transfer the suit land to him. Thus, it precipitated the instant suit.

8. The plaintiff (PW1) testified that he is entitled to the portion of the suit land which he bought from the deceased, who did not transfer the same to him. He relied on the originating summons, his supporting affidavit and PEXhibits 1 to 8 in the instant suit.

9. On 3<sup>rd</sup> March 2020, this court ordered and directed the parties to file and serve submissions, inter se. However, none of the parties complied accordingly hence this decision as this court is fully aware that justice shall not be delayed as stipulated under Article 159 (2) (b) of the Constitution of Kenya, 2010.

### **C. THE GIST OF THE DEFENDANTS’ CASE**

10. In the 1<sup>st</sup> defendant’s affidavit replying to the originating summons sworn on 8<sup>th</sup> March 2019 and filed in court on 18<sup>th</sup> March 2019 for and on behalf of himself and other defendants, The defendants partially admitted that the plaintiff has acquired title to the portion occupied by his homestead and not to the remaining portion of land parcel number Bukira/Bwisaboka/852 which they intend to apportion and distribute to the other beneficiaries of estate of the deceased. They urged this court to dismiss the suit as it was filed while Land Case No. 120 of 2017 is still pending in court.

11. The 1<sup>st</sup> defendant also deposed that the deceased sold only a portion of land measuring approximately 100 feet by 200 feet to the plaintiff who has erected a homestead thereon. That the defendants have possessed and occupied the rest of the land, LR No. Bukira/Bwisaboka/852 measuring approximately 3.96 hectares or 9.9 acres in area. That the plaintiff’s claim is exaggerated. They relied on documents marked as “DSM1” to “DSM5B” annexed to the affidavit. The documents include copies of letter of authority (DSM1), photograph of homestead of the plaintiff (DSM3), copies of grant and certificate of confirmation of grant in respect of the estate of the deceased (DSM2A and 2B) and copies of pleadings in Migori HC/ELCC No. 12 of 2017 PW1 –vs- DW1 and 3 others (DSM3).

12. The 1<sup>st</sup> defendant (DW1) testified and relied on his replying affidavit statement in form of affidavit titled “affidavit supporting originating summons” (I think, title in error) sworn on 24<sup>th</sup> February 2020 as part of his evidence. He did depose, inter alia, that:

***“Whereas I accept that the defendant has acquired title to the portion occupied by his homestead the defendant has no title, rights or interest over the remaining portion of Parcel No. Bukira/Bwisaboka/852, which we intend to apportion and distribute to all the beneficiaries.”***

13. DW1 further relied on the defendants’ list of documents dated 24<sup>th</sup> February 2020 and duly filed in court on 28<sup>th</sup> February 2020 (DEXhibits 1 to 5). Essentially, the documents are the ones attached to the replying affidavit and marked as “DSM 2A-2B” and “DSM4A to 4C”, “DSM5A and 5B” respectively.

14. As noted in paragraph 9 hereinabove, learned counsel for the defendants failed to file and serve submissions herein.

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

15. I have duly considered the originating summons and the replying affidavit in their entirety in the present suit. I have further considered the evidence of PW1 and DW1 in this suit.

16. It is settled 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 **Galaxy Paints Co. Ltd –vs- Falcon Grounds Ltd (2000)2 EA 385** by the Court of Appeal of Kenya.

17. In the light of the foregoing discourse, the issues for determination are the ingredients of adverse possession as have been restated in a long range of case law, inter alia, **Wambugu –vs- Njuguna (1983)KLR 172**, **Kasuve v Mwaani Investments Ltd and 4 others (2004)IKLR 184** and **Elijah V. L Opar v Tobias Odhiambo Abach (2019)eKLR**. So, has PW1 tendered evidence sufficient to prove on a balance of probabilities that he:

- a) entered upon the suit openly, peacefully and without the permission of deceased as well as DW1 and 2<sup>nd</sup> defendant who are legal administrators of the estate of the deceased, and
- b) continued in such possession for an uninterrupted period in excess of twelve (12) years, and
- c) has dispossessed the estate of the deceased and extinguished his right and title to the suit land.

## **E. DISCUSSION AND DISPOSITION**

18. On issue number one (1) or (a). I take into account paragraphs 3,10 and 11 of the supporting affidavit of PW1 fortified by documents marked as SNM 2,5 and 6 annexed thereto. PEXhibits 2,3 and 4 namely agreement, land control board consent and certificate of official search show that the original land was in the name of the deceased. By PEXhibits 1 and 2, PW1 bought the suit land from the deceased, an indication he entered thereinto.

19. PW1 stated in examination in chief that :-

***“I have built on the suit and cultivates the same.....”***

20. In cross-examination PW1 testified in conformity with paragraph 2 of his affidavit, inter alia:-

***“..... I bought the suit land in 1975 and 1977. My home is on the suit land, it is fenced also .....using .....fence.....”***

21. In further cross-examination, PW1 maintained thus:-

***“..... the seller failed to transfer the suit land to me.....,I have cultivated the land not registered in his name and his brother.....i bought it from Makara Sereta”***

22. The statement of PW1 which forms part of his testimony is pretty clear that he bought the suit land measuring 5 acres from the deceased and entered upon it. That he occupies and possesses the same in terms of its fencing, cultivation and erection of a permanent house thereon.

23. It is trite law that possession can take different forms such as fencing or cultivation; see **Titus Ong’ang’a Nyachieo –vs- Martin Okoma Nyauma and 3 others (2017) eKLR and Opar case (supra)**.

24. The defendants affirmed that PW1 is in possession and occupation of 100feet by 200feet portion of the suit land as revealed at paragraphs 5 and 12 of the replying affidavit. The document marked DSM 3” speaks to the undisputed fact of possession and occupation of the suit land.

25. PW1 has firmly shown that he occupies five (5) acres of the suit land. On the other hand, the defendants including DW1, admit the said allegations to the extent of only half an acre ( ½ ) thereof.

26. In the case of **West Bank Estates Ltd –vs- Arthur (1966) 3 WLR 750**, it was held that evidence of cultivation should be definite as to the area and time ;see also **Muthuita –vs- Wanoe and 2 others (2008) 1KLR (G&F) 1024**.

27. As regards issue number (2), PW1 deposed at paragraph 12 of his supporting affidavit that he has possessed and occupied the suit land for forty (40) years. That in particular, he has done so since 1975 and 1977.

28. On the part of the defendants, it is deposed at paragraph 5 of the replying affidavit that PW1 has occupied the portion of the suit land since 1998. At paragraphs 8 and 9 of the supporting affidavit the plaintiff deposed that he filed Kisii HCC case No. 3 of 1994. That the suit abated owing to the death of deceased.

29. It is noted that by PEXhibit 3, the deceased transferred the suit land to PW1. Furthermore, continued occupation of the land in question by a purchaser from the time of even a void transaction, amounts to adverse possession as held in see **Stephen Waweru –vs- Jane Richu (2004) eKLR and Titus Nyacheo case (supra)**.

30. Moreover, PW1 imputes that DW1 and 4<sup>th</sup> defendant hold the suit land on trust for him. I subscribe to the view that constructive trust and equitable estoppel apply in favour of a purchaser who paid full purchase price and took 14 years possession of a parcel of agricultural land but failed to obtain land control board consent under section 6 of the Land Control Act Chapter 302 Laws of Kenya between the appellant and the 1<sup>st</sup> respondent. Such sale, is valid and enforceable as held by the Court of Appeal in **William Kipsoi Sigei –vs- Kipkoech Arusei and another (2019) e KLR and willy Kimutai Kitilit –vs- Micheal Kibet (2018) eKLR** held that :-

***“Lack of the consent of the land control board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.....”***

31. In regard to issue number three, paragraph 5 of the supporting affidavit and paragraph 3 of the replying affidavit differ on the period of possession and occupation of the suit land by PW1. Be that as it may, PW1 has shown by PEXhibits 1 to 8 that he has acquired prescription over the suit land hence the 4<sup>th</sup> defendant and DW1 hence the title thereto extinguished and DW1, 2<sup>nd</sup> defendant and others dispossessed thereby. DW1 shall execute transfer of the suit land in favour of plaintiff.

32. In the foregone, PW1 has established the ingredients of adverse possession. He has proved this suit against the defendants jointly and severally on a balance of probabilities

33. Thus, Judgment is hereby entered for the plaintiff against the defendants jointly and severally sought in orders (a) (b) (c) and (d) in the originating summons dated 7<sup>th</sup> February 2019.

34. It is important to note that paragraph 13 of the replying affidavit refers to Migori ELC case No. 12 of 2017. I have perused the register and skeleton file in respect of that suit. The plaintiff therein is **Nyabichere Mochormason –vs- Danel Serera Makara, Jacob Gesase Marwa, Musa Marwa and Rioba Marwa**. The said suit was filed on 7<sup>th</sup> February 2017. However, on 24/10/2018, it was transferred to Kehancha SPM's court for hearing and determination.

35. In view of the above, it is further ordered that a certified copy of this Judgment be availed in Migori ELC case No. 1 of 2017 which was transferred to Kehancha Senior Principal Magistrate's court for hearing and determination. The copy is meant to guide the trial court in that matter accordingly.

36. 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 28<sup>th</sup> day of JULY, 2020.**

**G. M. A. ONGONDO**

**JUDGE**

**In presence of :-**

Parties - Absent

Tom Maurice- Court Assistant