



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 510 OF 2017

(Formerly Kisii ELC case No. 112 of 2012)

ALEXANDER UGALA ODENYO.....PLAINTIFF

VERSUS

**BENTA AKINYI OCHIENG }
Sued as the Legal Administrator of }
RICHARD PHILIP OGOLA, DECEASED}**

GRACE BITUTU OKEROSI }.....DEFENDANTS

JUDGMENT

A) INTRODUCTION

1. At the heart of the instant dispute is the whole of land title number Kamagambo/Kameji/951 measuring approximately one decimal one zero hectares (1.1.0 Ha) in area (Hereinafter referred to as the suit land). It is a resultant parcel of title number Kamagambo/Kameji/4 that measured approximately five decimal zero hectares (5.0 Ha) in area (the original land herein). The same is found within Rongo subcounty in Migori County contained in Registry Map Sheet Number 19.

2. Initially, this suit was lodged at Kisii Environment and Land Court. However, on 28th March 2017, it was transferred to this court upon its establishment, for hearing and determination.

3. The plaintiff, Alexander Ugala Odenyo is represented by M/S Oguttu, Ochwangi, Ochwal and Company Advocates, formerly M/S Oguttu Mboya and Co Advocates.

4. The 1st defendant Benta Akinyi Ochieng (sued as the legal representative of the estate of Richard Philip Ogola, Deceased) and the 2nd defendant, Grace Bitutu Okerosi, are represented by the firm of J. O Soire and Co Advocates.

5. On 25th February 2013, pursuant to consent of counsel for the respective parties, the court (Okongo, J) did order and direct inter alia;

- I. The Originating Summons together with the supporting affidavit be and is hereby constituted as the plaint.
- II. The replying affidavit filed by the defendant be and is hereby constituted as statement of defence.
- III. The matter shall proceed by way of viva voce evidence.

B) THE PLAINTIFF’S CASE IN BRIEF

6. By an originating summons dated 23rd March 2012 and filed in court on even date, under Order 37 Rules 7 and 14 Civil Procedure Rules, 2010 and Section 38 of Limitation of Actions Act Chapter 22 Laws of Kenya, the plaintiff claims to have acquired title to the suit land by way of adverse possession. So, is seeking determination of the following issues;

- a) A declaration that the defendants’ rights to recover the whole of the suit land is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya, and their title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and

continuously been in occupation and possession of the portion of land hitherto known as the original land, now known as the suit land for a period exceeding 12 years.

b) There be an order that the plaintiff be registered as the proprietor of the whole of the suit land in place of the defendants, more particularly the 2nd defendant, who currently holds the title of the suit land.

c) There be an order restraining the defendants by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit land, in any manner whatsoever and/or howsoever.

d) Costs of this originating summons be borne by the defendants.

e) 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 premised on grounds (a) to (u) set out on its face. The grounds include;

a) The 2nd defendant is currently the registered proprietor of the suit land w.e.f 26th day of January 2012, wherein the plaintiff has freely and continuously occupied and cultivated for over 12 years.

b) The plaintiff's entry into the said parcel of land was pursuant to a sale agreement dated 9th May 2000, between the plaintiff and one, RICHARD PHILIP OGOLA, now deceased.

c) The plaintiff has acquired prescriptive rights over the parcel of land herein.

8. The said summons is further premised on a 24-paragraphed supporting affidavit sworn on even date by the plaintiff and documents marked as "A001 to A006 (b)" and annexed thereto. The plaintiff deposed, inter alia, that on 9th May 2000, he bought the suit land out of the original land from Richard Philip Ogolla (Deceased 1) as per sale agreement marked as "A001(a)(PEXh2)". That Deceased 1 was the legal administrator of the estate of Ogola Agoro (Deceased 2) who was the registered proprietor of the original land as shown in a copy of the green card/register (PEXhibit 1) and he acquired title thereto through transmission as revealed in the grant (PEXhibit 4). Prior to his death, Deceased 1 sought to subdivide the original land with a view to transferring the suit land to the plaintiff as shown in the mutation (PEXhibit 7).

9. The plaintiff complains that in February 2012, the 2nd defendant laid claim over the suit land upon subdivision of the original land. That this was after the 1st defendant obtained a grant of letters of administration in respect of the estate of deceased 1, transferred the suit land to the name of the 2nd defendant as per PEXhibits 5 and 8 disregarding the fact that the plaintiff had been in possession and occupation of the same without interruption for a period in excess of 12 years. Thus, it precipitated the instant suit.

10. It was the testimony of the plaintiff (PW1) that he has occupied and developed the suit land since year 2000 as per PEXhibit 9. He relied on his supporting affidavit, statement dated 10th October 2013 and PEXhibits 1 to 9 as per his bundle of documents of 10th October 2013 filed under Order 3 Rule 2 Civil Procedure Rules 2010, in support thereof.

11. PW2, Tom Odhiambo Owiti, a friend and homemate to PW1 testified that he has known him (PW1) for over 20 years. That he knew deceased 1 who was also his homemate. He relied on his statement dated 17th November 2017 as part of his evidence herein.

12. By submissions dated 23rd April 2020 and filed in court on 4th June 2020, learned counsel for PW1 gave a brief background of the suit, evidence adduced during hearing and analysed the evidence in favour of PW1. Counsel cited authorities inter alia, **Githu v Ndeete (1984)KLR 776** and **Njuguna Ndatho - Masai Itumo and 2 others Civil Appeal Number 231 of 1999 (2002)2KLR 637** to fortify the submissions and urged this court to determine the issues on the face of the summons in favour of the plaintiff.

C) THE DEFENDANTS' CASE IN BRIEF

13. In a 13-paragraphed replying affidavit sworn on 3rd May 2012 and duly filed on 9th May 2012, the 1st defendant opposed the originating summons. She deposed inter alia, that she is the widow of Deceased 1 and knew that it is the 2nd defendant's husband who bought the suit land from deceased 2 as per sale of land agreement marked "BAO1" and annexed thereto. That when the husband of the 2nd defendant and family took possession of the suit land, a dispute arose therefrom between deceased 1 and the 2nd defendant's husband, but was resolved as shown in the pleadings and decree in Kisii HCC No. 40 of 2006 (O.S) marked as "BA02 and 3" respectively.

14. The 1st defendant further deposed that she obtained a grant of letters of administration from Rongo Law Courts in respect of the estate of deceased 1. That after the 2nd defendant showed her a power of attorney by her husband marked as "BAO4", she transferred the suit land to the 2nd defendant accordingly. That deceased 2 allowed PW1 to enter 0.5 acres later extended to 3.5 acres of the suit land in the year 2003/2004 and not in the year 2000 as claimed by the plaintiff (PW1).

15. The defendants neither gave evidence nor filed submissions in this suit. On 16th December 2019, their case was marked as closed. Their counsel also failed to honour his undertaking and directions of the court given on that date to the effect that; -

" ...The defendants' counsel to file and serve submissions within the next 60 days from the date of service..."

D) ISSUES FOR DETERMINATION

16. I have duly considered the parties' respective pleadings, the evidence of PW1 and PW2, the plaintiffs' submissions and the statement of agreed issues (The plaintiff's revision) dated 10th October 2013 filed on 11th October 2013. I also bear in mind the settled law in **Galaxy Paints Co. Ltd v Falcon Grounds Ltd (2002) 2 EA 385** in respect of issues for determination in a suit.

17. In that regard, the issues for determination boil down to the ones set out on the face of the originating summons and also subscribe to the Court of Appeal decisions including **Elijah O. L. Opar versus Tobias Odhiambo Abach (2019) eKLR**, to the effect that adverse possession dictates that:

- a) The applicant's entry into the land in dispute was open, peaceful and without permission of the registered owner.
- b) The applicant has continued in such possession for an uninterrupted period of at least, 12 years.
- c) The registered proprietor has been dispossessed thereby and his right and title thereto extinguished accordingly.

E) DISCUSSION AND DISPOSITION

18. In respect of the first ingredient or issue, I note grounds (a), (c), (e), (g), (j) and (k) of the application as well as paragraph 6 of the supporting affidavit, paragraph 7 of his statement and PEXhibit 9. PW1 stated that on 9th May 2000, he entered into a land sale agreement (PEXhibit 2) with Deceased 1 in respect of four (4) acres of the original land then registered in the name of Deceased 2 who allowed him to enter, occupy and take possession of the same.

19. The testimony of PW1 was affirmed by PW2, who stated that he witnessed PEXhibit 2 and thereafter PW1 entered the suit land. That PW1 is still in occupation and possession of the suit land.

20. At paragraph 27 of his statement, PW1 testified that his occupation of the suit land has been free, open, continuous and uninterrupted for a period of more than 12 years. His counsel submitted that after PW1 bought the suit land as revealed in PEXhibits 2 and 3, he has been in occupation and possession of the same as stated by PW1.

21. It was the evidence of PW1 that he has occupied the suit land where he has planted maize, sugarcane and trees since the year 2000. In cross examination, he did maintain that the size of the land is an area approximately one decimal four hectares (1.4Ha) or three decimal four (3.4) acres.

22. It is essential that adverse possession should be of the whole or a defined portion of the land; see **Muthuita -vs- Wanoe and 2 others (2008)IKLR (GeF)1024** which applied the decision of Madan J (as he then was) in **Gatimu Kinguru v Muya Gathangi (2008)IKLR 1007 at 1015** and also the case of **Geoffrey Shimonya Peter and 3 others -vs- Mary Anyango Ameke and another (2018)eKLR**.

23. It was also the testimony of PW1 that the suit land is registered in the name of the 2nd defendant since the year 2012 as shown in PEXhibits 5 and 8. In cross examination, he stated that the 2nd defendant was registered as such on 26th January 2012 as per PEXhibits 5 and 8.

24. During cross examination, PW1 stated in part that;

"I claim the suit land by virtue of the agreement) PEXhibit 2). I bought 4 acres of the suit land. The land is registered in the name of the 2nd defendant. I filed suit on 23/3/2012. PEXhibit 2 was made on 9th May 2000....."

25. PEXhibit 7 reveals that the original land was subdivided into four (4) parcels including the suit land. PEXhibit 7 is dated 1st November 2011 when the same was received for registration and the 1st defendant is named therein as the person interested in the subdivisions.

26. The 1st defendant deposed at paragraphs 8 and 9 of her replying affidavit that she obtained a grant of letters of administration in respect of the estate of Deceased 2. That following documents marked as "BAO3" and "BAO4" and annexed to the affidavit, she transferred the suit land to the 2nd defendant. It is quite clear from PEXhibits 5 and 8 that the suit land is registered in the name of the 2nd defendant.

27. With regard to the second ingredient, PW1 stated that he has carried out developments on the suit land as shown in PEXhibit 9. In cross examination, he told the court that he had occupied the suit land for 12 years before filing the instant suit.

28. It is discernable from PEXhibit 6 that deceased 1 obtained leave to commence judicial review proceedings against the 2nd defendant in the year 2005. Going by PEXhibits 2 and 3, the plaintiff bought the suit land in the year 2000.

29. The statement of PW1 reveals that PW1 entered into PEXhibit 2 in the year 2000 and that he has continuously possessed and occupied the same as shown in PEXhibit 9. In the case of **Kimani Ruchine -vs- Swift Rutherford Company Ltd and another (1976-80)KLR 1500** applied in **ELlijah Opar case (supra)**, it was held that possession can take the form of tilling and tending the land. See also the Court of Appeal decision in **Titus Ong'ang'a Nyachio versus Martin Okioma Nyauma and 2 others(2017)eKLR**.

30. The plaintiff asserts that he has been in an uninterrupted possession of the suit land for a period in excess of 12 years. This court is aware

of all case law cited in the plaintiff's submissions. **In Ndatho case** (supra), the Court of Appeal held that the filing of a suit to recover land in question stops time from running for purposes of **Section 38 (supra)**.

31. Moreover, in the case of **Wanyoike Gathure v Beverly (1965)EA 514 at 518**, Miles, J held that possession must be unbroken or no attempt or at all to interrupt it for adverse possession to prevail; see also **Githu case (supra)**.

32. By PExhibit 6, there was a suit between Deceased 1 and the 2nd defendant duly filed in court in the year 2005. Furthermore, documents marked as "BAO2" and "BAO3" the 2nd defendant's husband filed a suit, namely KISII HCCC NO. 41 of 2006 against Deceased 1 and the same was decided in favour of the former against the latter.

33. Quite clearly, from PExhibits 6 and "BAO2" and "BAO3", the 2nd defendant asserted her ownership rights and interests over the suit land. The prescribed period of time had not elapsed when the two (2) suits were mounted in court. As such, adverse possession can't arise thereby.

34. It was the contention of PW1 that Deceased 2 who was the proprietor of the suit land allowed him to enter and occupy the same. On that score, since PW1 had been given permission by its owner to be in possession thereof, adverse possession cannot be construed in favour of PW 1 the circumstances as held in **Virginia Wanjiku Mwangi versus David Mwangi Jotham Kamau (2013)eKLR**.

35. On the third ingredient, PW1 did state in cross examination that the 2nd defendant entered the suit land and that he got surprised at her entry thereunto. Moreover, there were steps taken by deceased 1 to assert his title to the suit land as disclosed in PExhibit 6 before permission of Deceased 1 to PW1 could be terminated. Thus, adverse possession is far-fetched in that scenario; see **Samwel Miki Waweru versus Jane Njeri Richu (2004)eKLR**.

36. It is important to note that the evidence of PW1 and PW2 stand unchallenged. However, in **Kirugi and another versus Kabiya and 3 others (1987)KLR 347**, the Court of Appeal held that the burden is always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof.

37. In the obtaining scenario, the plaintiff has failed to establish the essentials of adverse possession. On a balance of probabilities, he has failed to prove his claim against the defendants jointly and severally. His case must fail as the 1st defendant's replying affidavit is fortified by BAO1 to 4.

38. The upshot is that the plaintiff's suit commenced by way of an originating summons dated 23rd March 2012 and filed in court on even date, is hereby dismissed with costs to the defendant.

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 22nd day of JULY, 2020.

G. M.A. ONGONDO

JUDGE

In Presence of :-

Mr. Ochwangi learned counsel for the plaintiff

Court Assistant – Tom Maurice