



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC NO. 43 OF 2019

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

AND

IN THE MATTER OF: CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

AND

IN THE MATTER OF: L.R KAMAGAMBO/KANYAWANGA/169 MEASURING 1.7 HECTARES

BETWEEN

FELIX OGUTU OTIENO (Suing on behalf of the estate

of PAUL OTIENO ODWAR –Deceased.....1ST PLAINTIFF

SUSAN OWUONDO ODWAR-DECEASED.....2ND PLAINTIFF

(Suing on behalf of the Estate of CALEB ODWAR.....DECEASED)

AND

S.O. OKOTH DAWA (Sued on behalf of the estate

of MESHACK DAWA-DECEASED).....DEFENDANT

JUDGMENT

A) INTRODUCTION

1. The suit land herein is title number Kamagambo/Kanyawanga/169 measuring approximately one decimal seven hectares (1.7Ha) in area. The same is found in Rongo Sub County within Migori County.
2. The plaintiffs namely Felix Otieno Ogutu (suing for and on behalf of the estate of Paul Otieno Odwar-Deceased 1 herein) and Susan Owuondo Odwar (suing for and on behalf of the estate of Caleb Odwar Deceased 2 herein) are represented by learned counsel, Mr. Agure Odero.
3. There is no appearance for the defendant, S.O Okoth Dawa (sued on behalf of the estate of Meshack Dawa) in this suit.

B) THE PLAINTIFF'S CASE IN BRIEF

4. The plaintiffs commenced the instant suit by way of an originating summon pursuant to Section 7 and 8 of the Limitation of Actions Act Chapter 22 Laws of Kenya, S 1A, 1B of the Civil Procedure Act and Order 37 Rule 7 and 14 of the Civil Procedure Rules 2010. They claim to have acquired the whole of the suit land by adverse possession for determination of issues (a) to (n) set out on its face which I need to reproduce at this point in this Judgment. The originating summons is premised on grounds (a) to (f) spelt out on its body and a 19-paragraphed supporting affidavit sworn on even date by the 1st plaintiff, Felix Ogutu Otieno and annexed documents marked as FOO1 to FOO4 namely:

a) A copy of an order of certiorari, prohibition and stay of proceedings and or execution or enforcement of ruling/award of Rongo Divisional Land Disputes Tribunal dated 13th May 2005 granted by this court in Judicial Review number 1 of 2019 on 26th March 2019 (F001).

b) A copy of limited grant of administration ad litem issued to the plaintiffs in respect of the estate of Deceased 1 in Migori High Court Succession Cause No. 8 of 2017 on 4th April 2017 (F002).

c) A copy of certificate of official search dated 20th March 2010 in respect of the suit land (FOO3).

d) Photographs showing the plaintiff's occupation of the suit land (F004).

5. The plaintiffs claim that they have been in actual, peaceful and uninterrupted occupation and use of the whole of the suit land for a period in excess of twelve (12) years. That the suit land was owned by Deceased 2, who was grandfather of the 1st plaintiff and husband of the 2nd plaintiff. That Deceased 1 was father of 1st plaintiff and was entitled to the suit land. That by document marked FOO1, the decree in favour of the defendant regarding the proprietorship of the suit land was quashed. That the defendant holds a fraudulent title to the suit land and the plaintiffs are entitled to the suit land by adverse possession.

6. It is noted that on 10th December 2019, the court directed and ordered that this suit be heard by way of affidavit evidence in lieu of directions given on 22nd July 2019. Thus, learned counsel for the plaintiffs filed submissions dated 11th February 2020 on 16th February 2020.

7. Counsel submitted by reliance on orders sought in the originating summons, cited Sections 7 and 8 of the Limitation of Actions (supra) and urged this court to grant the said orders as the plaintiffs have proved this case to the requisite standard. To fortify his submissions, counsel also cited the Court of Appeal decisions in **Harrison Ngige Kaara and another-vs-Shadrack Nyanja Kaara Civil Appeal No. 79 of 1996, Mwinyi Hamisi Ali -vs- The Attorney General and Philemon Mwaisaka Wawaka Civil Appeal No. 125 of 1997 and Githu-vs-Ndeete (1984) KLR 776** with regard to adverse possession claim.

C) THE DEFENDANT'S CASE IN BRIEF

8. The defendant was duly served by way of substituted service as revealed in an affidavit of service sworn on 14th July 2019 by the plaintiffs' counsel. This followed leave of the court sought and granted on 8th July 2019.

9. The defendant failed to file and serve any pleading or response to the originating summons.

10. On that score, the court accorded the defendant the right to fair hearing under Articles 25 (c) and 50 (1) of the Constitution of Kenya, 2010.

D) ISSUES FOR DETERMINATION

11. I have duly considered the entire originating summons and the plaintiffs' submissions including all the authorities cited therein. Furthermore, I subscribe to the Court of Appeal decision in **Galaxy Paints Co Ltd- vs-Falcon Grounds Ltd (2000) 2EA 385** regarding issues for determination in a suit.

12. In **Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another (2015) eKLR**, among other long line of authorities, the Court of Appeal held that for any claim to amount to adverse possession, it must meet the following conditions:

a. The suit land must be registered in the name of a person other than the plaintiff.

b. The plaintiffs must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner.

c. The plaintiffs must have been in occupation of the suit land for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

E) ANALYSIS AND DETERMINATION

13. In respect of the first condition or issue for determination, the plaintiffs asserted that the suit land is currently registered in the name of the defendant. It is so revealed at paragraph 14 of the supporting affidavit as well as grounds of the originating summons.

14. According to part B – proprietorship section-in the document marked F003 as disclosed at paragraph 11 of the supporting affidavit, the suit land is registered in the name of the defendant with effect from 12th August 1986. Land certificate thereto was issued to the defendant on 25th November 1986.

15. A list of the plaintiff's documents especially numbers (d), (e) and (f) filed simultaneously with the plaint, clearly show that the suit land is registered in the name of the defendant. It's certificate was issued to him under the repealed Registered Land Act Chapter 300 Laws of Kenya; see also the decision **Mwinyi Hamisi Ali (supra)**.

16. In **Wainaina -vs- Murai and others (1976-80) KLR 283 at 289 and 290** of Simpson J (as he then was) took a stand point which I approve without any reservation because of its relevance herein. He held, inter alia;

“...The land in question is registered under the Registered Land Act...”

17. To the foregone extent, it is abundantly clear that the suit land is registered in the name of the defendant. The first issue is resolved thereby.

18. As regards the second issue, the plaintiffs stated at paragraphs 2 and 12 of the supporting affidavit of 1st plaintiff that the suit land is 1.7 hectares in area. In the case of **Gatimu Kinguru -vs- Munya Gatangi (1976) IKLR 253** which was applied in **Muthuita -vs- Wamoe and 2 others (2008) IKLR (G&F) 1024**, Madan J (as he then was) reasoned that it is essential that adverse possession be of the whole or a definite portion of land.

19. At paragraphs 11 and 12 of the 1st plaintiff's supporting affidavit, the plaintiff stated that they are in open, actual and peaceful possession and occupation of the whole suit land as shown in document marked F004. Indeed, I am guided by the Court of Appeal decision in **Titus Ong'ang'a Nyachio -vs- Martin Okioma Nyauma and 3 others (2017)eKLR**, that possession can take different forms such as fencing or cultivation of the land in question. On that score, the second issue is resolved accordingly.

20. As pertains the third issue, the 1st plaintiff deposed at paragraphs 6 and 14 of the supporting affidavit that the plaintiffs have been in possession and occupation of the suit land for the last forty (40) years. That the interests and rights of the defendant have been extinguished in the circumstances.

21. Quite clearly, the plaintiffs' claim is hinged on the doctrine of Nec vi, nec clam, nec placerio (No force, no secrecy, no evasion). It is disclosed from the supporting affidavit and annexed documents that the plaintiffs are in open occupation of the suit land without force and time stated running over forty (40) years ago for the purposes of adverse possession as noted in **Kaara and Githu cases (supra)**.

22. Admittedly, adverse possession has been defined as possession inconsistent with the title of the owner as held in **Mutiso -vs- Mutiso (1998)LLR 3268 (CAK)**; see also **Philemon Mwaisaka case (supra)**.

23. It follows that the plaintiffs' case is steadfast and unchallenged. They have proved that they have been in open, exclusive, peaceful possession and occupation of the suit land for a period in excess of twelve (12) years thus, dispossessed the defendant of the suit land and his title thereto extinguished thereby.

24. It is the finding of this court that the plaintiffs have proved their claim jointly and severally against the defendant on a balance of probabilities; see **Ahmed AbdulKasim v Member for Lands and Mines (1958)EA 436** and **Githu case (supra)**.

25. Wherefore, judgment be and is hereby entered for the plaintiffs jointly and severally against the defendant for:-

a) A declaration that the plaintiff and any other person claiming under the by way of adverse possession acquired title to LR KAMAGAMBO/KANYAWANGA/169, measuring approximately 1.7 hectares currently registered in the name of S. O. Okoth Dawa, but previously registered in the names of MESHACK DAWA to an extent of 1.7 hectares as the defendant's registration thereof is extinguished accordingly.

b) The defendant herein is hereby ordered and/or directed to execute and/or sign all the necessary transfer instruments to facilitate transfer and registration of the suit property measuring approximately 1.7 Ha in the names of the plaintiff in default, the Deputy Registrar of this Honourable court be granted liberty to execute the transfer instruments in favour of the applicants herein.

c) Costs of this suit to be borne by 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 15th day of JULY, 2020.

G.M.A ONGONDO

JUDGE

In Presence of :-

Mr. Agure Odera learned counsel for the plaintiff.

Court Assistant – Tom Maurice