



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 525 OF 2017**

**(FORMERLY KISII HCC/ELC CASE NO. 303 OF 2010)**

**JOSHUA JAOKO OKETCH.....PLAINTIFF**

**-VERSUS-**

**ERASTUS OPIYO OTIENO.....DEFENDANT**

**JUDGMENT**

**A) INTRODUCTION**

1. The suit land herein is Title number Sakwa/Kanyamgony/1063 measuring approximately two decimal two hectares (2.2 Ha) in area. The same is found in Registry Map Sheet number 9 in Awendo Sub County within Migori County. The original land was title number Sakwa/Kanyamgony/538 registered in the name of Kilion Mbogo Rabu (Deceased 1).
2. The plaintiff namely Joshua Jaoko Oketch is represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates following a notice of appointment of advocate dated 28<sup>th</sup> June, 2018 and filed in court on 1<sup>st</sup> July 2019 pursuant to Order 9 Rule 7 of the Civil Procedure Rules, 2010.
3. The defendant, Erastus Opiyo Otiemo is represented by the firm of Omonde Kisera and Company Advocates further to a notice of change of advocate dated 24<sup>th</sup> June 2019 and filed in court on even date. Previously, the firm of Olel, Onyango, Ingutya and Company Advocates represented him.
4. By a consent of counsel for the respective parties made on 15<sup>th</sup> March, 2013, the court (Okong'o J) directed that the instant suit be heard by way of oral evidence. That the originating summons and the reply thereto be treated as a plaint and a defence respectively.
5. On 22<sup>nd</sup> March 2017, the present suit was transferred from Kisii Environment and Land Court where it was originally lodged to this court upon its constitution, for hearing and determination. On 1<sup>st</sup> July 2019, this court ordered and directed that the suit proceeds for further hearing.

**B) THE PLAINTIFF'S CASE IN BRIEF**

6. The plaintiff has sued the original defendant, Erastus Opiyo Otiemo (Deceased 2 herein) by way of an originating summons dated 21<sup>st</sup> October 2010 and filed in court on 15<sup>th</sup> November 2010 brought under Section 37 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, among other legal provisions. He claims to have acquired the whole of the suit land by way of adverse possession and for determination of issues as follows:

- That the plaintiff has been in continuous, uninterrupted and peaceful occupation of the entire parcel of land comprised in the suit land and currently registered in the name of Deceased 2 for a period of time exceeding 40 years.*
- That the respondent's title over the suit land should be revoked and or annulled in favour of the plaintiff as he has acquired the same by virtue of adverse possession.*
- That plaintiff is entitled to be registered as the sole proprietor of the whole of the suit land.*
- That the respondent to pay the costs of this suit.*

**v. Any other relief.**

7. The originating summons is anchored on the plaintiff's supporting affidavit sworn on even date and copies of title deed and the adjudication register marked as "J.J.O.1 (a) to (c)" annexed thereto. The plaintiff deposed, inter alia, that the original land is their ancestral land and is registered in the name of their late father, Deceased 1. That his brothers and himself have been in peaceful and uninterrupted possession and occupation of the land, now the suit land for a period in excess of forty (40) years. That the said adjudication register shows that adjudication in the area was done in the year 1968 while deceased 2 was unlawfully registered as the proprietor of the suit land on 9<sup>th</sup> September 1981, thus provoking the instant suit.

8. The plaintiff (PW1) and his two witnesses namely James Aguku Angira (PW2) and George Achila Mbogo (PW3) gave their respective testimonies on 10<sup>th</sup> February 2014. Apparently, the same are targeted at supporting the plaintiff's claim.

9. By submissions dated 18<sup>th</sup> April, 2020 and filed in court on 4<sup>th</sup> June 2020, learned counsel for the plaintiff framed four (4) issues for determination which include whether the defendant is the registered owner of the suit land and whether the occupation and or possession of the same constitute adverse possession. Counsel analysed the said issues and cited authorities: **Ndatho -vs- Masai Itumo and 2 others (2002)eKLR**, **Mwangi Githu -vs- Livingstone Ndeete (1980)eKLR**, Section 7 of the Limitation of **Actions Act (supra)** and **Peter Tumo Kairu -vs- Kuria Gacheru (1988) 2KAR** at pages 111-116, in support of the submissions. In sum, he urged this court to grant the reliefs sought in the originating summons.

**C) THE DEFENDANT'S CASE IN BRIEF**

10. It is worthy to note that an unopposed application commenced by way of a Notice of Motion dated 27<sup>th</sup> March 2017 and filed in court on 30<sup>th</sup> March 2017, was allowed on 9<sup>th</sup> November 2017. Thus, the present defendant, Elisha Opiyo Otieno (DW1) substituted his father (Deceased 2).

11. By his replying affidavit of 24 paragraphs sworn on 28<sup>th</sup> February 2011 and filed in court on 2<sup>nd</sup> March, 2011, Deceased 2 opposed the originating summons, termed the same made in bad faith and with the sole intention to vex him, lacks merit and sought its dismissal *ex debito justitiae*. He deposed, inter alia, that in the year 1977, he bought 2.2 hectares from Deceased 1 at Ksh 4,000/=, registered the same in his name in 1981 and obtained its title deed on 16<sup>th</sup> December 1982. He denied the plaintiff's claim and termed the same a figment of his wild and fertile imagination.

12. It was deposed further that the plaintiff (PW1) has severally attempted to alter the land boundary, trespassed into the suit land in the year 2011 and cultivated the same to the detriment of the defendant. He reinforced his affidavit by documents marked as "EOO1" to "EOO8" annexed thereto and they include;

**a) A copy of payment schedule (DEXhibits 2).**

**b) A copy of title deed to the suit land issued to the defendant (DEXhibits 3).**

**c) A copy of green card in respect of the suit land (DEXh4).**

**d) Copies of payments made to his sons and himself from Sony Sugar Company Ltd regarding sugar cane developed thereon and sold to the said compnsy (DEXhibits 5 and 6).**

13. The defendant (DW1) adduced evidence on 5<sup>th</sup> December 2019 and stated, inter alia, that Deceased 2 resisted the plaintiff's entry into the suit land whose boundary the plaintiff destroyed. That the plaintiff's occupation of the suit land has not been peaceful since the year 2003. He relied on DEXhibits 1 to 12 which include a grant in Migori High Court Succession Cause No. 456 of 2015 (DEXhibit 1) and his replying affidavit with annexed documents, inter alia, Awendo Land Disputes Tribunal proceedings marked as "EOO7" and judicial review ruling in Kisii HCC JR No. 150 of 2006, DEXhibits 11 and 12 respectively.

14. Learned counsel for the defendant filed a 3-paged submissions dated 26<sup>th</sup> June 2020 wherein it is argued that the doctrine of adverse possession is an equitable remedy. Counsel identified four (4) pre-conditions for the doctrine, among them, continuous possession of the land in question for over 12 years and the maxim "*Nec vi, nec clan, nee precario*" (peaceful, open and continuous).

15. To fortify the submissions, counsel referred to three (3) authorities **namely:-**

**a) Mawen -vs- Liu Ranching and Farming Co-operative Society (1985) KLR 430.**

**b) Jandu -vs- Kirplal and another 1975 EA 225.**

**c) Mbira -vs- Gachuhi 2002 EALR 137.**

**D) ISSUES FOR DETERMINATION**

16. I have thoroughly considered the parties' respective pleadings, evidence on record and submissions including all the issues identified therein. I further note the plaintiff's issues dated 8<sup>th</sup> July 2013 and filed in court on 9<sup>th</sup> July 2013.

17. It is trite law that issues for the 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**.

18. In view of the foregone, the central issues for determination are as set out on the face of the originating summons and the parties' respective submissions; see also the Court of Appeal decision in **Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another (2015)eKLR** where it was held that adverse possession dictates that:-

*a) The suit land must be registered in the name of a person other than the applicant.*

*b) The applicant must be in open, peaceful and exclusive possession of the suit land in an adverse manner to the title of the owner.*

*c) The applicant must have been in that occupation 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 DISPOSITION**

19. On the first dictate (issue herein), PW1 stated at paragraphs 7, 8 and 9 of his supporting affidavit that the suit land is registered in the name of Deceased 2. Moreover, in examination in chief, he stated in part;

*"...When I went to do search at the lands office I found the suit property registered in the name of the defendant."*

20. During cross examination, PW1 maintained that:

*"...According to the adjudication record, the suit property was registered in the name of the defendant..."*

21. It is well noted that Deceased 2 deposed at paragraph 6 of his replying affidavit that the suit land was registered in his name on 16<sup>th</sup> December 1982. Clearly, DExhibits 3 and 4 speak to registration to that effect.

22. As also noted at paragraph 10 hereinabove, DW1 obtained grant of letters of administration in respect of the estate of the late Erastus Opiyo Otieno in Migori High Court Successive Cause number 456 of 2015 (DExhibit 1). As such, he is clothed with legal mandate herein pursuant to Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya and Section 82 (a) of the Law of Succession Act Chapter 160 Laws of Kenya.

23. It is well settled that the estate of the deceased person vests in the legal representative; see **Trouistik Union International and another -vs- Jane Mbeyu and another (1993) eKLR**.

24. It is quite plain from DExhibits 3 and 4 that the suit land was registered in the name of DW1 on 9<sup>th</sup> September 1981. That title deed in form of land certificate thereto was issued to him on 16<sup>th</sup> December 1982.

25. Sections 27, 28 and 30 of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act) under which the land certificate was issued, anchored the rights of the defendant; see also the Court of Appeal decision in **Macharia Mwangi Maina -vs- D. Mwangi Kagiri (2014) eKLR** at paragraphs 15 and 16.

26. As regards the second and third issues closely interrelated, PW1 deposed at paragraphs 10 and 11 of his supporting affidavit, inter alia, that he was born on the suit land which they have never subdivided to date. That the defendant has never possessed, occupied or developed it or at all.

27. On the other hand, deceased 2 deposed at paragraph 8 of his replying affidavit that he has had exclusive possession, use and control of the suit land from the time he bought it. That the plaintiff (PW1) has never had control over the same. That DEXhibit 4 shows that he has developed the suit land in terms of its cultivation.

28. It is well established that possession can take the form of tilling and tending the land; see **Elijah Oopari -vs- Tobias Odhiambo Abach (2019) eKLR as well as Titus Nyachieo -vs- Martin Nyauma and 3 others (2017)eKLR**.

29. The testimony of PW1 was that the suit land does not exist on the ground but it is a portion of their ancestral land, LR No. Sakwa/Kanyamgony/538 which he occupies together with his brothers. That the instant dispute arose in the year 2007 and that the defendant does not occupy the suit land.

30. The testimonies of PW2 and PW3 were that Deceased 2 leased the suit land from Deceased 1 who was the father of PW1 and PW3. However, PW2 confirmed that he did not witness the alleged lease and that the defendant is in forceful use of the suit land.

31. At paragraphs 5, 6 and 7 of his replying affidavit, Deceased 2 deposed that he bought the suit land and obtained land certificate thereof. It is so demonstrated by DEXhibits 2, 3 and 4 herein.

32. It was the evidence of DW1 that PW1 sued Deceased 2 over ownership of the suit land as disclosed in DExhibits 11 and 12. That

Deceased 2 resisted the entry of PW1 into the suit land.

33. DW1 was quite emphatic in his evidence that PW1 did destroy fence of the suit land and entered thereunto. That PW1 encroached the suit land after the proceedings shown in DExhibit 10 and that there has been no peace thereon since the year 2003.

34. It is evident that the entry of PW1 into the suit land was open and without the consent of Deceased 2. However, his entry, possession and occupation of the land occurred in the year 2003 and has not been peaceful in view of DExhibits 8, 10 and 12. In the obtaining scenario, PW1 has not dispossessed the defendant of the suit land and the latter's title thereto has not been extinguished thereby.

35. The finding of this court is that PW1 has not met all the requisite ingredients of adverse possession over the suit land. To that end, the plaintiff has not proved the present suit against the defendant on a balance of probabilities as observed in a long line of authorities including **Ndatho, Githu and Mbira cases (supra)** and **Salim –vs- Boyd (1971)EA 550**.

36. In the result, the instant suit mounted by way of an originating summons dated 21<sup>st</sup> October 2010 and lodged in court on 15<sup>th</sup> November 2010, is hereby dismissed.

37. By dint of the proviso to **Section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya and Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 10**, among others, the costs of this suit shall be borne by the plaintiff.

**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 Corona Virus pandemic challenge this 8<sup>th</sup> day of JULY, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Kisera learned counsel for the defendant

Tom Maurice – Court Assistant