



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NUMBER 99 OF 2017

JOSEPH OBONGO OYAYA.....PLAINTIFF

VERSUS

MARY ATIENO OKUMU.....1ST DEFENDANT

EUNICE ATIENO OKUMU.....2ND DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The suit property herein is the whole of title number Kanyamkago/Kawere 1/ 1429 measuring approximately four decimal seven seven hectares (4.77 Ha) in area. The same is contained in Registry Map Sheet number 2. It is located in Uriri sub county within Migori County.
2. The plaintiff, Joseph Obongo Oyaya is represented by learned counsel, Mr. Sam Onyango.
3. The 1st defendant, Mary Atieno Okumu and the 2nd defendant, Eunice Atieno Okumu are represented by learned counsel, Mr. P. R Ojala.
4. On 19th July 2016 and 27th October 2016, counsel for the respective parties informed the court that the parties were in negotiations with a view to settling the dispute out of court. Pursuant to Section 20 of the Environment and Land Court Act, 2015(2011) as aligned to Article 159(2)(c) of the Constitution of Kenya, 2010, the court granted them a latitude to attempt accordingly. However, it is apparent that the proposed negotiations failed hence the suit was fixed for further hearing.
5. Originally, this suit was lodged at Kisii Environment and Land Court where PW1 gave oral testimony and the plaintiff's case closed. Subsequently, the suit was transferred to this court upon its establishment, for further hearing and determination.

B. THE GIST OF THE PLAINTIFF'S CASE

6. In a plaint dated 3rd July 2012 and filed in court on even date, the plaintiff has sought an order of eviction, permanent injunction, general damages for trespass, costs of the suit and interest on the said damages and costs at court rates against the defendants jointly and severally. The plaintiff has alleged that he is the sole proprietor of the suit property. That on or about 29th February 2012, the defendants encroached thereunto and started to construct residential houses, cultivated the same and initiated the process of leasing portions thereof to third parties.
7. That defendants' activities were without the consent of the plaintiff who has suffered loss and damage thereby. It thus, proved the instant suit.
8. On 18th June 2013, the plaintiff (PW1) testified inter alia, that when he acquired the suit property, it was registered in the name of James Okeyo Okumu (deceased 1) and not in the name of the defendants' husband, John Otieno Okumu (deceased 2) That the same was transferred to him in the year 1983. He relied on a copy of title deed (PEXhibit 1), a copy of certificate of official search(PEXh2) and a copy of the register(PEXh3), all of the suit property.

9. The plaintiff's submissions were not duly filed and served as ordered and directed by court on 13th November 2019. The orders were extended on 12th February 2020.

C. THE GIST OF THE DEFENDANTS' CASE

10. In their statement of defence dated 10th August 2012 and filed in court on 15th August 2012, the defendants denied the plaintiff's claim

and sought dismissal of the same with costs. They stated that if the plaintiff got registered as the sole proprietor of the suit property, then the same was fraudulently done between James Okeyo Okumu (deceased 1) and himself. They pleaded particulars of fraud at paragraph 2 thereof.

11. The defendants further stated that they have been on the suit property since the year 1990 hence acquired title thereto by adverse possession. That they are in lawful occupation of the suit property in the circumstances.

12. On 10th April 2018, the 1st defendant(DW1) testified that she was married to John Otieno Okumu (Deceased 2) who passed on in June 2001 leaving her with five (5) children. That she has lived thereon since 1990.

13. The 2nd defendant(DW2), too, testified that she got married to the deceased in the year 1993 and that DW1 is her co-wife. She relied on her statement dated 10th August 2012 as part of her testimony.

14. DW3, Jeckonia Malago Okiro aged 70 years, stated that the suit property belonged to Deceased 3, Okumu Nyagol who was father in law of DW1 and DW2. He relied on his statement dated 10th August 2012 in his evidence.

15. DW4, Joash Ageyo Opiang, a farmer, gave evidence in terms of his statement dated 10th August 2012. He told the court that the suit property belonged to deceased 3 who was his brother.

16. The defendants' submissions not duly filed and served as ordered and directed by court on 15th November 2010.

D. ISSUES FOR DETERMINATION

17. It is well settled that the issues for determination in a suit generally flow from either pleadings or as framed by the parties for the court's determination; see *Great Lakes Transport Company(V) Ltd vs Kenya Revenue Authority (2009)KLR 720*.

18. In light of the pleadings, evidence and no submissions of the respective parties herein, the issues for determination are crystallized thus:

- a) Is the plaintiff the sole proprietor of the suit property?
- b) Have the defendants jointly and severally trespassed into the suit property?
- c) Depending on the outcome in issue numbers (a) and (b) hereinabove, what are this court's final orders in the present suit?

E. DISCUSSION AND DISPOSITION

19. On the first issue, PW1 stated in paragraph 3 of the plaint that he is the sole proprietor of the whole of the suit property. He stated in examination in chief that he bought the suit property from Deceased 1 at Ksh 6,400/= between the year 1978 and 1984. That before purchase, he confirmed that the suit property was in the name of Deceased 1 and it was transferred to him accordingly.

20. During cross examination, PW1 told the court as follows:

"I visited the suit property before I purchased it...."

21. On her part, DW1 testified in examination in chief that the suit property does not belong to PW1. In cross examination, she stated, inter alia;

"...PW1 occupies the rest of the suit property...He has used it since he bought it...I can't tell when he bought it..."

22. DW2 stated that PW1 claims to have bought the suit property from deceased 1. That she was not conversant with the purported transaction.

23. According to DW3 and DW4, the suit property was owned by Deceased 3 who was father in law to DW1 and DW2. Whereas DW3 testified that Deceased 1, a son of deceased 2 sold the suit property, DW4 told the court that he was not aware of its subdivision and sale.

24. PExhibits 1, 2 and 3 show that the suit property is a sub division of the original land, LR NO. Kanyamkago/Kawere 1/1400 and PW1 is its sole proprietor with effect from 11th July 1985. That title deed was issued to PW1 on 7th October 2004.

25. In the case of *Wainaina vs Murai and others (1976-80)IKLR 283 at 289/290*; Simpson J (as he was) took a position which I approve as it is relevant hereto. He reasoned in part thus:-

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

26. In the case of *Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri(2014)eKLR*, the Court of Appeal cited the decision

of the same court (differently constituted) in *Michael Githinji Kimotho vs Nicholas Muratha Mugo Civil Appeal No. 63 of 1995* where it was held that:

“The protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser...”

27. In view of the foregone, the suit property is registered in the name of PW1 under the Registered Land Act Chapter 300 Laws of Kenya (the Repealed Act). I am aware of the provisions of Sections 27 and 28 of the Repealed Act as read with Section 30 of the same Act regarding the indefeasibility of title to registered land. The first issue is resolved thereby.

28. In respect of the issue of trespass, I bear in mind the plaintiff’s allegations at paragraphs 4 and 5 of the plaint. Furthermore, I note the defendants’ denial of the plaintiff’s allegations and their claim of adverse possession over the suit property.

29. It was the testimony of PW1 that the defendants interfered with the boundary features of the suit property. He stated in part as follows:

“.....on 29/2/2012 the defendants entered the suit property and put up semi –permanent structures on a portion of the suit property. They also started cultivating maize and sugarcane on a portion of the land. This was being done on a portion measuring about 7 acres.”

30. According to DW1, the suit property on which her late husband (Deceased 2) was buried and has stayed continuously for 22 years, does not belong to PW1. Her co-wife (DW2) confirmed that portion of evidence. DW3 told the court that Deceased 2 owned the suit property since the year 1968 and the same position was affirmed by DW4.

31. The Black’s Law Dictionary 10th Edition at page 1733 defines the term trespass thus;

“ An unlawful act committed against the person or property of another especially wrongful entry on another’s real property”

32. Similarly, in Clerk and Lindsell on Torts, 18th Edition at paragraph 18-01, “Trespass” means:

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass.”

33. DW1 and DW2 contended that they have acquired title to the suit property by way of adverse possession. This court is aware of the procedure for asserting adverse possession claim under Sections 37 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya and as held by the Court of Appeal in *EvE (1970) EA 604 at 606* and *Gulam Mariam Noordin vs Julius Charo Karisa (2015)eKLR*, and generally observed in *Halsbury’s Laws of England 3rd Edition Volume 24 on pages 251,252 at paragraphs 481 and 482*, among other long range of authorities.

34. In the instant suit, I take into account the ingredients of adverse possession as restated in various authorities including *Wambugu vs Njuguna (1983) KLR 172*, *Godfrey Shimonya Peter and 3 others vs Mary Anyango Ameka and another (2018)eKLR*, and *Elijah O. L. Opar vs Tobias Odhiambo Abach(2019)eKLR*. However, whereas DW1 testified that he has continuously stayed on the suit property to the extent of a quarter an acre only, she affirmed that she had nothing to show that she occupies the suit property. Furthermore, DW1 stated that she (DW2) erected a semi-permanent house therein in the year 2012 but DW3 could not confirm that DW2 erected her house on the suit property.

35. PW1 confirmed that the defendants started occupation of the suit property on the 29th of February 2012. That upon purchase of the same, it was vacant and a government surveyor carried out survey exercise thereof.

36. On that score, the defendants’ claim for adverse possession in respect of the suit property is not tenable. Therefore, the defendants are trespassers on the suit property as observed in the case of *Muratha Mugo cited in Mwangi Maina case(supra)*, among other authorities.

37. In the foregone, PW1 is entitled to an order of eviction and permanent injunction pursuant to Article 40(1) of the Constitution of Kenya, 2010, Sections 152A and 152B of the Land Act, 2016(2012), Section 13(7)(a) of the Environment and Land Court Act, 2015(2011) and established law, inter alia, *National Bank of Kenya Limited vs Shimmers Plaza Limited (2009)KLR 278 at 283 and Nguruman Limited vs Jan Bonde Nielsen and 2 others(2014)eKLR*. In my view and considering the entire case, an amount of Kenya Shillings One Hundred and Fifty Thousand Only (Kshs. 150,000/=) as general damages would be appropriate in the circumstances of the case. So, I award the same in favour of the plaintiff; see the Court of Appeal decision in *Eric Adome and another vs Pauline Kasumba Osebe and another (2014)eKLR*.

38. To that end, it is the finding of this court that the plaintiff has proved his claim against the defendants jointly and severally on a balance of probabilities. The defendants’ case thus, fails.

39. A fortiori, judgment is hereby entered for the plaintiff against the defendants jointly and severally in the following terms;

a) An order of eviction against the defendants from parcel No. Kanyamkago/Kawere 1/429. The defendants to move out of the suit property within the next Ninety (90) days from this date in default the plaintiffs to forcibly evict them.

b) An order of permanent injunction restraining the defendants from occupying tilling, cultivating, developing, building structures or leasing, alienating or in any way interfering with the plaintiff's rights of occupation and possession of parcel No. Kanyamkago/Kawere 1/1429.

c) General damages for trespass at Ksh. 150,000/=

d) Costs of the suit.

e) Interest on (c) and (d) hereinabove at court rates.

40. Orders accordingly.

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 SEPTEMBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of :-

Both parties – Absent

Tom Maurice – Court Assistant