



**REPUBLIC OF KENYA**

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

**AT MIGORI**

**ELC CASE NO 537 OF 2017**

**(formerly Kisii Elc case No. 387 of 2014 O.S)**

**JAMES AOLOO ATITO.....PLAINTIFF**

**VERSUS**

**SALINA ADHIAMBO NYODEGI.....1<sup>ST</sup> DEFENDANT**

**BERNARD OKOTH NYODEGI.....2<sup>ND</sup> DEFENDANT**

**RICHARD OTIENO NYODEGI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The central property in the instant dispute is a portion of land measuring one (1) acre being part of land parcel number Kanyamwa/Kaboyo/Kwandiku/2228 measuring approximately seven decimal five seven hectares (7.57Ha) in area (Hereinafter referred to as the suit land). The same is contained in Registry Map Sheet number 40. The suit land is located within Homa Bay County, Kenya.
2. The plaintiff, James Oloo Atito is represented by learned counsel, Mr. G. S. Okoth and Company Advocates.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, Salina Adhiambo Nyodegi, Benard Okoth Nyodegi and Richard Otieno Nyodegi respectively, are represented by learned counsel, Mr. Moriasi Osoro and Co. Advocates. Previously, Nyauke and Company Advocates, represented them.
4. Originally, this suit was lodged at Kisii Environment and Land Court. On 24<sup>th</sup> March 2017, it was transferred to this court, upon its constitution, for hearing and determination.
5. On 15<sup>th</sup> November 2017, the court gave directions that the originating summons dated 4<sup>th</sup> August 2014 duly filed in court on 14<sup>th</sup> October 2014 and the 2<sup>nd</sup> defendant's replying affidavit sworn and filed in court on 23<sup>rd</sup> June 2015, be treated as a plaint and a statement of defence respectively. That the suit be heard by way of viva voce evidence.

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

6. By the originating summons, the plaintiff is claiming to have acquired title to the suit land by way of adverse possession for determination of questions 1 to 8 set out on it's face. They include: -

**1. Whether the deceased proprietor put the plaintiff in possession or occupation thereof; and if so when did the plaintiff start to occupy the same;**

**2. Whether the said occupation and possession of the portion measuring one (1) Hectare can now amount to adverse possession, and if so what is the effect thereof.**

7. The originating summons is anchored on the plaintiff's supporting affidavit of 17 paragraphs sworn on even date and copies of documents marked as "HA-1" to "HA-3" annexed to the affidavit. The documents are a sale of land agreement form for the sale of the suit land made between the plaintiff and Clement Nyodegi Otete-deceased (PEXh1), a letter dated 10<sup>th</sup> March 2014 addressed to the plaintiff by Kenya

Forest Service in regard to destruction of trees (PEXh8) and a letter dated 9<sup>th</sup> April 2014 and addressed to the plaintiff by M/S S.O Odingo and co. Advocates for the deceased and 3<sup>rd</sup> defendant (PEXh9).

8. The plaintiff contends that on 21<sup>st</sup> May 1998, he purchased the suit land from the deceased before the latter could transfer the same to him. That upon the said sale and prior to the passing on of the deceased, he erected a mud house on the suit land and buried his mother and sister thereon in the year 1998. That he has been in occupation and possession of the suit land for a period in excess of twelve years without any disturbance and that the estate of the deceased is obliged to transfer the suit land to him.

9. On 15<sup>th</sup> November 2017, the plaintiff(PW1) testified in further support of the originating summons. He relied on PEXhibits 1 to 10 which include sale of land agreement form(PEXhibit 1), a letter from Kenya Forest Service (PEXh8) and a letter from counsel for the deceased and the 3<sup>rd</sup> defendant (PEXh9).

10. PW2, John Opiyo Otete, a brother in law to the 1<sup>st</sup> defendant and PW1 testified, inter alia, that PW1 bought the suit land from the deceased. That he was a witness to PEXh1 duly signed by him. That PW1 has lawful right to the suit land.

11. PW3, Violet Lamu, Land Registrar then in charge of Homa Bay County relied on copies of PEXhibits 4, 5, 11, 12 and 13. The said documentary exhibits are applications for consent dated 10<sup>th</sup> November 1998, a consent dated 10<sup>th</sup> November 1998, a green card in respect of LR No. Kanyamwa/Kaboyo/Kwandiku/261 registered in the name of the deceased, a green card in respect of LR Nos. Kanyamwa/Kaboyo/Kwandiku/2228 and 2229 and a green card in respect of LR No. Kanyamwa/Kaboyo/Kwandiku showing transmission of the suit land to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively.

12. On 2<sup>nd</sup> March 2020, learned counsel for the plaintiff filed 4-paged submissions dated 28<sup>th</sup> February 2020 giving facts and evidence of the case and citing the relevant law including Sections 7 and 9(2) of the Limitation of Actions Act Cap 22 Laws of Kenya and the decision in *N'gati Farmers Cooperative Society Ltd v Councillor Ledidi and others (2010)1EA 285* and the case of *Celina Muthoni Kithinji v Safiya Binti Swatch and 8 others (2018)eKLR*, in support of the plaintiff's claim.

13. Counsel further submitted that by Section 28 of the Land Registration Act, (LRA) 2012, PW1 enjoys overriding interest over the suit land. That he has proved his claim against the defendants on a balance of probabilities and judgment be entered in his favour as well as for costs of the suit.

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

14. In his 18-paragraphed replying affidavit filed in court on 23<sup>rd</sup> June 2015, the 2<sup>nd</sup> defendant through the written consent of the 1<sup>st</sup> and 3<sup>rd</sup> defendants, opposed the originating summons. He deposed, inter alia, that PEXh1 is not for the suit land but for LR No. Kanyamwa/Kaboyo/Kwandiku/261. That the deceased never attended the relevant Land Control Board, the consent (PEXH5) is faulty and that PW1 took so long to appear before the second Land Control Board for consent, after the deceased had passed on and that PW1 is not in physical possession of the suit land as alleged herein.

15. The defendants asserted that in September 2013, PW1 forcefully wanted to lease the suit land to a stranger. That they reported the trespass at Ndhiwa police station vide OB No. 11/10/4/2014 resulting in a criminal case No. 130 of 2015 before Ndhiwa Law Courts. Annexed to the affidavit is a copy of a letter from Ndhiwa sub county Forest Officer marked as "B.O.N-1" (PEXhibit 8).

16. DW1, the 2<sup>nd</sup> defendant testified inter alia, that the deceased who was his father passed on in the year 1999. That he (DW1) was approximately 16 years old at the time. That PW1 entered the suit land in the year 2014. He relied on his replying affidavit filed in court on 23<sup>rd</sup> June 2015 and list of documents filed on even date (DEXhibits 1 to 4).

17. On 5<sup>th</sup> March 2020, learned counsel for the defendants filed submissions dated 3<sup>rd</sup> March 2020 making reference to the issues for determination on the face of the originating summons, the evidence on record and factors attributed to adverse possession. He submitted that PW1 did not challenge succession in respect of the estate of the deceased thus a certificate of confirmation of grant thereof (DEXh3) was issued to the 3<sup>rd</sup> defendant who is the proprietor of the suit land as revealed in title deed (DEXh1). Counsel urged this court to dismiss the suit with costs to the defendants.

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

18. It is settled law that the 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 v Falcon Grounds Ltd (2000) 2EA 385*.

19. In light of the foregone and having carefully considered the pleadings, evidence and submissions of the respective parties herein, I am of the view that PW1 has to prove on a balance of probabilities the ingredients of adverse possession. The position has been restated in a long line of authorities including *Wambugu v Njuguna (1983)KLR 172*, *Mtana Lewa v Kahindi Ngala Mwangandi (2015)eKLR*, *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another (2015)eKLR*, and *Ng'ati Farmers case (supra) thus:*

- a. Did the applicant (PW1) enter upon the suit land openly, peacefully and without the permission of the registered proprietor?
- b. Has the applicant (PW1) continued in such possession for an uninterrupted period of at least 12 years?
- c. Has the applicant (PW1) thereby dispossessed the proprietor and extinguished his or her right and title thereto?

## **E. DISCUSSION AND DISPOSITION**

20. In respect of the first ingredient, PW1 stated at paragraph 3 of his affidavit in support of the originating summons that he bought the suit land at an agreed size of Ksh 15,000/= from the deceased who was its registered proprietor. This court is conscious of the meaning of the term “proprietor” under Section 3 of the Land Registration Act 2016(2012).

21. DExhibits 1 and 2 reveal that the suit land is registered in the name of the 3<sup>rd</sup> defendant upon obtaining DEXh3 herein. Indeed, title deed (DEXh1) was procured by way of transmission as stipulated under Section 26(1) of the LRA, 2016(2012).

22. The Black’s Law Dictionary 10<sup>th</sup> Edition at page 1712, defines the term “Title” as follows:

**“Legal evidence of a person’s ownership rights in property, an instrument (such as deed) that constitutes such evidence.”**

23. At paragraphs 3, 4, 7 and 8 of the affidavit in support of the originating summons, PW1 deposed that he bought the suit land from the deceased as shown in PEXh1, built a mud house thereon. That upon the death of her mother and his sister, their remains were interred thereon.

24. In examination in chief, PW1 stated in part:

**“The deceased did put me in possession of the suit land in 1998...”**

25. According to PW2 who witnessed PEXh1 and signed the same, PW1 bought the suit land from the deceased at Ksh 15,000/= purchase price. In examination in chief, he testified;

**“...PW1 took possession of the suit land and used it.....PW1 built his house on the land. PW1 lived in the house...”**

26. On his part, DW1 stated that PW1 trespassed into the suit land in the year 2014. His statement filed on 23/6/2015 and which forms part of his evidence in chief reads;

**“.....the year 2002 when the plaintiff ploughing in the land...”**

27. During cross examination, DW1 told the court that:

**“...There was a house thereon in the year 2002...”**

28. In paragraphs 12 and 15 of the affidavit in support of the originating summons, PW1 deposed that he built a house on the suit land. PEXhibits 7 and 8 also demonstrate that the defendants destroyed the plaintiff’s boundary in respect of the suit land.

29. It is trite law that possession can take different forms including fencing or cultivation of the land in dispute; see *Titus Ong’ang’a Nyachio v Martin Okioma Nyauma and 3 others (2017) e KLR*.

30. On the second and third ingredients intertwined, PW1 testified in examination in chief, inter alia;

**“I used the land and I have used it since 1998. I stay on it. My home is on the suit land...”**

31. During cross examination, PW1 maintained that:

**“...I have been on the land since 1998...”**

32. In *Wambugu case(supra)*, the Court of Appeal further held thus:

**“...The proper way of assessing proof of adverse possession would be whether or not the title holder has been disposed or has discontinued his possession for the statutory period.....”**

33. In the case of *Gatimu Kinguru v Munya Gathangi (1976)KLR 253*, Madan J (as he then was) took a stand point which I fully endorse and he reasoned:

**“...The defendant’s possession was open and notorious...”**

34. Similarly, in *Jandu v Kirpial and another (1975) EA 225* cited in *Cecilia Kithinji case (supra)*, it was held in part:-

**“ To prove title by adverse possession , it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extend to show that it is adverse to the owner. It must be actual, visible, exclusive, open and**

**notorious.**

35. It was the assertion of the defendants that PW1 allegedly bought land different from the suit land. However, by PEXh2(a), 2(b), 3(a) and 3(b) the error in PEXh1 regarding the land registration number of the suit land was corrected thereafter and PEXhibits 4, 5, 11, 12 and 13 were all executed in favour of PW1.

36. Moreover, by the decision in *Odd v Jobs (1970)EA 476*, Article 10(2)(b) of the Constitution of Kenya, 2010, Section 28(b) of the LRA(supra) and the reasoning in *William Kipsoi Sigei v Kipkoech Arusei and another (2019)eKLR*, constructive trust and equitable estoppel principles apply in favour of PW1 in the present suit; see also the Court of Appeal decision in *Willy Kimutai Kitilit –vs- Micheal Kibet (2018) eKLR*.

37. This court is aware of the nature of the tort to trespass to land. It is actionable per se. The award of damages thereof is within the discretion of the court. By the character of the case, the circumstances of the same and with the said discretion, I decline to award general damages for trespass as sought in the plaintiff's pleadings.

38. To that end, the plaintiff has proved all the essential ingredients of adverse possession against the defendants jointly and severally on a balance of probabilities; see *Ahmed AbdulKarim v Member for Lands and Mines (1958) EA 436 and Githu v Ndeete (1984)KLR 776,780*.

39. Accordingly, judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for:-

**a. A declaration that the plaintiff has acquired an absolute title to the suit land, one (1) acre of LR No. Kanyamwa/Kabonyo/Kwandika/228 by way of adverse possession and that the defendants' title thereto has been extinguished thereby.**

**b. A declaration that the plaintiff entitled to an order under section 38 of the Limitation of Actions Act chapter 22 laws of Kenya to be registered as proprietor of the suit land in place of the defendant who shall execute a valid transfer in favour of the plaintiff free from encumbrances whatsoever in default, the Deputy Registrar of this court to execute the transfer accordingly.**

**c. A permanent injunction to issue against the defendant's, their servants or anybody deriving authority from them, restraining them from evicting, dispossession or in any way interfering with the plaintiff's occupation, use land quite enjoyment of the portion measuring one (1) Hactare of the suit land.**

**d. Costs of the suit.**

40. 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 22<sup>nd</sup> day of OCTOBER, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

Tom Maurice – Court Assistant

Both

Parties

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Absent