



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 862 OF 2017

SYLVESTER O. OGOLLA.....1ST PLAINTIFF

JONATHAN ADAGI MAHIJA.....2ND PLAINTIFF

ROSE ATIENO OCHOLA.....3RD PLAINTIFF

RISPA ABOUDHO ALOO.....4TH PLAINTIFF

VERSUS

SALOME ATIENO OTIENO.....1ST DEFENDANT

RAPHAEL OTIENO OTIENO.....2ND DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The central property in dispute herein is part of Land Reference Number Suna East/Wasweta I/ 7624 measuring approximately one decimal eight zero hectares (1.80 Ha) in area (Hereinafter referred to as the suit property). The parent property was Land Reference Number Suna East/Wasweta II/3707 measuring approximately five decimal one six hectares (5.16 Ha) in area. The suit property is contained in Registry Map Sheet number 3 and the same is located within Migori county.
2. The four (4) plaintiffs namely Sylvester O. Ogolla, Jonathan Adagi Mahija, Rose Atieno Ochola and Rispa Abuodho Aloo, the 1st, 2nd, 3rd and 4th plaintiffs respectively are represented by M/S Abisai and Company Advocates. The 1st and 2nd defendants, Salome Atieno Otieno and Raphael Otieno Otieno, respectively are not represented in this suit.
3. On 16th December 2019, this court ordered and directed, inter alia;

“The Originating summons dated 01/11/2017 be treated as a plaint and the replying affidavit if any, to be filed by this respondent be treated as a statement of defence

The suit be heard by way of viva voce evidence.”

B. THE PLAINTIFFS’ CASE IN BRIEF

4. The plaintiffs generated the instant suit by way of an originating summons dated 1st November 2017 duly filed on even date pursuant to Sections 7 and 8 of the Limitation of Actions Act Chapter 22 Laws of Kenya, Section 1A, 1B of the Civil Procedure Act and Order 37 Rule 7 & 14 of the Civil Procedure Rules. They are claiming to have acquired portions under the suit property by adverse possession for determination of the issues infra;-

1. This Honourable court be pleased to declare that the 1st Applicant and any other person claiming under them by Adverse possession acquired title LR NO. SUNA EAST/WASWETA 1/7624, measuring approximately 1.8 ha registered in the name of CHARLES OTIENO, now deceased, and is now under the administration of one SALOME ATIENO, OTIENO the 1st respondent herein and one RAPHAEL OTIENO OTIENO, the 2nd respondent herein, to an extent of 1 ha.

2. This Honourable court be pleased to declare that the 2nd Applicant and any other person claiming under them by way of Adverse possession acquired title to LR NO. SUNA EAST/ WASWETA 1/7624, measuring approximately 1.8 ha, registered in the name of CHARLES OTIENO, now deceased, and is now under the administration of one SALOME ATIENO OTIENO, the 1st respondent herein and one RAPHAEL OTIENO OTIENO, the 2nd respondent herein to an extent of 2 ½ ha.

3. THIS Honourable court be pleased to declare that the 3rd Applicant and any other person claiming under them by way of adverse possession acquired title to LR NO. SUNA EAST/WASWETA 1/7624, measuring approximately 1.8 ha, registered in the name of CHARLES OTIENO, now deceased, and is now under the administration of one SALOME ATIENO OTIENO, the 1st respondent herein and one RAPHAEL OTIENO OTIENO, the 2nd Respondent herein, to an extent of 0.24 ha.

4. The Honourable court be pleased to declare that the 4th applicant and any other person claiming under by way of adverse possession acquired title LR NO. SUNA EAST/WASWETA 1/7624, measuring approximately 1.8 ha, registered in the name of CHARLES OTIENO, now deceased, and is now under the administration of one SALOME ATIENO OTIENO, the 1st respondent herein and one RAPHAEL OTIENO OTIENO, he 2nd respondent herein, to an extent of 1 acre.

5. The respondents her in be ordered and/or directed to execute and /or sign all the necessary transfer instruments to facilitate the sub-division, transfer and registration of the suit property measuring approximately 1.8 ha, in the name of the applicant. In default, the Deputy Registrar of this Honourable court be granted liberty to execute the transfer instruments in favour of the applicants herein.

6. This court be pleased to order the 1st and 2nd respondent to bear costs of this case.

7. This court be please to make an order as to interest on costs.

8. This court be pleased to make any other order deemed expedient in the circumstances.

5. The originating summons is anchored on grounds 1 to 17 set out on its face and 17-paragraphed supporting affidavit sworn on even date by the 1st plaintiff and copies of documents marked as “SOO1” to “SOO7” annexed to the affidavit. Briefly, the plaintiffs state that the suit property which originally belonged to Raphael Lute Wagasia (deceased 1) is a subdivision of the parent property. That it was later transferred to Charles Otieno Lute (deceased 2), a son of deceased 1. That the same is still under the ownership of the 1st and 2nd defendants and registered in the name of deceased 2.

6. The plaintiffs further state that on 15th May 1989, the 1st plaintiff and the 2nd plaintiff by written agreements, bought one (1) acre and a half (1/2) acre of the suit property at Ksh 10,000/= and Ksh 14,500/= respectively from deceased 2. That on 15th June 1992, the 3rd plaintiff and the 4th plaintiff through sale agreements bought zero decimal two four hectares (0.24 Ha) and one (1) acre of the suit property at Ksh 15,000/= and 5,000/= respectively from deceased 2. That prior to the death of deceased 2, the plaintiffs pleaded with him to transfer the portions of the suit property without success. That the 1st and 2nd defendants have also refused to effect the transfer thereof. So, the plaintiffs who have been in open and notorious possession of the portions of the suit property from the time they purchased them, commenced the instant suit.

7. In his testimony, the 1st plaintiff (PW1) relied on his statement, supporting affidavit and list of documents of even date (PEXhibits 1 to 10). He sought determination of issues set out in the originating summons in respect of one (1) acre of the suit property.

8. The 3rd plaintiff (PW2) also relied on her statement, supporting affidavit and list of documents of even date (PEXhibits 1 to 10) as part of her evidence. That she is entitled to zero decimal two four hectares (0.24 Ha) of the suit property.

9. The 4th plaintiff (PW3), too, relied on her statement, supporting affidavit and list of documents of even date (PEXhibits 1 to 10) as part of her testimony. That she is claiming one decimal eight hectares (1.8 Ha) of the suit property.

10. The 2nd plaintiff (DW4) is claiming 2½ acres of the suit property. His counsel, Mr. Singei urged this court to adopt his statement, supporting affidavit and PExhibits 1 to 10 as part of his evidence herein. The court adopted the same accordingly.

11. On 6th November 2020, the plaintiff’s counsel filed submissions dated 3rd November 2020 as ordered by the court on 7th October 2020. Counsel identified three (3) issues for determination including that the plaintiffs are entitled to the suit property by adverse possession. Reliance was made on the case of **Jaber Mohsen Ali and another –vs- Priscillah Boit & another (2014) eKLR, Sections 7,13 (1) and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya and Article 60 (1) of the Constitution of Kenya 2010.**

C. THE DEFENDANTS’ CASE IN BRIEF

12. The defendants were duly served as proved by affidavits of service sworn on 18th March 2019 and 21st January 2020 by Aggrey Ongiri, a licenced court process server. However, they failed to enter appearance and or file statement(s) of defence in this suit.

13. On 7th October 2020, this court observed in part:

“Thus, the respondents’ case deemed closed as they were duly served and offered no evidence.”

D. POINTS FOR DETERMINATION

14. It is well settled 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 *Great Lakes Company (U) Ltd v Kenya Revenue Authority (2009) KLR 720*.

15. I have duly examined the entire originating summons, the testimonies of PW1, PW2, PW3 and PW4 herein. I am of the considered view that the issues that fall for determination are whether the plaintiffs have established the ingredients of adverse possession as restated in longline of authorities including *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another (2015)eKLR*, where the Court of Appeal summed up the three (3) issues, thus:

“First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner. Lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuation or possession by the owner...”

E. ANALYSIS AND DISPOSITION

16. As regards the issue of registration of the suit property, PW1, deposed at paragraph 9 of his supporting affidavit to the originating summons that the suit property is still registered in the name of the deceased 2. The same position is supported by paragraph 8 of the respective affidavits of PW3 and PW4 as well as paragraph 9 of the supporting affidavit of PW2 herein.

17. The **Black's Law Dictionary 10th Edition at page 1414**, defines the following terms;

“Proprietor” – An owner especially one who runs a business.

“Propriety” – Privately owned possession; property

18. Additionally, this court is conscious of the meaning of the term **“Proprietor”** under Section 2 of the Land Registration Act, 2016 (2012). The rights and interests of proprietor are stipulated at Sections 24, 25 and 26 of the same Act.

19. PEXhibits 7 and 8 reveal that the suit property was registered in the name of deceased 2 on 8th August 1991 and title deed was issued accordingly on even date. By PEXh7, the nature of title is absolute.

20. The testimonies of PW1, PW2, PW3 and PW4 were to the effect that they claim one (1) hectare, 2 (½) acres, 0.24 hectares and one (1) acre of the suit property respectively. Therefore, their claims in this suit are of defined portions of the suit property as held in the case of *Muthuita v Wanoie and 2 others (2008) IKLR (G & F) 1024*.

21. In the present suit, it is established that deceased 2 is the absolute proprietor as provided for under Sections 27 and 28 of the Repealed Act, the Registered Land Act Chapter 300 Laws of Kenya. In that regard, I approve the stand point taken by Simpson J (as he then was) in the case of *Wainaina v Murai and others (1976-80) IKLR 283 at 289 and 290* where he observed that:

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

22. It is noteworthy that the deceased passed on as per PEXh6. The 1st and 2nd defendants are personal representatives of his estate as revealed in PEXhibit 9 in accordance with Sections 3 and 82 of the Law of Succession Act Chapter 160 Laws of Kenya and the Court of Appeal decision in *Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014)eKLR*.

23. On whether PW1 to PW4 have been in open and exclusive possession of the suit property in adverse manner to the title of deceased 2. The evidence of PW1, PW2, PW3 and PW4 as deposed in their respective supporting affidavits is that they took immediate possession of their respective portions of the suit property upon purchase of the same from deceased 2. That they built and cultivate thereon as disclosed in PEXhibit 5 herein.

24. It is trite law that possession of land may take the form of tilling and tending the land; see *Elijah O. L Opar v Tobias Odhiambo Abach (2019)eKLR*, which restated the decision in *Kimani Ruchine v Swift Rutherford Company Ltd and another (1976-80)KLR 1500*.

25. In the case of *Gatimu Kinguru v Muya Gathangi (1976)KLR 253*, Madan J (as he then was) arrived at a finding which I find very sound and endorse accordingly. He reasoned, inter alia;

“The defendant's possession was open and notorious. There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant...”

26. Quite clearly, PW1, PW2, PW3 and PW4 undeniably stated that they cultivate their respective portions of the suit property and have built thereon. So, their occupation and possession thereof has been open, exclusive and notorious as observed in *Kazungu Katana, Jaber Mohsen Ali and Gatimu Kinguru cases (supra)*.

27. Regarding the third ingredient, PW1, PW2, PW3 and PW4 deposed in their respective affidavits herein that their occupation and

possession of the respective portions of the suit property has been without interruption for a period in excess of 12 years. Deceased 2, by extension the 1st and 2nd defendants, have ceased to possess the suit property as there is denial of the owner's title thereto as stated in **Halsbury's Laws of England 4th Edition volume 22 and Jaber Ali case (supra)**.

28. In **Mutiso v Mutiso (1998) LLR 3268 (CAK)**, it was held that adverse possession has been defined to mean possession inconsistent with the title of the owner. That there must be denial of the owner's title to the land in question for possession to be adverse.

29. In **Kimani Ruchine case (supra)**, it was held that rights and registration to land can be challenged on grounds including adverse possession; see also **Tayebali Adamji Alibhai v Abdulhussein Adamji Alibhai (1938) EA 5EA CA1**.

30. Moreover, since deceased 2 (vendor) and PW1 to PW4 (purchasers) entered into enforceable contracts including PEXhibits 2, 3 and 4, the principles of equity apply very handy in aid of the purchasers; PW1, PW2, PW3 and PW4, who have failed to obtain transfer of their respective portions of the suit property; see **Article 10(2)(b) of the Constitution(supra)** and the Court of Appeal decision in **Willy Kimutai Kitilit v Michael Kibet (2018)eKLR**, among other authorities.

31. It is noted that the defendants were accorded an opportunity to access this court for fair hearing of this suit as envisaged under **Articles 48 and 50(1) of the Constitution (supra)**, and the case of **Onyango Oloo v Attorney General (1986-89) EA 456**. However, without any reason, they failed to defend the suit. Thus, I find that the plaintiffs have established their case on a balance of probabilities against the defendants bearing in mind the decision of the Court of Appeal in **Kirugi and another v Kabiya and 3 others (1987) KLR 387**.

32. A fortiori, judgment be and is hereby entered for the plaintiffs against the defendants jointly and severally in terms of prayers 1, 2, 3, 4, 5 and 6 sought in the originating summons dated 1st November 2017 duly lodged in court on even date.

Orders accordingly.

DATED SIGNED and DELIVERED in open Court at **MIGORI** this **11th** day of **November 2020**.

G.M.A ONGONDO

JUDGE

In presence of :-

Ms. Okota learned counsel for the plaintiff

Tom Maurice- Court Assistant