



**REPUBLIC OF KENYA**

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

**AT MIGORI**

**ELC CASE NO. 541 OF 2017 (Formerly Kisii ELC case No. 307 of 2016 (O.S))**

**TOBIAS OGUTA NYATINGO.....PLAINTIFF**

**VERSUS**

**SILA OWIYO OWITI.....DEFENDANT**

**JUDGMENT**

**A) INTRODUCTION**

1. The central property in the present suit is the whole of land parcel number West Kasipul/Kotieno Kochich/526 measuring approximately one decimal four hectares (1.4 Ha) in area. (Hereinafter referred to as the suit land). The same is contained in Registry Map Sheet Number 4 and it is located within Homa Bay County.
2. The plaintiff, Tobias Oguta Nyatingo is represented by learned counsel, Mr. Nyagwencha instructed by Maroro and Omariba Associates Advocates.
3. The defendant namely Sila Owiyo Owiti is represented by M/S Oguttu Mboya and company Advocates, now M/S Oguttu, Ochwangi, Ochwal and Company Advocates.
4. Originally, this suit was lodged at Kisii Environment and Land Court, Kisii. By an order dated 15<sup>th</sup> March 2017 and issued on 17<sup>th</sup> March 2017, the suit was transferred to this court, upon its constitution, for hearing and determination.
5. On 11<sup>th</sup> December 2017, this court gave directions that the suit be heard by way of viva voce evidence. That the originating summons dated 16<sup>th</sup> August 2016 duly filed on 5<sup>th</sup> October 2016 and the 26-paragraphed replying affidavit sworn on 27<sup>th</sup> October, 2016 duly filed in court on 1<sup>st</sup> November 2016, be treated as a plaint and a statement of defence respectively.

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

6. By the originating summons commenced under Order 37 Rule 7 and Rule 1 of the Civil Procedure Rules, Section 3A, 17 and 18 of the Civil Procedure Act, the plaintiff is claiming to have acquired title of the suit land by prescription and or adverse possession. Thus, he has sought determination of issues infra;
  - a) A declaration that the respondent's right to recover land the suit land is barred under the Limitations of Actions Act Cap 22 Laws of Kenya and their title if any thereto extinguished on the grounds that the applicant (together with his family) herein have been in occupation and possession of the aforesaid parcel of land for a period exceeding 12 years and that the applicant be registered as proprietor of the suit land in place of the respondent.
  - b) That the costs of this suit be borne by the respondent.
7. The originating summons is premised on grounds (a) to (e) set out on its face, the plaintiff's supporting affidavit sworn on the same date and a copy of official search dated 17<sup>th</sup> July 2015 of the suit land annexed thereto. The plaintiff deposed, inter alia, that he has been in continuous actual possession of the suit land without interruption for a period in excess of 12 years and that the respondent's right thereto has been extinguished thereby.
8. The plaintiff (PW1) testified by relying on the supporting affidavit and the certificate of official search marked as "TON1" (PEXhibit1). He told the court that he owns the suit land which he cultivates in part and that he has never been ordered to vacate the same.

9. On 18<sup>th</sup> November 2019, the parties were granted a latitude to file and exchange submissions. The court extended the orders in favour of the plaintiff on 15<sup>th</sup> July 2020. However, the plaintiff failed to comply accordingly.

### **C) THE GIST OF THE DEFENDANT'S CASE**

10. In the replying affidavit, the defendant opposed the originating summons, termed the same false, misleading and is seeking its dismissal. He deposed inter alia, that following the lawful and successful termination of the adjudication and demarcation process at Kotieno Kochich Adjudication Section (now registration section), the suit land was lawfully registered in his name to the exclusion of any other person. That there was no person in occupation of the suit land at the time. That he is the one who has been in exclusive possession of the suit land.

11. The defendant also deposed that PW1 appears not satisfied with the defendant's registration of the suit land. That PW1 resides and cultivates LR No. West Kasipul/Kotieno Kochich/528 registered in his own name. That the plaintiff's claim is misconceived, mischievous, does not capture any reasonable cause of action and it is legally untenable. A copy of a letter dated 11<sup>th</sup> December 2015 by the plaintiff's advocate, the area chief's letter dated 27<sup>th</sup> October 2016 and a copy of certificate of official search dated 27<sup>th</sup> October 2016 to the effect that PW1 owns LR No. West Kasipul/Kotieno Kochich/528 marked as "SOO1, SOO2" and "SOO3" respectively, are in support of the defendant's affidavit.

12. DW1, Sila Owiyo Owiti aged 84 years testified on 10<sup>th</sup> July 2019. He relied on his replying affidavit and bundle of documents of even date (DEXhibits 1 to 5) and the chief's letter dated 22<sup>nd</sup> October 2016 (DEXhibit 6) and the chief's letter dated 27<sup>th</sup> October 2016 (DEXhibit 7). He termed the plaintiff's claim false.

13. DW2, Lawrence Otieno Mbaka, a retired chief of Konoonga location testified that he prepared DEXhibit6. That DW1 owns the suit land as per DEXhibit 6.

14. DW3, George Opiyo Okombo, assistant chief of Kotieno location aged 51 years stated that the suit land is occupied and possessed by DW1. That he (DW1) gave him DEXhibit2 and DEXhibit 3 which prompted him to write DEXhibit 7 showing that the suit land belongs to DW1.

15. By submissions dated 10<sup>th</sup> July 2020 and filed in court on 19<sup>th</sup> July 2020, learned counsel for the defendant gave the background of the suit including the originating summons, the replying affidavit and the evidence on record herein. Counsel framed three (3) issues principally, on whether the plaintiff has proved his claim for adverse possession in respect of the suit land against the defendant and analysed them in the negative hence urged this court to dismiss this suit with costs to the defendant.

16. Counsel submitted that the plaintiff is the legitimate proprietor of the suit land as per PExhibit 2 which is conclusive proof thereof. He cited **Section 26 of the Land Registration Act, 2016(2012)** to reinforce the argument. To further buttress the submissions, counsel relied on a number of authorities including *CMC Aviation Ltd-vs-Kenya Airways Ltd (Cruisair Ltd)(1978)eKLR*, *Kuria Kiarie and 2 others-vs-Sammy Magera (2015)eKLR*, *Githu v Ndeete (1984)IKLR 776*, *Wambugu v Njuguna (1998)KLR 173*, *Ruth Wangari Kanyagia –vs-Josephine Muthoni Kinyanjui (2017) eKLR* and the Halsbury's Laws of England, 4<sup>th</sup> Edition volume 28.

### **D) POINTS FOR DETERMINATION**

17. It is settled law that 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-vs-Kenya Revenue Authority (2009) KLR 720*.

18. I have duly studied the entire originating summons, the replying affidavit, the testimonies of PW1, DW1, DW2 and rival submissions. So, the points for determination in this suit are as restated in the Court of Appeal decisions, inter alia, *Elijah O.L Opar v Tobias Odhiambo Abach (2019)eKLR*, where it was held thus:

***“...evidence sufficient to prove on a balance of probabilities that he had entered upon the subject land openly, peacefully, without the permission of Opar and had continued in such possession for an uninterrupted period of at least 12 years thereby dispossessing Opar and extinguishing his right and title thereto. These are the ingredients of adverse possession.....” (Points emphasized)***

### **E) DISCUSSION AND DISPOSITION**

19. On the first point, I note paragraphs 2 and 3 of the supporting affidavit to the originating summons to the effect that DW1 is the registered proprietor of the suit land. Part B- proprietorship section of PExhit1 shows that DW1 was registered as the proprietor of the suit land on 18<sup>th</sup> September 1975 and title deed issued to him on 25<sup>th</sup> June 2015.

20. In examination in chief, PW1 testified that:-

***“...The suit land, LR No. West Kasipul/Kotieno Kochich/526 is registered in the name of the defendant....”***

21. On his part, DW1 affirmed that he owns the suit land. It is pretty clear that the same is registered in his name since the year 1975.

22. DW2 and DW3, too, stated that DW1 owns the suit land. That they prepared DEXhibits 6 and 7 respectively thereof.

23. In *Ruth Kanyagia case (supra)*, it was held that:

**“...It is well settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec claim, nec precario*”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period” (Emphasis added)**

24. On what amounts to adverse possession, the Court of Appeal observed in the case of *Wilson Kazungu Katana and 101 others -vs- Salim Abdalla Bakshwein and another (2015)eKLR*, thus:

**“First, the parcel of land must be registered in the name of a person other than the applicant...”**

25. It is common baseline that the suit land is registered in the name of DW1 under Sections 24, 25 and 26 of the LRA (supra). It is so discernable from paragraph 6 of the plaintiff’s supporting affidavit to the originating summons and the defendant’s replying affidavit as well as their respective testimonies in this suit.

26. It is also noted from DEXhibits 4, 6 and 7 in support of the replying affidavit, that DW1 is in possession of the suit land and that PW1 has never entered thereunto. The first point is resolved thereby.

27. Regarding the second point, I take into account grounds (a) and (b) of the originating summons. Paragraphs 8 and 9 of the plaintiff’s supporting affidavit thereto and the defendant’s replying affidavit, too, relate to the aspect of possession of the suit land by DW1 herein.

28. Moreover, PW1 testified that his home is confined to LR No. West Kasipul/Kotieno Kochich/528. During cross examination, he stated in part:

**“...I am conversant with LR No. West/Kasipul/Kotieno Kochich/528 where my home is confined to. The suit land is mine. My elder brother Micah Sila has been cultivating it. I do not live or cultivate the suit land.....”**

29. On further cross examination, PW1 agreed with DEXhibit 1 showing that DW1 owns the suit land. That he did not object to adjudication process which gave forth to the registration of the suit land in the name of DW1.

30. DW1 affirmed that he uses the land in form of cultivation. The same is revealed in DEXhibits 1 to 5.

31. PW1 was quite emphatic that he had no photograph to show that he is in occupation or possession of the suit land. That he had no witness to confirm that he (PW1) cultivates the suit land.

32. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Titus Ong’ang’a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017) eKLR*, which applied the decision in *Kimani Ruchine and another-vs-Swift Rutherford Company Ltd and another (1976-80)1KLR 1500 (supra)*.

33. DW3 told the court that DW1 is in occupation of the suit land. That he owns and cultivates the same as disclosed in DEXhibit 7. Therefore, PW1 has failed to demonstrate that he has been in continued occupation and possession of the suit land within the prescribed period of time. Thus, it resolves the second point herein.

34. In respect of the third point, I bear in mind grounds (c) and (e) of the originating summons. PW1, DW1, DW2 and DW3 testified that DW1 owns the suit land and that PW1 is not in possession of the same.

35. In the obtaining circumstances, dispossession of the suit land cannot arise if enjoyment and user are not possible by PW1; see generally **Halsbury’s Laws of England 3<sup>rd</sup> Edition Volume 24 paragraphs 481 and 482 on pages 251 and 252 (Supra)**.

36. This court is conscious of the reasoning in **CMC Aviation case (supra)** that proof is the foundation of evidence. Sections 107, 108 and 109 of the Evidence Act Chapter 80 Laws of Kenya provide for burden of proof, incidence of proof and proof of particular fact respectively.

37. In light of the pleadings, evidence on record and the defendant’s submissions, the plaintiff has failed to prove the ingredients of adverse possession against the defendant on a balance of probabilities; see *Ahmed Abdul Karim-vs-Member for Lands and Mines (1958) EA 436 at 441 and Murunga Kabangi and 2 others-vs-Hannah Wairimu Gitau and another (2019)eKLR*.

38. Wherefore, the plaintiff’s suit initiated by way of an originating summons dated 16<sup>th</sup> August 2016 and duly filed in court on 5<sup>th</sup> October 2016, fails. I proceed to dismiss the same with costs to the defendant.

**DATED, SIGNED and DELIVERED** in open Court at **MIGORI** this 5<sup>th</sup> day of **NOVEMBER** 2020.

**G.M.A. ONGONDO**

**JUDGE**

**In presence of:-**

Mr. Adawo learned counsel for defendant

Tom Maurice- Court Assistant