



REPUBLIC OF KENYA

ENVIROMENT AND LAND COURT MIGORI

ELC CASE NO. 63 OF 2017

(Formerly Kisii Elc Case no 628 of 2016)

JOSHUA GUYA ODANDO.....PLAINTIFF

VERSUS

LUKAS ADIKA ODENYO.....DEFENDANT

JUDGMENT

1. The suit property in this matter is LR NO. KAMAGAMBO/KABUORO/1927. It is a subdivision of LR. NO. KAMAGAMBO/KABUORO/270. The said property is approximately 6.1 hectares in area.

2. The plaintiff has sued the defendant by way of an originating summons dated 11th November 2016 brought under Sections 1A and B 3, 3A and 63 (e) of the Civil Procedure Act and order 37 Rules 1 and 2 and Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010, Cap 21 Laws of Kenya and Articles 159 (1) A, of the Constitution of Kenya 2010 and all other enabling provisions and enactments of the law. He is seeking the following orders.

a) THAT the plaintiff be granted an order of permanent injunction restraining the defendant either by himself or agent and/or servants and/or anyone claiming under the said defendant from entering upon, trespassing into, taking possession, cultivating, building and or/in any way whatsoever interfering with the plaintiff's right over the suit land, that is land parcel number KAMAGAMBO/KABUORO/1927.

b) THAT, this honourable court be pleased to issue a prohibitory order to preserve and /or conserve the suit land parcel number KAMAGAMBO/KABUORO/1927 from being alienated, encumbered and/or wasted whatsoever.

c) THAT the plaintiff JOSHUA GUYA ODANDO be declared entitled by adverse possession to a portion of that piece of land containing four (4 acres) share of the total hectares of the suit land parcel or thereabout registered in the land titles parcel number KAMAGAMBO/KABUORO/1927 where he is jointly registered with the defendant.

d) THAT the defendant do transfer a portion of land parcel number KAMAGAMBO/KABUORO/1927/ measuring four (4 acres) share of the said land parcel to the plaintiff forthwith and in default of the defendant signing the transfer forms and any other relevant documents in respect to the land parcel herein, the Deputy Registrar of this Honourable court do sign the same, execute and/or endorse such papers/documents to effect the transfer.

e) THAT, a declaration that the plaintiff has acquired adverse possession of the suit land parcel number KAMAGAMBO/KABUORO/1927 which is a mutant of land parcel number KAMAGAMBO/KABUORO/270 and the plaintiff be entitled to 4 acres share of the suit land.

f) THAT, such further and/or other orders be made as the court may deem fit and expedient.

g) THAT, cost of the Originating summons be borne by the defendant.

3. The plaintiff who initially appeared in person, is represented by learned counsel Mr. R. Abisai with effect from 26th April 2017.

4. The defendant was duly served on 26th November, 2016 as demonstrated by an affidavit of service sworn on 7th December 2016 by Isaiah Miruka Omwenga, a duly authorized court process server. He failed to either enter appearance or file defence within the prescribed period of time or at all.

5. On 7th May 2018, the court directed that the originating summons be treated as a plaint and the suit be heard by way of *viva voce* evidence. Since the defendant was duly served and under Order 10 Rule 9 Civil Procedure Rules 2010, hearing of the suit proceeded ex parte where the plaintiff (PW1) and his witness namely WILLIAM OPONDO KISANDO (PW2) adduced evidence in support of the plaintiff's case.

6. Learned counsel for the plaintiff filed submissions dated 10/11/2018 in support of the plaintiff's case. He cited **Chevron (K) Ltd.-v- Harrison Charo Washutu (2016) eKLR, Prime Bank Ltd -v- Paul Otieno Nyamodi (2014) eKLR** and various Constitutional and statutory provisions to buttress his submissions.

7. I have carefully considered the entire originating summons, evidence of PW1 and PW2 as well as submissions of the plaintiff's counsel. In the case of **Galaxy Paints Co. Ltd -v- Falcon Grounds Ltd (2000) 2 EA 385**, it was held that issues for determination in a suit generally flow from the pleadings or as framed by the parties. In the instant suit, the plaintiff claims adverse possession over the suit property. Therefore the issues for determination are whether the plaintiff has attained the dictates of adverse possession doctrine.

8. In the case of **Wilson Kazungu Katana and 101 others -v- Salim Abdallah Bakshwein and another (2015) eKLR**, it was held that the doctrine of adverse possession dictates that :-

a) The suit land must be in the name other than the applicant.

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

c) That the applicant must be in occupation of the land for a period in excess of 12 years having dispossessed the owner or discontinued the possession of the owner.

9. By a grant of letters of Administration intestate issued on 16th August 2011 in Rongo Principal Magistrates Court Succession Cause No. 129 of 2011 (PEXhibit 1) and a certificate of confirmation of grant issued on 7th November 2011 in the same cause (PEXhibit 2), PW1 and the defendant are the personal representatives of the estate of the late Odeny Buodo. (Deceased person); see **Section 2 of the Civil Procedure Act (Cap 21)**.

10. A certificate of official Search dated 10th June 2016 in respect of the suit land (PEXhibit 5) reveals that the defendant is the proprietor of the property since 22nd November 2011. It also shows that the property has been subdivided into LR Nos. KAMAGAMBO/KABUORO/6760 to 6764. It is further supported by the testimony of PW1 that :-

“ A certificate of official search dated 10th June 2016, shows that the defendant has subdivided it into LR Nos. 6760 to 6764”.

11. This court is very conscious of the definition of the term **“Proprietor”** under **Section 2 of the Land Registration Act, 2012**. The suit property is registered in the name of the defendant as per PEXhibit 5 under the **repealed Registered Land Act (Cap 300)**; see the decision of **Simpson J (as he then was) in Wainaina -v- Murai and others (1976-80) 1KLR 283**.

12. It was the evidence of PW1 that he built and he lives on the suit property. He testified, inter alia,

“ I live on the suit land. I have built on it..... There are houses on the land..... I occupy four (4) acres of the suit land..... He has not processed title deed to the four (4) acres and he claims that not entitled to the suit land.”

13. In court proceedings of Kisii High Court Misc. Application No. 169 of 2012 at page 5 (PEXhibit 3), PW1 stated that he lives on the suit property. That the defendant wants to take away the portion that was given to him by his (PW1) father

14. The testimony of PW1 was confirmed by PW2 who stated in part that :-

“The portion of four acres belong to the father of PW1, Odondo Obuodo(Deceased)”

15. PW1 stated that he is 74 years old and that he has lived in the suit property for over 60 years. The evidence of PW1 was fortified by PW2 herein.

16. In **Chevron (K) Ltd case (Supra)** the court of Appeal dismissed the appeal and ordered the appellant to transfer to the respondent of the property at the latter's expenses. A similar situation emerges in favour of PW1 in the instant suit.

17. Borrowing from the **Chevron (K) Ltd case (Supra)** and bearing in mind the Constitutional and statutory provisions cited in the plaintiffs submission and the evidence of PW1 and PW2, I am of the considered view that the claim by plaintiff (PW1) has attained the threshold in **Kazungu Katana case (supra)**. The plaintiff has proved that his occupation of the suit property is adverse to that of the defendant whose occupation has been extinguished thereby. He has established his claim against the defendant on a balance of probability.

18. Accordingly I enter Judgment for the plaintiff against the defendant in terms of orders 1,3,4,5,6, and 7 sought in the originating summons dated 11th November 2016.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of JANUARY 2019.

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. Nyarige counsel holding brief for Mr. Abisai for the plaintiff.

Tom Maurice – Court Assistant.