



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 712 OF 2015 (FORMERLY HCCC NO. 15 OF 2009 (O.S))

JOAB OKELLO NYABUNDE.....1ST PLAINTIFF

JOHN OMONDI OMBIJA.....2ND PLAINTIFF

PETER BUNDE.....3RD PLAINTIFF

DENIS ONGETO OKWANYO.....4TH PLAINTIFF

BENJAMIN ONGETO OJIWA.....5TH PLAINTIFF

VERSUS

ABU MAJIKHA GROUP.....DEFENDANT

JUDGEMENT

1. Joab Okello Nyabune, John Omondi Ombija, Peter Bunde, Denis Ongeto Okwanyo and Benjamin Ongeto Ojiwa, the 1st to 5th Plaintiffs respectively, commenced this suit through the originating summons dated 11th February 2009, and amended on 13th July 2010, against Abu Majikha Group, the Defendant, seeking to have been in adverse possession of part of Kisumu/Karateng/1628, measuring 40 acres registered in the Defendant's name for over 12 years. They seek for the following;

- a) Whether the Defendant acquired valid title to the suit land bearing in mind that the Plaintiffs have been in occupation of the same since time immemorial.**
- b) Whether there should be a declaration that the Defendant hold the land in trust for the Plaintiffs.**
- c) Whether the Plaintiffs should be registered as proprietor of the 40 acres portion of the suit land.**
- d) Whether the register should be rectified to register the Plaintiffs as proprietors of the 40 acre portion of the land in place of the Defendant.**
- e) Who pays the costs.**

2. That the Defendant filed their memorandum of appearance dated the 17th March 2009, through M/s Otanga Etenyi & Co. Advocates but did not file their statement of defence.

3. The hearing commenced on the 15th December 2014 when Joab Okello Nyabune, John Omondi and Peter Bunde Ombija, the 1st to 3rd Plaintiffs, testified as PW1 to PW3 respectively. They testified that they come from Jok Aluoch clan and live at Karateng on land parcel Kisumu/Karateng/1628 measuring 40 acres. That they occupy 20 acres of the land. That though the land was registered with the Defendant without their knowledge, they have lived on that portion of the land, and have buried their deceased parents and relatives on it without any interference. That they got to know that the Defendant had been registered with the land in 1993 and had a caution filed but the Defendant had it lifted later.

4. That after closing their case, the Counsel for the Plaintiffs filed their written submission dated the 20th December 2017.

5. The following are the issues for the court's determinations;

a) Whether the Defendant is the registered proprietor of Kisumu/Karateng/1628, the suit land.

b) Whether the Plaintiffs have been in uninterrupted and continuous occupation of a 20 acre portion of the suit land or the whole portion.

c) Whether the title of the Defendant to the 20 acre portion of the suit land occupied by the Plaintiffs has been extinguished through prescription and if so whether the Plaintiffs have acquired title to that portion.

d) Who pays the costs.

6. The Court has carefully considered the pleadings filed by the Plaintiffs, the oral and documentary evidence presented by the Plaintiffs, the written submission by Counsel, the decided cases cited therein, and come to the following determinations;

a) That the testimonies of PW1 to PW3, and the green card filed with the Originating Summons as required under **Order 37 Rule 7 (2) of the Civil Procedure Rules** confirms that Kisumu/Karateng/1628, the suit land, was first registered on the 20th April 1977 in the name of Abumajikha Group, the Defendant. The register further shows that the Defendant were issued with the Land Certificate on the 26th July 1980, and that on the 22nd June 1993, one Nick Henry A. Ochanga, who the Plaintiffs have testified was their representative, filed a caution claiming beneficial interest.

b) That the Plaintiffs' testimony that they have, even before the suit land's registration with the Defendant, been in occupation of twenty (20) acres of the said land has not been disputed as the Defendant neither filed any response to the claim nor participated in the hearing despite having been served and entering appearance through counsel.

c) That though the Plaintiffs had filed an amended originating summons changing the acreage claimed from twenty (20) acres to forty (40) acres, the witness statements filed by Joab Okello Nyambune and his testimony in court as PW1 was to the effect that they have been in occupation of twenty (20) acres. That was the portion they had sued the Defendant for. That there is therefore no evidence tendered in support of the acreage in the Amended Originating Summons.

7. That in the view of the foregoing, the court finds that the Plaintiffs have proved their case against the Defendant on a balance of probabilities and orders as follows;

a) That the Plaintiffs having been in adverse possession of about twenty (20) acres of Kisumu/Karateng/1628 for over twelve (12) years, the Defendant's title to the said acreage has been extinguished by operation of the law.

b) That the Plaintiffs have acquired ownership of the portion of Kisumu/Karateng/1628, measuring about twenty (20) acres, that has been under their occupation for over twelve (12) years and that the said portion be registered in their names.

c) That as the Defendant did not defend the Plaintiffs' claim, each party to bear their own costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6th DAY OF MARCH 2019

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel M/s Kirabo for Odunga for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE