



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 465 OF 2017

(Formerly Kisii ELCC No. 431 of 2015)

CAREN ANYANGO OMOLLO.....PLAINTIFF

VERSUS

JOSHUA ONDIGO JALANGO.....DEFENDANT

JUDGMENT

1. The property in dispute is land parcel No. Kabondo/Kasewa/984 measuring approximately 1.3 hectares in area (Hereinafter referred to as the suit land). It is situated in **Kasewe "A"** sub-location within Kodumo –location, Homa-Bay County. The suit land is currently registered in the name of the plaintiff Caren Anyango Omollo who claims to have acquired it through transmission on 22nd March 2013.

2. The plaintiff (PW1) contends that the deceased, Turphosa Bonyo Omollo, who was her mother was the original registered proprietor of the suit land. That the deceased established her homestead on the land and her remains were interred therein in the year 1992. That PW1 was the only beneficiary to the estate of the deceased comprising the suit land. That immediately after the death of her mother, PW1 took lawful possession of the suit land LR NO. KABONDO/KASEWE/655 following succession proceedings in Oyugis Senior Principal Magistrate's court Succession cause number 55 of the 2012 and dismissal of application for revocation of grant per order in Homa-Bay High Court Succession cause number 4 of 2014 (PEXhibit 1). PW1 obtained title deed to the suit land issued on 27th March 2013 (PEXhibit 2) and as shown on the certificate of official search dated 9th October 2014 (PEXhibit 3). However, PEXhibit 2 got lost and PW1 obtained a police abstract dated 14/6/2013 thereof.

3. PW1 contends further that in the year 2003, the defendant unlawfully entered the suit land. That the defendant committed acts of trespass as particularized at paragraph 5 (a) to (c) of her plaint dated 23rd September 2015 wherein the plaintiff has sought the following reliefs:-

i. An order for eviction of the defendant from the suit land parcel number KABONDO/KASEWE/984

ii. General damages for trespass and mesne profit.

iii. Costs of the suit.

iv. Interest on (ii) and (iii) above at court rate.

4. In his statement of defence and counterclaim dated 12th October 2015, the defendant has denied the plaintiff's claim. He states that he has been in actual occupation of the suit since February 1992 when the deceased was still alive and with her consent as she (Deceased) was ailing from cancer thus the issue of trespass thereon can not arise or at all. That he built his hut on the homestead of the deceased and has lived with his family thereon peacefully, continuously and without any interruption for over twenty three (23) years hence acquired ownership of the suit land by way of adverse possession.

5. The defendant states further that since his father Jalongo Omolo was the son of Joram Omolo, the husband of the deceased Truphosa Bonyo Omolo, he is ipso facto a beneficiary of the estate of Truphosa Bonyo Omolo (Deceased), who adopted him (defendant) as her own child. Wherefore, the defendant is seeking dismissal of the plaintiff's suit with costs to the defendant and that Judgment be entered against the plaintiff for :-

i. A declaration that the defendant be registered as the owner of Land Parcel No. Kabondo/Kasewe/984 having acquired title to the same by way of adverse possession.

ii. Rectification of the Register for Land Parcel number Kabondo/Kasewe/984 by deleting the name of Caren Anyango Omollo and inserting thereon the name of Joshua Ondingo Jalang'o.

iii. Costs of the counterclaim together with interest thereon @14 p.a from the date of judgment until payment in full.

6. It was the testimony of PW1 that she is the sole beneficiary of the estate of the deceased, and that the defendant is a trespasser thereon. She relied on PExhibits 1 to 4 in her evidence.

7. PW1 called witnesses namely JAPHET OGORO (PW2) and PATRICK ODONGO ADAGO (PW3) who stated that they were a Reverend of Roho Israel Church, Kasewe “A” and a relative of the deceased respectively. Both PW2 and Pw3 testified that the defendant entered the suit land in 2003.

8. The defendant (DW1) testified that the deceased, Truphosa Bonyo Omollo who was his grandmother and being supported by his father, Athanasio Jalongo Omollo, gave LR NO. KABONDO/KASEWE/655 and the suit land to her only child (PW1) and DW1 respectively. That DW1 lives on the suit land where he erected a permanent house, planted trees and bananas and fenced it. DW1 relied on his list of documents dated 12th October 2015 (DExhibits 1 to 8) which include a copy of title deed for the suit land in the name of the deceased Truphosa Bonyo Omolo as at 15th January 1992 (DExhibit 1), a copy of title deed for the suit land in the name of PW1 issued on 27th March 2013 (DExhibit 6), photographs of developments on the suit land (DExhibits 7 (a) to (f)) and a copy of certificate of official search for LR NO. KABONDO/KASEWE/655 (DExhiti 8).

9. DW 2, a clan member told the court that the deceased Truphosa Bonyo Omollo, who died in 1992 used to occupy the suit land. That she had two (2) parcels of land namely the suit land and LR NO. Kabondo/Kasewe/655 which she allocated to DW1 and PW1 respectively. That there was no complaint raised thereof. That DW1 used to live and occupied the suit land prior to the death of Turphosa Bonyo Omollo (Deceased).

10. Learned counsel for the plaintiff, Mr. Gilbert of Owade and Company Advocates filed submissions dated 7th December 2018 wherein reference was made to the pleadings, evidence of PW1, PW2, PW3, DW1 and DW2. Counsel framed ten (10) issues for determination which include whether the plaintiff is the absolute owner of the suit land and whether the parties to the suit are entitled to the orders sought in their respective pleadings.

11. Counsel submitted further that the plaintiff has proved her claim against the defendant on a balance of probability and that the defendant has failed to prove his counterclaim on a balance of probability. He urged the court to enter judgment in favor of the plaintiff against the defendant and dismiss the defendant’s counterclaim with costs. In support of his submissions, counsel cited the following authorities regarding adverse possession:-

a) Samwel Miki Waweru –v- Jane Njeri Richu (2007) eKLR.

b) Wanyancha Gibiti and 3 others –v- Waigoge Nyahiri Sinda (2015) eKLR

12. Mr. G.S. Okoth learned counsel for the defendant filed submissions dated 29th January 2019 whereby he also referred to the pleadings including orders sought therein, facts and evidence of the respective cases as well as the applicable law, among others, **section 107 (1) of the Evidence Act (Cap 80), section 7 of the Limitation of Actions Act (Cap 22) and Clerk and Lindsell on Torts 18th Edition** at paragraph 18 - 01.

13. Learned counsel further cited **Black’s Law Dictionary 9th Edition at page 62** on the definition of the term “**Adverse Possession**”. He also relied on the case of **Kipkebut t/a Riverside Lodge and Rooms –v- Ogola (2015) 1 EA 332 at 336** and the case of **John Imbaiza Vodoyo –v- Ann Chebet and another (2017) eKLR** on adverse possession.

14. I have considered with care the entire pleadings, evidence of the plaintiff as well as the evidence of the defendant together with their respective submissions. It is trite 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 **Galaxy Paints Co. Ltd –v- Falcon Grounds Ltd (2002) 2 EA 385 applied in the case of Great Lakes Transport Company (U) Ltd –v- Kenya Revenue Authority (2009) KLR 720**. I embrace the issues for determination in the plaintiff’s submissions and condense them to issues (i), (ii) ,(iv),(vi) (vii) and (ix) thereof as follows:-

a. Is the plaintiff the absolute registered owner of the suit land?

b. Whether the plaintiff is the sole beneficiary of the estate of the late Truphosa Bonyo Omollo which include the suit land?

c. Has the defendant acquired the ownership of the suit land by way of adverse possession as against the plaintiff?

d. Whether the defendant trespassed on a portion of the suit land in the year 2003.

e. Whether the plaintiff and the defendant are entitled to the orders sought in the plaint and statement of defense and counterclaim respectively?

15. On the first issues, paragraph 3 of the plaint and paragraph 3 of the statement of defense and counterclaim disclose that PW1 is the sole registered owner of the suit land. PW1 stated that he obtained titled deed dated 27th March 2013 in respect of the suit land (Exhibit 2). In exam in chief, DW1 stated inter alia,-

“PW1 has title to the suit land”

16. It is discerned from PExhibits 2 and 3 as well as DExhibits 5 and 6 that PW1 is the sole proprietor of the suit land with effect from 27th March 2013. Quite plainly, the suit land was registered in her name under the repealed **Registered Land Act (Cap 300)** as observed in the case of **Wainaina –v- Murai and others (1976-80) 1KLR 283 at 289 and 290**. Therefore, there is no dispute that PW1 is the sole proprietor of the suit land; see **also Sections 24,25, and 26 of the Land Registration Act, 2016 (2012)**.

17. With regard to the second issue. It is stated at paragraph 4 of the plaint that PW1 in her capacity as the only beneficiary of the deceased, Truphosa Bonyo Omollo obtained PExhibit 2. DW 1 denied the plaintiff's claim but admitted that PW1 was in a position of priority as an administrator of the estate of the deceased .

18. PW2 stated that the deceased being a member of Roho Israel Church **Kasewe “A” since 1975**, donated part of the suit land to the church. That a church building where services are conducted stands thereon. He testified that the church built a house for the deceased who passed away in 1992. PW2 also testified that the deceased left behind PW1 thus strongly indicating that she is the beneficiary of estate of the deceased as admitted at paragraphs 2 and 3 of the counterclaim. Furthermore, PExhibit 1 is in favour of the plaintiff.

19. In respect of adverse possession, DW1 stated at paragraph 5 of his statement of defence and counterclaim that he has been in actual possession of the suit land since February 1992 when the deceased, Truphosa Bonyo Omollo was still alive. That the said occupation was with the consent of the deceased, who was suffering from cancer. DW1 further stated that he built his homestead on the suit land where he has lived peacefully, continuously and without interruption for the past 23 years. DW1 asserts that he has acquired title to the suit land by adverse possession and that the name of PW1 be deleted from the register and his name be registered accordingly.

20. In her submissions, PW1 opposed the defendant's claim for adverse possession over the suit land. She contends that the occupation of DW1 thereon was with the permission or consent of the deceased, who was the original proprietor of the suit land.

21. In the case of **Virginia Wanjiru Mwangi –v- David Mwangi Jotham Kamau (2013) eKLR** , it was held that the claimant had been permitted by the owner to be in possession of the suit land. On that strength, the claim for adverse possession failed.

22. Similarly, I endorse the stand point taken by P. Nyamweya J in **Ramco Investment Ltd –v- Uni-Drive Theatre Ltd (2018) eKLR** that:-

“The appellant’s occupation of the disputed portion was open and continuous, but it was not adverse to the respondents title as it was not exclusive and was also consensual.....” (Emphasis added)

23. In the instant case, since it is not in dispute that the defendant's occupation of the suit land has been open, peaceful and continuous but with the permission of its registered owner, DW1 has not proved at all that his possession of the suit land has been exclusive in adverse manner to the title of the owner; see the Court of Appeal decision in **Wilson Kazungu Katana and 101 others –v- Salim Abdallah Bakshwein and another (2015) eKLR**.

24. Regarding trespass unto the suit land, PW1 produced PExhibits 1 to 4 and in examination in chief stated, inter alia;

“ The defendant trespassed into the suit land in year 2003. My mother had died. I did not allow him to enter the land. He built on it.”

25. On further examination in chief with regard to the defendant, PW1 stated that :-

“He has fenced off the land. He stopped me from using the land.”

26. DW1 and DW2 told the court that PW1 was given LR NO. KABONDO/KASEWE/655 and not the suit land. Their testimonies were evasive, mere denial and fail to displace the plaintiff's solid claim.

27. It is evident that DW1 made unjustified intrusion upon the suit land which is absolutely owned and occupied by PW1.

28. **Clerk and Lindsell on Torts** 18th Edition at paragraph 18-01 has defined the term **“Trespass “** thus :-

“An unjustified entry by one person upon the land in possession of another.”

29. Moreover, unlawful occupation of private land is prohibited under **Section 152 of the Land Act , 2016 (2012)** which provides;-

“A person shall not unlawfully occupy private, community or public land”.

30. The plaintiff has sought general damages for trespass in her plaint. The tort of the trespass is one which is actionable without proof of any damage as recognized by M.A. Odera J in **Nakuru Industries Ltd –v- S.S. Mehta and Sons (2016) eKLR**. In my view and in considering the entire case, a sum of **Kshs. 100,000/=** would be appropriate for the plaintiff in the circumstances and I award the amount accordingly.

31. I am aware of the definition of mesne profits under **section 2 of the Civil Procedure Act (cap 21 Laws of Kenya)** and in the case of **Rioki estate Company (1970) Ltd – v- Kinuthia Njoroge (1977) KLR 146**. Mesne profits are also a form of special damages which must

be specifically pleaded and proved at trial. In the instant case, the plaintiff did not plead a specific amount as mesne profits; see **Nakuru Industries Ltd case (supra)**. To that end, she is not entitled to mesne profits in the circumstances and I declined to grant the same accordingly.

32. In sum, the plaintiff has established that she is the absolute registered owner of the suit land through transmission. Her rights and registration to the suit land can only be challenged on the grounds of fraud, misrepresentation and adverse possession as held in **Tayebali Adanji Alibhai –v- Abdull Hussein Adanyi Alibhai (1938) 5 EACA** again applied in the case of **Kimani Ruchine and another –v- Swift Rutherford Company Ltd (1976- 80) 1KLR 1500**. I find that the plaintiff has proved her case against the defendant on a balance of probability and the defendant's counterclaim against her has not attained the required stand of proof. Accordingly I dismiss the defendant's defence and counterclaim dated 12th October 2015.

33. A fortiori, I enter judgment for the plaintiff against the defendant for:-

- a) An order for eviction of the defendant from the suit land parcel number Kabondo/Kasewe/984.
- b) General damages for trespass at Kshs. 100,000/= only.
- c) By dint of the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21 Laws of Kenya)**, costs of the suit and the counterclaim shall be borne by the defendant.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of APRIL 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. G. Owade learned counsel for the plaintiff

Ms. E. Opiyo learned counsel holding brief for G.S. Okoth for the defendant.

Tom Maurice – Court Assistant.