



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 114 OF 2013

DANIEL EKIRAPA ORODI.....PLAINTIFF

= VERSUS =

PIUS ENARACHI MARAGO.....DEFENDANT

J U D G E M E N T

1. This matter was filed at Bungoma by way of Originating Summons on 15/12/2009. The Plaintiff – **DANIEL EKIRAPA ORODI** - filed it as applicant against the Defendant – **ENARACHI MARAGO** – who was the respondent. The application was brought under the then order XXXVI Rule 3D of the Civil Procedure Rules, Sections 7, 17, 37 and 38 of Limitation of Actions Act (cap 22) and Sections 28, 30, and 31 of the now repealed Registered Land Act (cap 300). The Plaintiff is claiming land parcel No. N.TESO/KOCHOLIA/2081 (“suit land”) by way of adverse possession. The suit land is registered in the name of the Defendant. The matter was later transferred here.

2. The Plaintiff’s claim is pegged on determination of the following issues by the court:

- (1) Whether the Plaintiff/Applicant has been in open, continuous and peaceful use and occupation of 0.15Ha comprising land parcel No. N.TESO/KOCHOLIA/2081 for a period exceeding 12 years.
- (2) Whether, although the said parcel known as N.TESO/KOCHOLIA/2081 is now registered in the names of PIUS ENARACHI MARAGO, the Defendant/Respondent, his rights and interests over the suit land in occupation of the Plaintiff/Applicant have been extinguished by the operation of Sections 7 and 17 of the Limitation of Actions Act.
- (3) Whether the Plaintiff/applicant has acquired proprietary rights and interests over the aforesaid land parcel.
- (4) Whether the Plaintiff/Applicant is legally entitled to be registered as proprietor thereof.
- (5) Who should be condemned to pay costs of this suit?

3. The Plaintiff pleaded that the suit land was gifted to him by his father way back in 1979 and that the land is adjacent to that of the Defendant with boundary features separating the two parcels. The Plaintiff allegedly took possession when the suit land was gifted to him and has since then peacefully, openly and continuously been occupying and utilising it without interruption for a period spanning over 12 years. The Plaintiff averred that he has even constructed residential houses on the land and has also planted crops. The Defendant on the other hand has never been in occupation and/or possession. In 1999 however, the Defendant is said to have fraudulently and secretly become the registered owner of the land.

4. The Plaintiff’s position is that having occupied and utilised the suit land for that long and in the manner stated, he has defeated the Defendant’s rights of titled ownership by dint of Sections 7 and 17 of the Limitation of Actions Act (cap 22). As a corollary, he himself has acquired registrable proprietary rights over the same piece of land.

5. The Defendant responded to the suit vide a replying affidavit filed on 29/12/2009. He denied that the Plaintiff has had peaceful and continuous occupation of the suit land. He averred that there has been a longstanding dispute between himself and the Plaintiff which remains unresolved to date. Further, the Defendant alleged that the land was gifted to him by his father in 1996 and the Plaintiff is merely illegally and falsely laying claim to it and has even unjustifiably encroached on it.

6. At the time of hearing, the Plaintiff’s side called two witnesses – with himself as PW1 while his uncle, whom he calls father in the customary sense, testified as PW2. The Plaintiff’s evidence is in accord with what is stated in his application. To him, the Defendant got title to the suit land fraudulently. He said he has lived on the land for 35 years and has permanent buildings on it. He has had occasion to take

the Defendant to the then existing area Land Dispute's Tribunal where he won, with the only hiccup being that the court refused to endorse his win on jurisdictional grounds.

7. The Plaintiff's witness – PW2 – said he knew the parties well, both being his relatives and both being members of his clan. He also knew the suit land and was sure it belonged to the Plaintiff. The Plaintiff has been using that land, he said, and is still using it at the time of giving his evidence. Further, PW2 said that the Plaintiff constructed permanent rental houses on the land in 1996 and has also been farming there. From his evidence, it's clear that the parties' fathers had disputed over the suit land in the past, with the Plaintiff's father coming out the winner.

8. The defence side stated giving its evidence on 13/2/2018, when the Defendant testified as DW1. The Defendant's evidence, like that of the Plaintiff largely mimicked what his response contained. In sum, the Defendant said that his father gifted him the land. Originally, his father owned land parcel No. N.TESO/KOCHOLIA/992 but in 1996, he decided to divide that land among his children. The resultant subdivisions comprised land parcel No. N.TESO/KOCHOLIA/2050 which the Defendant came to own. The Defendant then subdivided that parcel of land into several other parcels, the suit land being one of them. He sold several parcels to other people but retained ownership of the suit land and another parcel. According to this witness, the Plaintiff's parcel of land is different and he wondered why the Plaintiff was claiming the suit land.

9. The Defendant called his father – EVANS MARAGO ETE – who testified as DW2. According to this witness, the suit land belongs to the Defendant. This witness was old. His age was put at 97 years. He could not recall much. He could not recall even the number of his land.

10. Hearing over, both sides filed written submissions. The Plaintiff gave a snapshot of the case and pointed out that he has been in possession of the land to the exclusion of the Defendant since 1979. He has been in such possession for over 35 years and even developed the land in 1996 to the knowledge of the Defendant who never raised any objection. The possession, he submitted, was with a claim of right, the land having been gifted to him in 1979. It was submitted that the Defendant's rights of ownership have already been extinguished and the Plaintiff has become an adverse possessor. It was pointed out too that even the Defendant's side has acknowledged that the Plaintiff has been in possession and has even developed the land.

11. The Plaintiff cited various judicial pronouncements – like **MWANGI & Another Vs Mwangi [1986] KLR 328, PUBLIC TRUSTEE Vs WANDURU (1984) KLR 314**, and **PETER MBIRI MICHUKI Vs SAMWEL MUGO MICHUKI [2014] eKLR** – and submitted that all favoured his case. He also cited various provisions of Limitation of Actions Act (cap 22) – like Sections 7, 37, and 38 – and posited that they favoured him. Ultimately, it was submitted that the Plaintiff has proved his case to the required standard. The court was urged to allow it.

12. The Defendant's submissions were filed on 23/4/2018. A brief background was given and then a question was posed as to whether the alleged possession of the suit land by the Plaintiff had ran its full mile by the time this suit was filed in the year 2009. And in answer to this, it was submitted that the suit land was created in the year 1999 while this suit was filed in the year 2009. The period in-between is 10 years, which is 2 years short of the mandatory period of 12 years required to sustain a claim of adverse possession. The Defendant also submitted that the Plaintiff does not live on the land and that the averment that he was gifted the land in 1979 by his father is false as the suit land did not exist then. According to the Defendant the suit land has all along been their family land. The court was asked to dismiss the plaintiff's case.

13. I have considered the suit as filed, evidence availed, and rival submissions. I find it well shown that the Plaintiff is in possession of the land. The evidence given by the Plaintiff's side is clear on it. The Defendant admitted it in cross-examination when he said:

“Yes, the Plaintiff built rental premises on the land parcel No. 2081. I have not sued the Plaintiff anywhere that he has built on my parcel of land. Yes the Plaintiff has built on the land. He has put up permanent building”.

14. The Defendant's witness – DW2 – also seemed to admit it in cross examination by saying:

“Yes, the Plaintiff has built permanent house on parcel No. 2081. It is tenants who live there and not the Plaintiff. No, the Plaintiff also lives on that shamba”.

15. The defence has taken the position that the suit land started to exist in 1999 and since the suit was filed 2009, the Plaintiff has not yet become an adverse possessor. And the simple reason for this is that 12 years, the minimum period required by law for one to become an adverse possessor, are not yet over. But this argument seems to me to overlook or gloss-over the salient aspects of the evidence availed. The Plaintiff said he was gifted the land in 1979 and immediately went into possession and use of it. By the Defendant's own account, the Defendant got the land in 1997. True, the suit land's existence as the legal entity it is now dates back to 1999 when it was registered. But its physical existence and its status as different legal entity pre-dates this period. The parties claim to its ownership also arose much earlier.

16. It is clear then that even if one were to go by the year 1996 given by the Defendant himself, the period of 12 years is clearly attained. Evidence shows that though the Plaintiff has all along utilised the suit land as its owner, the Defendant has never filed a dispute against him. In other words, he has never sought to assert his ownership by evicting the Plaintiff. It is not even shown that he uses any portion of parcel No. 2081. All he has is a paper title.

17. In **WAMBUGU Vs NJUGUNA [1983] KLR 172**, the court held, *inter alia*, that as regards adverse possession, the general principle is that until the contrary is proved, possession in law follows the right to possess. And in order to acquire by the statute of Limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. And dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

18. Wambugu's Case (supra) has been cited with approval in various other cases – see for instances **JOHNSON NEHONDO Vs CHRISTOPHER NASHISAKO & Another: CA No. 161 of 2012, KISUMU** and **ALBERT FRED EKIRAPA Vs NYONGESA SIRARI & 5 others: CA No. 87 of 2015, KISUMU**. Wambugu's case itself was not breaking new ground. Earlier decisions – see for instance **KASUVE Vs MWAANI INVESTMENTS LIMITED & 4 others [2004] KLR 184** – had espoused the same position.

19. In **MTANA LEWA Vs KAHINDI NGALA MWAGANDI: CA No. 56 of 2014, MALINDI**, the Court of Appeal (per Makhandia J.A) defined adverse possession as “**essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period which, in Kenya, is 12 years**”.

This definition in my view captures what the Defendant in this case has failed or neglected to do against the Plaintiff. Knowing that the Plaintiff is utilising the land and has even put up permanent buildings on it, the Plaintiff has never taken action. He has left the situation to remain that way for far too long. In other words, he has slept on his rights. It is instructive that even the earlier dispute at the Land Dispute Tribunal was not filed by the Defendant but by the Plaintiff himself.

20. It may be useful to state or reiterate that adverse possession is deemed sufficiently demonstrated if proved to be adequate, continuous, and exclusive. Differently stated, possession is adverse if it is adequate in continuity, in publicity, and in extent. (see the decided case of **WANYANCHA GIBITI & 3 others Vs WAIGOGI NYAHIRI SINDA: CA No. 4/2013, KISUMU**).

21. The Plaintiff herein has well shown that he has possessed the land for over 30 years. His possession has been evidently open and notorious. It has not been surreptitious; it is not by stealth. It has also been continuous and/or uninterrupted. There is no evidence that the Defendant, whether as a registered owner or as un-titled owner before he got registered, has ever tried to displace the Plaintiff or evict him. And it is erroneous in my view to take the position that time started running when the Defendant became the registered owner. Time started running much earlier. As against the Defendant, adverse possession is traceable to 1996 when the land was allegedly gifted to him by his father. The fact that the Defendant changed status from un-registered ownership to registered ownership did not interrupt the running of time. It is even possible to take the position that time was running against the Defendant's own father before the alleged gifting of the suit land to the Defendant. And this is so because no matter what claim the Defendant's father may have had to the suit land, it is clear that the Plaintiff has always been on the land as owner and has never regarded himself as anything else.

22. In light of all the foregoing, I make a finding that the Plaintiff's case is proved on a balance of probabilities and determination of the issues put forward in the Originating Summons is as follows:

Issue 1: Yes, the Plaintiff/Applicant has been in open, continuous and peaceful use and possession of 0.15Ha comprising in land parcel No. N.TESO/KOCHOLIA/2081 for a period exceeding 12 years.

Issue 2: Yes. Even though land parcel No.

N.TESO/KOCHOLIA/2081 is now registered in the name of the Defendant/Respondent, the rights and interests of the Defendant/Respondent over the suit land have been extinguished by the operations of Sections 7 and 17 of the Limitation of Actions Act (cap 22).

Issue 3: Yes, the Plaintiff/Applicant has acquired

proprietary interests and rights over the aforesaid parcel of land.

Issue 4: Yes, the Plaintiff is legally entitled to be

registered as proprietor thereof.

Issue 5: Each side should bear its costs. The parties seems to be closely related and they appeared to me to be simple rural folk of humble circumstances. I am therefore relevant to condemn one side to pay costs to the other.

Dated, signed and delivered at Busia this 21st day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Present

Defendant: Present

Counsel for the Plaintiff: Present

Counsel for the Defendant: Present

Court Assistant: Nelson Odame