



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 140 OF 2013

JACOB OMOYA OBAM.....PLAINTIFF

VERSUS

ANTONY WAMEYO alias

ELIENDERI WAMEYO STEFANO OBEMO.....1ST DEFENDANT

GEORGE OTIENO WAMEYO.....2ND DEFENDANT

HENRY OGOLA WAMEYO.....3RD DEFENDANT

JOSEPH OMOYA WAMEYO.....4TH DEFENDANT

J U D G E M E N T

Introduction

1. The Plaintiff – **JACOB OMOYA OBAM** – filed this suit on 10/4/2012 vide an Originating Summons dated 29/3/2013. The suit is against four Defendants – **ANTONY WAMEYO alias ELIENDERI WAMEYO STEFANO OBEMO** (1st Defendant), **GEORGE OTIENO WAMEYO** (2nd Defendant), **HENRY OGOLA WAMEYO** (3rd Defendant), and **JOSEPH OMOYA WAMEYO** (4th Defendant). The Plaintiff is claiming ownership of Land parcel No. MARACHI/BUJUMBA/131, which has been subdivided into land parcels Nos. MARACHI/BUJUMBA/1907, 1908 and 1909. The Plaintiffs claim of ownership is by way of trust and adverse possession. Land parcel No. MARACHI/BUJUMBA/131 was registered in the name of 1st Defendant who then subdivided it into three parcels – 1907, 1908 and 1909. He then transferred the resultant parcels to the other Defendants, who are his sons.

Pleadings

2. The Originating Summons came with issues for determination and prayers. The issues for determination are as follows:

- (a) The ownership of the whole of land parcel No. MARACHI/BUJUMBA/131 subdivided into MARACHI/BUJUMBA/1907, 1908 and 1909.
- (b) Whether the 1st Defendant was registered and held the whole land in trust for STEFANO OBAM, and/or the Plaintiff.
- (c) Whether Stephano Obam and/or the Plaintiff has acquired the whole land by way of adverse possession.
- (d) Whether the 2nd, 3rd and 4th Defendant holds MARACHI/BUJUMBA/1907, 1908, and 1909 in trust for the Plaintiff.
- (e) Whether the subsequent transfer to and registration of the 2nd, 3rd and 4th Defendant was fraudulent and intended to defeat the Plaintiff's interests in the whole land.
- (f) Whether the Defendants are entitled to MARACHI/BUMALA/11.

3. The Plaintiff hopes or presumes that the determination of the issues will be in his favour and has therefore made the following prayers:

- (i) A declaration that the Plaintiff has been in peaceful, uninterrupted adverse possession of land parcel No. L.R. MARACHI/BUJUMBA/131 now 1907, 1908 and 1909 since 1958 to date and consequently acquired rights and interests therein by operation of the law.
- (ii) A declaration that the Defendants' interests and rights in the aforesaid land have been extinguished by operation of the law/adverse possession.
- (iii) A declaration that the Defendants holds the aforesaid land parcel in trust for the Plaintiff to whom it has vested and should be registered.
- (iv) An order that the aforesaid parcels be transferred to the Plaintiff as sole absolute owner.
- (v) That the Defendants be condemned to pay costs.
- (vi) That further orders or reliefs as this honourable court may deem fit to grant.

4. Back-up information for the Plaintiff's claim is contained in the supporting affidavit that came with the application. The information shows, *inter alia*, that the Plaintiff and 1st Defendant's father had two wives – AKUMU OBAM and MARY ADHIAMBO. The Plaintiff and 1st Defendant are therefore step-brothers, each being a son to one of the wives. According to the Plaintiffs, his late father owned land parcels MARACHI/BUJUMBA/131, 87, 11, 15 and 16. It would appear that all family members initially lived on neighbouring parcels No. 131 and 132. But this changed sometimes in 1958 when the family patriarch – STEFANO OBAM – moved the 1st Defendant's mother and her children to an area called Nango and settled them on parcel No. 11. The mother of the Plaintiff and the Plaintiff himself were left on parcel No. 131. That is where they lived and the Plaintiff still lives there. The Plaintiff's mother died and was buried there.

5. The Plaintiff averred that the Defendants hold the land in trust for him. According to him, he has resided on the land from 1958 to date and his own mother is buried on it. In contrast, the 1st Defendant's mother is buried on the land she migrated to with her children. The Plaintiff emphasised that the Defendants have never used the land since 1958 and that their land is parcel No. 11, not parcel No. 131. Further, the Plaintiff stated past disputes resolved the ownership issue in his favour. The land, he stated, was gifted to his late father by his maternal uncles before adjudication. The 1st Defendant took the position that his open, peaceful, continuous, uninterrupted and exclusive possession since 1958 rendered any rights or interests of the 1st Defendant extinguished and by the time the 1st Defendant was transferring the land to his sons, he had no title in law capable of being transferred.

6. The first Defendant swore a replying affidavit on 5/6/2012 on behalf of himself and the other Defendants. The replying affidavit was filed here on 13/6/2012. He deponed, *inter alia*, that land parcel No. 131 was registered in his name way back on 16/8/1971 and that registration was not in trust for the Plaintiff. He averred that the land was bequeathed to him by the in-laws to his grandfather – SIANGANI - who was husband to one WAMEYO after whom the 1st Defendant is named.

7. The 1st Defendant said that his late father owned land parcel No. 11 which he allowed him to develop and occupy and on which he still lives. The Plaintiff on the other hand was given parcel No. 87. According to the 1st Defendant, his late father did not own parcel No. 131 and it is not also true that the Plaintiff has possessed and/or occupied the land since 1958. The 1st Defendant reasoned that had that been the case, the Plaintiff would have been registered as owner at the time of adjudication.

8. The 1st Defendant talked of having caused subdivisions of parcel No. 131 on 22/9/2008 and transferred the resultants three parcels – Nos 1907, 1908 and 1909 – to his sons, who are the other Defendants. The Plaintiff is said to have illegally entered into parcel No. 1907 and proceeded to construct a house. This led to his arrest and was only released upon undertaking to remove the offending structure. But the Plaintiff still refused to remove the structure after release and this necessitated a filing of suit to evict him.

Evidence

9. When hearing started, the Plaintiff's side called four witnesses – the Plaintiff himself (PW1), Richard Siangani Olunga (PW2), Joseph Ogutu Omondi (PW3) and Raphael Ogoya Obel (PW4). The Plaintiff testified, *inter alia*, that he wants parcel No. 131 transferred to him as that is the land his late father had given to his late mother. According to the Plaintiffs, the Defendants land is parcel No. 11 and it is not true to say that the Defendants are using parcel No. 131.

10. And regarding registration of 1st Defendant as owner of parcel No. 131, the Plaintiff said that he got so registered as the eldest son in trust for his father. The Plaintiff's second witness – RICHARD SIANGANI – testified on 25/2/2015. He adopted his written statement dated 25/4/2013 as evidence. The statement shows him saying that he knew the parties and knew the father of the Plaintiff and 1st Defendant. The 1st Defendant's mother moved to parcel No. 11 in 1958 together with her husband and since then the Defendants have never used parcel No. 131. According to this witness, land parcel No. 131 was allocated to Plaintiff's mother and it is the Plaintiff who is entitled to it. This same position emerged from PW3 – JOSEPH OGUTU OMONDI – and PW4 – RAPHAEL OGOYA OBEL. And the position is not only clear from their testimonies in court but also from their written statements dated 21/2/2017 and 25/4/2013.

11. The Defendants gave their evidence as DW1, DW2, DW3 and DW4 on 27/2/2018. The 1st Defendant testified as DW1 and adopted his written statement as his evidence. That statement is substantially in the fashion of the replying affidavit sworn in response to the originating summons. A summation of the contents of that affidavit have already been given elsewhere in this judgement and is equally a fitting

summation of DW1's statement. A repeat would amount to regurgitation and is therefore un-necessary.

12. The 1st Defendant testified as DW2 and adopted his written statement as his evidence. That statement is dated 26/6/2013 and shows the 2nd Defendant saying that parcel No. 131 did not form part of the estate of his late grandfather since it was gifted to 1st Defendant and he got to become its first registered owner. The statements also says that the Defendants have all along been in actual possession of parcel No. 131 and have planted cassava, maize, millet and trees that existed even at the time of making the statement. The Plaintiff was said to have entered the land only in the year 2009.

13. The 3rd Defendant testified as DW3 and also adopted his statement. It is a statement that echoes that of DW2 and it would be superfluous to re-state it here. The same case applies to 4th Defendant – DW4.

Submissions

14. After all evidence was in, both sides filed written submissions. The Plaintiff's submissions were filed on 21/5/2018. Fwaya for the Plaintiff picked snippets of evidence from both sides of the case and, using deductive reasoning, submitted that the preponderant position is that though the Defendants are the registered owners, they actually hold the land in trust for the Plaintiff. Fwaya then changed focus and addressed the issue of adverse position. He submitted, *inter alia*, that the Plaintiff was put in possession and occupation of the land by his late father, a fact, he submitted, which was adverse to the interests of the 1st Defendant then. That was way back in 1958 and the Plaintiff has had peaceful and uninterrupted occupation and use of the land all along to the exclusion of the Defendants. This demonstrates adverse possession, he submitted.

15. And this is so despite subdivision of the land by 1st Defendant, which the Plaintiff views as meant to defeat his interests as adverse possessor. He stated that when this was happening, he was already an adverse possessor.

16. Some decided authorities were availed to offer guidance. They include **JOSEPH GITHINJI GATHIBA Vs CHARLES KINGORI GATHIBA: HCC No. 1647/1984, NAIROBI, PAUL MUTHUITA Vs WANDE: CA No. 12 of 1982, NAIROBI, JASON GITIMU WANGARA Vs MARTIN MUNENE WANGARA & others: ELC NO. 278/2013, KERUGOYA, and KANYI MUTHIORA Vs MARITHA NYOKABI MUTHIORA: CA No. 19 of 1982, NAIROBI.** The factual or legal relevance of these authorities was not explained but I have nevertheless read them to see if they have a bearing on the matter at hand.

17. The Defendants' submissions were filed on 23/4/2018. The submissions made reference to the issues for determination and then singled out each for consideration. The Defendants were said to be the registered owners of the land in dispute and being such, owned it as absolute proprietors together with all the rights and privileges that go with such ownership. This position was said to have statutory backing at Section 24(a) of the Land Registration Act.

18. As to whether Defendants were owners in trust for the Plaintiff, the Defendants submitted that good evidence is required to prove trust. The Defendants made reference to the reasoning of the court in **MBUTHI & others Vs WAITIMU & 11 others: [1980] KLR 171** and in the **MATTER OF THE ESTATE OF MANASEH OSAKO NYAWIRA deceased [2012] eKLR** where the court emphasised the need to prove trust by way of evidence in order for it to give expression to the intention of the parties. In this regard, the Defendants submitted that contrary to Plaintiff's allegations, the Plaintiff only entered the land in the year 2009 and was even reported to police. He was also sued thereafter and the case is still pending. The Plaintiff was said to have failed to prove trust given the evidence availed by the Defendants.

19. The Defendants then shifted focus to the issue of adverse possession and took the position that the use of the disputed land by the Plaintiff is merely temporary and does not vest any adverse possession rights in him. The use and occupation was said to be with permission of 1st Defendant and it was not possible therefore for the Plaintiff to acquire adverse or prescriptive rights.

20. On whether the transfer of portions of land to 2nd, 3rd and 4th Defendants by 1st Defendant was fraudulent, the issue of fraud was said not to be one to be urged by way of originating summons. In addition, the Plaintiff was said not to have given the particulars of fraud as by law required.

21. Finally, the Defendant noted that the Plaintiff wanted the court to decide whether their lawful entitlement is in parcel No. MARACHI/BUMALA/11. They submitted that that parcel of land is still registered in the name of a deceased person. The court was said not to be seized of the requisite jurisdiction to make such findings as it has not been demonstrated that letters of administration have been taken out.

22. The court was ultimately asked to dismiss the plaintiff's claim.

Analysis

23. I have considered the pleadings, the oral and documentary evidence availed, judicial pronouncements in the authorities cited, and the rival submissions. The parties are close relatives. Their bone of contention is ownership of land parcel No. 131, which the Plaintiff claims as his own by way of trust and/or adverse possession but which the 1st Defendant, as its registered owner, claimed to have owned absolutely to the exclusion of the Plaintiff or anybody else before rightfully and lawfully transferring it to his sons, the other Defendants, after a subdivision initiated by him.

24. When the time came for hearing, the Plaintiff reiterated his claim to ownership. He said he wanted the Defendants "to transfer land parcel No. MARACHI/BUJUMBA/131" to him "as that is the land that my father had given to my mother". He denied that the Defendants use the land and averred that he and his late mother have all along used it. He further said that the 1st Defendant got registered as owner in trust for

his late father. The Plaintiff's witnesses – PW2, PW3 and PW4 – were all unanimous that the land should be owned by the Plaintiff both through inheritance or trust and also by virtue of long use and possession. There has been past attempts to resolve the issue of ownership. The first, before the area local administration, is said to have resolved the issue in Plaintiff's favour. The second, before the now defunct Land Disputes Tribunal, also resolved the issue in Plaintiff's favour before the court overturned the decision on jurisdictional grounds. The three witnesses called by the Plaintiff are diverse and gave their evidence based on the knowledge they had as local inhabitants of the area.

25. The 1st Defendant on the other hand gave his evidence and reiterated the position manifest in his pleadings but he didn't call the kind of evidence that the Plaintiff called. The only other evidence is that of the other Defendants, who are his sons. This other evidence was clearly informed by the evidence of the 1st Defendant. According to the 1st Defendant, the land was a gift to him by his grandfathers' in-laws and that is why it was registered as his right from the beginning.

26. To the 1st Defendant, the land was never the Plaintiff's land, and cannot be, because it was never part of the estate of Stefano Obam, their common father. But this position stated here seems to be at variance with what the 1st Defendant is shown to have told the Land Dispute Tribunal long ago. Part of his evidence at the tribunal is shown as follows **"I am Eliender Wameyo Obam, 78 years, I come from Bumala, Nango village, Burinda sub-location. I wish to state that:- Our father Stephen Obam had many parcels of land, MARACHI/BUMALA/11, 15, 16 and MARACHI/BUJUMBA/131, 87"**. From this it is clear that the 1st Defendant acknowledged that parcel No. 131, alongside others, belonged to his father.

27. And when it was the presiding elders turn to ask questions to the Defendants, a question was asked whether the Defendants were cultivating the land. The answer was **"NO"**. The proceedings of the tribunal availed here are dated 24/4/2010. They were availed here for the court to scrutinize them and that is where it is clear that the Defendants, who were the Objectors, said they didn't live on the land.

28. In my view, the evidence given at the tribunal by the parties and the evidence given here should not materially differ. The only aspect of ownership added to the proceedings here is that of adverse possession. The other aspects of ownership based on trust and/or inheritance remain the same. The Plaintiff's evidence is substantially similar to the evidence given at the tribunal. The Defendants' evidence is different in some material aspects.

29. More informative however are first Defendant answers to Plaintiff's counsel questions during cross-examination. Asked where the Plaintiff's house was, he answered **"The Plaintiff's house is on parcel No. 131 even now"**. Asked whether the Plaintiff uses the land, his answer was **"yes, the Plaintiff has been using that land and is still using it"**. And as to whether he himself was using the land, he said **"I don't use that land, Yes"**. That same cross-examination shows the 1st Defendant saying that the Plaintiff and his mother were put on the land by the Plaintiff's father. He also says that the other Defendants, who are his sons, have never lived on parcel No. 131.

30. The issues of sizes of the parcels of land also arose, with parcel No. 87 said to be 1½ acres while parcel No. 11 where the Defendants live is said to be about 6 acres. According to the 1st Defendant the land given to the Plaintiff is parcel No. 87. The 1st Defendant has a brother, Mathew Mahero, said to have been given parcel No. 16 which according to records is 1.4Ha (or 3.5 acres approximately).

31. It seems to be common ground that land in the area is customarily allocated according to the number of households the head of the family has. Each household being represented by a wife. The late Stefano Obam who was the father to Plaintiff and 1st Defendant evidently had two wives – the Plaintiff's mother and the 1st Defendant's mother. He had several pieces of land and long ago – 1958 to be specific – he allocated land in the manner he pleased. Nobody disputed him at the time. The Plaintiff and his mother were put on parcel No. 131 while the 1st Defendant, his mother, other siblings and Stefano himself shifted to parcel No. 11.

32. There is no evidence that he did this with a view to having his family members shifting yet again to other parcels of land later. In particular, nothing shows that the Plaintiff and his mother were to shift from parcel No. 131 to parcel No. 87. Nothing also shows that the 1st Defendant was to come later and displace the Plaintiff and/or his mother from parcel No. 131.

33. In this matter, choices have to be made as to what is credible or not credible and what is fair or unfair. After considering the material before me, I am more persuaded that the Plaintiff's side was the more truthful side. In this regard, I am persuaded that parcel No. 131, though registered in the name of 1st Defendant, was never meant to be his. The 1st Defendant was merely a trustee. The 1st Defendant would have the court believe that that land was never part of his late father's estate. But the substance of the evidence he gave at the Land Dispute Tribunal makes him out to be less than honest. At the tribunal, parcel No. 131 was mentioned by him as one of the pieces of land owned by his father. The 1st Defendant evidence here was therefore a change of tune to entrench a position that would secure a favourable outcome for him.

34. I also note that in this case, the defence side did not avail independent evidence to buttress their claim. Compare this with the Plaintiff's side which called three independent witnesses whose evidence was in one common accord.

35. From the evidence availed by the Plaintiff's side, it is clear that the Plaintiff has all along lived on parcel No. 131. That was the land his late father showed him. That is the land where his mother is buried. And that is the place he calls home to this day. This manner of Plaintiff's association with the land was even unwittingly acceded to by 1st Defendant himself in some of his answers to the Plaintiff's counsel during cross-examination. As pointed, the 1st Defendant, though the registered owner of the land, was only a trustee.

36. It requires to be appreciated that the 1st Defendant has almost invariably lost in past disputes concerning ownership of this land. And even if one were to approach the matter differently, one would wonder where fairness is if the Plaintiff, as representative of one household in a family setting of two households, would be relegated to own a mere 1½ acres (that is parcel No. 87) while the other household comprising of the 1st Defendant, his brother, and the mother would own parcels of land whose total size is over six (6) times larger. In my view, the 1st Defendant's dealing in land parcel No. 131 smacks of greed. He would like to trample underfoot the interests of his step-brother (the

Plaintiff) while giving priority to unmerited interests of his sons (the other Defendants) over parcel No. 131. It would be unconscionable to allow this to take place.

37. But even without the aforesaid different approach, the evidence availed points to existence of trust. And this is so notwithstanding the Defendants' protestations and submissions to the contrary. It is not believable that the Plaintiff was put on parcel No. 131 with the intention of shifting him later while the 1st Defendant and his brother were put on their own parcels of land around the time with no intention to shift them later. The Plaintiff was not a child of a lesser father. He was as much a good son to his late father as 1st Defendant and his brother were.

38. The evidence on record also proves adverse possession. It has been well shown that the Plaintiff has all along possessed the land openly, peacefully, continuously and notoriously as its owner. And that started way back in 1958. No evidence was availed that the situation was different. The 1st Defendant became the registered proprietor long ago. Even then however, he has never taken action to evict or remove the Plaintiff from the land. It appears to me that the suit for eviction said to be pending now cannot be said to change this position. The 1st Defendant became owner in 1971. By then, the Plaintiff was still on the land with his mother. And immediately the 1st Defendant became the registered owner, the Plaintiff's interests must have become immediately adverse to his. Twelve years, the minimum period for adverse possession to actualize, must have ran their full mile by 1983. The pending suit is shown to have been filed in the year 2009. I do not want to comment further as that suit is still pending but I think the point is clear why I am reluctant to consider that suit as a legitimate consideration on this issue.

39. A very relevant maxim of law runs thus: *Longa possessio parit jus possidendi et tollit actionem vero domino*. In the language of law, this means that long possession produces the right of possession and deprives the true owner of his action. The Plaintiff is entitled to own the land as of right by virtue of his long possession - *Longa possessio jus parit* (Long possession begets a right).

Findings

40. Judicial pronouncements in cases of adverse possession – see for instance **RASUVE Vs MWAANI INVESTMENTS LIMITED & 4 others: (2004) IKLR 184, WANYANCHA GIBITI & 2 others Vs WAIGOGO NYAHIRI SINDA: CA No. 4 of 2013, KISUMU, and JOHNSON NEHONDO Vs CHRISTOPHER NASHISAKO & Another: CA No. 161 of 2012** – have consistently emphasized the need for a claimant in adverse possession to prove either the fact of dispossessing the registered owner or the discontinuation of possession by that owner. The 1st Defendant in the case at hand has never even possessed the land. Even before he shifted to parcel No. 11 where he currently lives, it is clear he was on parcel No. 132, not parcel No. 131. He has all along been a paper title holder who has never actualized his possession. On the other hand, the Plaintiff has always used the land in a manner inconsistent with enjoyment of the soil as the 1st Defendant would have wanted. These acts of use in a manner that the 1st Defendant would not approve of would finding backing in the holding of the decided case of **WAMBUGU Vs NJUGUNA [1983] KLR 172**.

41. And the fact that the 2nd, 3rd, and 4th Defendants became registered owners did not defeat the rights of the plaintiff as adverse possessor. These parties only became such in the year 2009 and as has already been observed, the Plaintiff became an adverse possessor as a matter of fact some times in 1983. This position finds backing in the case of **NGATI FARMERS CO-OPERATIVE SOCIETY LIMITED Vs COUNCILLOR JOHN LEDID & 15 others: CA No. 94 of 2004, NAKURU**, where the court held, *inter alia*, that mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's rights of adverse possession.

42. Overall then, the Plaintiff herein is shown to own the land first as a beneficiary of a trust implied at the time of initial registration of the land and, secondly, as an adverse possessor whose rights crystallised sometimes in 1983. Thirdly, another trust, this time flowing directly from the fact of adverse possession, accrued to the Plaintiff from 1983. The 1st Defendant therefore, and later the other Defendants, can properly be said to have been holding the land for the Plaintiff under this second category of trust. The other Defendants, who are the current registered owners of what used to be parcel No. 131, continue to do so to date.

43. The Originating Summons set out the issues or questions to be determined by the court. This judgment is an exercise in that determination. In light of what is stated heretofore, it is clear that the answer to issue or questions (a), (b), (c), (d) and (e) is YES. I have not mentioned issue (f). I have not mentioned it because my considered view is that I should not determine it. Issue (f) requires the court to determine whether the Defendants are entitled to land parcel No. MARACHI/BUMALA/11. It emerged that that land is still registered in the name of a deceased person. It is clear that the Defendants live on that land but it is not clear whether they are the legal representatives of the estate of the deceased. It would be contrary to law to delve into the issue of ownership of a property belonging to a deceased person when it is not clear whether the necessary grant from probate and administration court has been obtained.

44. I think I should make it clear that even for parcel No. 131, I have made the determination I am invited to make because its ownership is or has been in the hands of the Defendants. I would have not done so if the land was still registered in the name of a deceased person. It is also necessary to appreciate that the Plaintiff and the 1st Defendant are not the only children of their late father in whose name parcel No. 11 is registered. If I start considering whether the Defendant are entitled to own parcel No. 11, would I not be closing the doors to the deceased's other children who may possibly have an interest and have not been made parties in this suit?

Decision

45. And now to the prayers made: In light of my findings, it is clear that prayers (i), (ii), (iii) and (iv) are merited by the Plaintiff and I hereby grant them. Prayer (v) relates to costs. The Plaintiff wants costs. I will not grant him costs. This is a dispute involving close family members. My view is that each side should bear its own costs and I so order. Prayer (vi) is about further or other orders deemed fit by the court in circumstances of this case. My view is that prayers (i), (ii), (iii) and (iv) as granted are sufficient. There is therefore no further order or relief to grant.

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

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

3rd Defendant: Absent

4th Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendants: Absent

Court Assistant: Nelson Odame