



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCC NO. 770 of 2017 (0.S)

DOMNICUS OJWANG KISIENGO.....APPLICANT

VERSUS

SAMWEL ODERO OBUNGA.....RESPONDENT

JUDGMENT

1. This suit was commenced by way of an originating summons dated 1st August, 2017 and filed on even date pursuant to Order 37 Rule 7 of the Civil Procedure Rules 2010, section 3A of the Civil Procedure Act and Section 38 (1),(2) and (4) of the Limitations of Actions Act, Cap 22 of the Laws of Kenya. The Applicant (Plaintiff) is seeking the following orders:-

- a. That the Honourable court be pleased to make an order that the plaintiff having been in continuous and uninterrupted occupation of land parcel number Kanyamwa/Kabonyo/Kwandiku/2903, has thus acquired perspective right to the title thereto by adverse possession.
- b. That the Honourable court be pleased to make an order that the applicant having been and still is in continuous and uninterrupted occupation of land parcel number Kanyamwa/Kabonyo/Kwandiku/3218 has acquired prospective right to the title thereto by adverse possession.
- c. That the Honourable court be pleased to order the Land Registrar to delete the name of the defendant, Samwel Odero Obunga in the whole land parcel No. Kanyamwa/Kabonyo/kwandiku/3218 and to cause the same parcel of land to be registered in the name of the applicant herein, Dominicus Ojwang Kisiengo in the place thereof absolutely.
- d. That the cost of this originating summons be borne by the defendant herein.

2. The originating summons is anchored on the plaintiff's supporting affidavit sworn on even date and three (3) certificates of search dated 4th January, 2017, marked DOK-01, DOK -02, and DOK-03 (P Exhibits 1 to 3 respectively) annexed to the said affidavit. The plaintiff averred, inter alia, that he has had quiet and uninterrupted possession, use and occupation of the suit parcel of land since 1969. Thus, he claims to have acquired ownership of the suit land by way of adverse possession.

3. The originating summons is further premised on six (6) grounds on its face. The grounds include :-

- a. The defendant name appears in the Land Register as the registered owner of land parcel number Kanyamwa/Kabonyo/kwandiku/2903.
- b. The defendant name appears in the Land Register as the registered owner of land parcel number Kanyamwa/Kabonyo/Kwandiku/3218.
- c. The plaintiff who came into occupation and possession of the suit parcel of land herein has his homestead on the suit parcel, has continuously stayed on the suit parcel since 1969, and his stay has not been interrupted by anybody as he knew that the suit parcel of land belonged to his family.

4. The plaintiff is represented by the firm of Nyauke and Company Advocates. The defendant appears in person.

5. The defendant denied the plaintiff's claim and termed it absolutely false in his response to the originating summons dated 10th April, 2018 and filed on 11th April, 2018. He termed the plaintiff's claim unmerited/ he stated inter alia, that the plaintiff had a different parcel of land number which he sold to one Julius Obonyo Odumbe and transferred accordingly.

6. He also stated that the suit parcel of land is an inheritance from his late father and that the plaintiff ought to have sued his father. He relied

on a certificate of official search in respect of LR. No. Kanyamwa/Kabonyo/Kwandiku/2905 (D Exhibit 1).

7. Learned counsel for the plaintiff filed submissions dated 20th August, 2018 pursuant to court directions given on 26th July, 2018. Counsel framed two (2) issues for determination namely whether the plaintiff has been in quiet, continuous and uninterrupted possession of the suit parcel of land and whether the plaintiff has succeeded in the claim for adverse possession.

8. Counsel urged the court to find in favour of the plaintiff in terms of the orders sought in the originating summons. Reference was made to the decision in **Maweu-vs-Liu Raveling and Faring Cooperation Society (1985) KLR 430, the Limitation of Actions Act (Cap 22)** and the case of **James Maina Kinya-vs-Gerald Kwendaka (2018) eKLR and P Exhibit 2**.

9. The defendant opted not to file any submissions in this matter.

10. I have carefully considered the parties' respective pleadings and the plaintiff's submissions including authorities cited therein. I bear in mind the Court of Appeal decision in **Great Lakes Company (U) Limited-vs- Kenya Revenue Authority (2009) KLR 720** and the issues for determination in the plaintiff's submission. Therefore, the points to resolve are whether the plaintiff has acquired title to the suit parcel of land as per the dictates in case of **(2015) eKLR. Wilson Kazungu Katana and 101 others -vs- Salim Abdallah Bakshwein and another**

11. Is the suit parcel of land registered in the name other than the plaintiff? P Exhibit 1 shows that on 19th November, 2014, the suit land, a subdivision of LR No. Kanyamwa/Kaboyo/Kwandiku/3218, was registered in the name of the defendant of P.O Box 24 Homabay. The said land was registered under the **Registered Land Act (Cap 300 Repealed)**. I also take note of the definition of the term "**proprietor**" under **section 2 of the Land Registration Act, 2016 (2012)** under which P Exhibit 1 was issued.

12. The defendant asserted that the plaintiff's claim is made to mislead the court as the suit parcel of land was registered in the name of his late father. However, P Exhibit 1 is pretty clear that the said land is registered in the name of the defendant.

13. It was the contention of the plaintiff that since he was born in 1969, he has not known any other home except the one situated on the suit parcel of land. That he has occupied, used and possessed the suit parcel of land quietly and uninterrupted since the time of his birth.

14. The defendant merely denied the plaintiff's claim. There is nothing to show that the plaintiff's quiet, open and continuous possession and occupation of the suit parcel of land has been broken or interrupted; see the decision of Miles J in **Wanyoike Gathure-vs-Beverly (1965) EA 514 at 518 and 519**.

15. Similarly, in the case of **Gatimu Kinguru -vs- Muya Gathangi (1976-80) 1KLR 317, Madan J** (as he then was) held, inter alia;

"The defendant's possession was open and notorious...there has been no discontinuation of possession by the plaintiff since 1959....There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and alteration of the land by the defendant."

16. It is quite that the plaintiff is in open and notorious possession of the suit parcel of land see Kinguru case (ibid).

17. Having weighed the plaintiff's claim against the defendant's response to it, I find that D Exhibit 1 relates to LR No. Kanyamwa/Kaboyo/Kwandiku/2905 which was subdivided into the suit parcel of land and LR No. Kanyamwa/Kaboyo/Kwandiku/as shown on P Exhibit 1 and 3 respectively. To that extent, the defendant's case supports the plaintiff's claim for adverse possession to the suit parcel of land.

18. Borrowing from the cited authorities and in view of the totality of evidence herein, the plaintiff's evidence stand uncontroverted. The defendant's response to the plaintiff's claim is mere denial and fails to displace the plaintiff's case in the circumstances. The plaintiff case has been proved against the defendant herein on a balance of probabilities' as envisaged in the case of **Abdukadir Abdikadir-vs-Member for Lands and mines (1958) EA 436 at 441**.

19. Consequently and for those reasons, I enter judgment for the plaintiff against the defendant in terms of orders 1,2,3 and 4 sought on the face of the plaintiff's originating summons dated 6th July, 2017.

It is ordered accordingly.

DELIVERED, SIGNED and DATED in open Court at MIGORI this 24th JUNE 2019

G.M.A.ONGONDO

JUDGE

In the presence of:

Nancy Nyaringe learned counsel holding brief for Nyauke for plaintiff

Court Assistant – Tom Maurice