



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCC NO. 832 of 2017 (0.S)

JOHN MOBWE MWITA.....PLAINTIFF/APPLICANT

VERSUS

PETER MURIMI MWITA.....DEFENDANT/RESPONDENT

JUDGMENT

1. On 22nd September, 2017, the plaintiff namely John Mobwe Mwita filed the present suit by way of an originating summons dated 4th September, 2017 brought under the relevant legal provisions, among them sections 1A, 1B and 3B of the Civil Procedure Act (Cap 21) and section 38 of the limitation of Actions Act (Cap 22). The plaintiff claims to have acquired a portion of land measuring seven (7) acres of L.R No. Bugumbe/Mabera/260 (Herein after referred to as the suit land) by prescription and or adverse possession. Thus, he is seeking the following reliefs:-

- i. A declaration of that the defendant father sold 7 acres of LR. NO. Bugumbe/Mabera/260 to the plaintiffs father, is barred under Limitation of Actions Act Cap 22 Laws of Kenya and his title over portion measuring 7 acres in occupation/use of the plaintiff thereto, extinguished on the grounds that the plaintiff herein, has openly, peacefully and continuously been in occupation/ use and possession of the said portion measuring 7 acres for a period exceeding 12 years.
- ii. That there be an order that the plaintiff be registered as the proprietor of the possession measuring 7 acres of land parcel LR NO. Bugumbe/Mabera/260 that pending court order viz- Migori matter be reviewed varied and or be set aside by this court, hence this Honourable court do move sue moto that the plaintiff s be the owner of 7 acres of land thereof.
- iii. That the defendant herein be ordered to execute all the requisite papers necessary to have the plaintiff be registered as the owner of the porton of LR NO. Bugumbe/Mabera/260 measuring 7 acres in default, the Deputy Registrar and or Court Executive Officer be at liberty to execute all such necessary documents to give effect to the Judgment and or Decree of the court.
- iv. Costs of the originating summons be borne by the defendant.
- v. Such further and or other orders be made as the court may deem fit and expedient in the circumstance of this case.

2. The originating summons is anchored on the plaintiff's supporting affidavit sworn on 4th September,2017 and annexed documents, among them, copies of agreement dated 4th August, 1992 and title deed of the suit land marked JMMS and JMM 5(a) respectively. The originating summons is also based the grounds on its face which include; -

- i. The plaintiff has peacefully and openly occupied and cultivated apportion measuring 7 acres of LR. NO. Bugumbe/Mabera/260 for uninterrupted duration exceeding 25 years with effect from 1992 and has thus acquired ownership by way of prescription/adverse possession.
- ii. That the defendant is currently the registered proprietor of LR NO. Bugumbe/Mabera/260 by virtue of registration and viz;- Migori CC No. 647/2015 which order this court has jurisdiction to vary /review and vacate in the circumstance, wherein the plaintiff has freely and continuously occupied and cultivated the land for over 20 years.
- iii. That the plaintiff entry into the said 7 acres of LR NO. Bugumbe/Mabera/ 260 was pursuant to a sale of Land Agreement between the plaintiff father MWITA CHACHA MAROO (Deceased) which agreement was entered into on or about 4/8/1992.
- iv. That the plaintiff only occupies 7 acres out 36.0 hectares has shown in the official search.

3. The defendant opposed the originating summons in his replying affidavit sworn on 24th January, 2018 wherein he stated, interalia, that the deceased, Mwita Murimi Mwita together with Gati Keroko and Joseph Masiaba were the registered owners of the suit land measuring 36

hectares. That each of them owned a third 1/3 undivided share of the suit land. That on or about 6th of April, 2015, the plaintiff trespassed into the suit land.

4. The defendant further stated that this suit is resjudicata. He relied on documents marked PMM1 to 6 (Dexhibits 1 to 6) which include photographs showing the plaintiff's semi-permanent buildings and crops on the suit land as well as pleadings and judgment in respect of Migori Chief Magistrates case Court Civil case No. 647 of 2015.

5. The plaintiff is represented by learned counsel, Mr. R Abisai of Messrs Abisai and company Advocates. The defendant is represented by learned counsel, Mr. Agure Odero of Messrs Agure Odero and company Advocates. On 22nd January, 2019 by consent of counsel for the respective parties, the court directed that this suit be argued by written submissions and the parties complied accordingly.

6. In his submissions dated 22nd January, 2019, learned counsel for the plaintiff urged the court to grant the orders sought in the originating summons. He submitted that the plaintiff's father bought the suit land in 1992 and that this court can not move suo motto and review earlier orders made in Migori CMCC case No. 647 of 2015 and set aside the same to warrant the plaintiff reclaim the suit land. That plaintiff in error failed to raise the claim of innocent purchaser for value without notice before the said CMCC case. Indeed his late father was a purchaser of the suit land on which they have lived without any interruption for over ten (10) years.

7. Counsel relied on the grounds of the face of the originating summons, affidavits, statements and exhibits as filed herein. He cited **Articles 48, 50 and 159 (1), (2) (a) (b) (c) and (d) of the Constitution of Kenya, 2010**, to buttress his submissions.

8. By his submissions dated 8th February, 2019, learned counsel for the defendant gave brief facts of the case. He framed and analyzed the following issues for determination.

1) Whether the plaintiff has established a case of adverse possession in respect of the suit property

2) Whether the plaintiff is entitled to the suit property by adverse possession.

3) Who should have cost o of this suit.

9. Counsel submitted that the plaintiff has not established his claim for adverse possession over the suit land to the required standards and urged the court to dismiss the same with costs to the defendant. He relied on the case of **Gilbert Kimutai Koech-vs-Wilson Kipngeno Koech (2018) eKLR**, sections 7, 13 and 3 of the Limitation of Actions Act (Cap 22), **Articles 60 and 64 of the constitution of Kenya, 2010** in support of his submissions.

10. In his further submissions dated 20th February, 2019, learned counsel for the plaintiff framed seven (7) issues for determination herein which I note accordingly. He relied on celebrated authorities namely; **Kenya Tea Development Authority –vs-jackson Gichuhi Karanja and another (2006) eKLR** and **Githu-vs-Ndete (1994) KLR 776**. He submitted that the plaintiff is not a trespasser on the seven (7) acres of the suit land and that he is entitled to the same land.

11. I have carefully studied the parties' respective pleadings and 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** regarding issues for determination in a suit. I also note all the issues framed in the parties, respective submissions. The questions that arise for determination are compressed as hereunder;

(a) Whether this suit resjudicata?

(b) Has the plaintiff established his claim for adverse possession to entitle him to the orders sought in his pleadings?

12. On the issue of resjudicata, I am guided by **section 7 of the Civil Procedure Act (Cap 21) and Black's Law Dictionary 10th Edition**. Accordingly, I take into account the definition of res judicata and its three (3) essential elements..

13. It is also noted that the parties as well as the subject matter in the instant suit were the same before Migori CMCC case and the dispute was heard and finally determined as revealed in Dexhibits 4 and 5. To that extent, this suit is resjudicata.

14. On the issue of adverse possession, I am aware of the decision of **Gatimu Kinguru –vs- Muya Gathangi (1976) KLR 253** of the originating summons is that the defendant is currently the registered proprietor of the suit land by virtue of registration and further to the decision in Migori CMCC case 647 of 2015. I further take into account PExhibits 3(b), 4 and DExhibits 4 and 6 thereof.

15. Paragraph D of the plaintiff's affidavit in support of the originating summons and paragraphs 7 and 8 of the defendant's replying affidavit show that the deceased was the registered proprietor of the suit land. The said averments fortify ground (c) of the originating summons regarding registration of the suit land in the name of the deceased.

16. It is the plaintiff's claim that he has freely and continuously occupied and cultivated the suit land for over twenty five 25 years. Interestingly, Dexhibits 2 and 3 annexed to the replying affidavit are in support of his claim.

17. Notably, the plaintiff's claim is for seven (7) acres of the suit land. It is essential that adverse possession should be of the whole or a defined portion of land as recognized in **Muthuita-vs-Wanoe and 2 others (2008) 1KLR (G&F) 1024** where decision in the **case of Gatimu Kingura-vs- Muya Gathengi (supra)** was applied.

18. Be that as it may, the instant suit was clearly determined by a court of competent jurisdiction in Migori CMCC case on 7th April, 2016. As such the same dispute cannot be reopened through a claim for adverse possession in the obtaining circumstances. Litigation has to come to an end by virtue of resjudicata doctrine which comes into play herein.

19. The plaintiff asserts that this court has the mandate to either vacate or vary and set aside the decision in Migori CMCC case. . Admittedly, this court has both original and appellate jurisdiction under **section 13 (1) of the Environment and Land Court Act, 2015 (2012)**. However, the instant suit is neither an appeal nor a judicial review application from the said CMCC case. Therefore the instant suit is not an avenue legally available to the plaintiff.

20. Moreover, I find that failure by the plaintiff to file either an appeal or judicial review as aforesaid is not a technicality of procedure. I am of the considered view that the said defect cannot be salvaged **under section 3 of the Environment and Land Court Act (Ibid) as read with Article 159 (2) (d) of the constitution of Kenya, 2010 in this matter.**

21. In the premises, it is the finding of this court that the plaintiff's suit has not been proved on a balance of probabilities; **see Ahmed Abdulkarim-vs-Member for Lands and Mines (1958) EA 436 at 441.**

22. A fortiori, I dismiss the plaintiff's originating summons dated 4th September, 2017 with costs to the defendant.

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

G.M.A. ONGONDO

JUDGE

In the presence :-

Mr. Aguire Odera learned counsel for the plaintiff

Mr. Singei holding brief for Abisai learned counsel for the defendant

Tom Maurice – Court Assistant