



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 401 OF 2017 (O.S)

(Formerly Kisii ELC case No. 179 of 2014)

CHARLES ODONGO NGANI.....PLAINTIFF

VERSUS

MESHACK OKUMU OTIENDE1ST DEFENDANT

JOSHUA MWONYA.....2ND DEFENDANT

ERICK OBADO AWUOR.....3RD DEFENDANT

MICHAEL OTIENO DANDE.....4TH DEFENDANT

JUDGMENT

1. By an originating summons dated 8th May 2013 and filed on even date under section s 1A, 1B and 3A of the Civil Procedure Act, Order 37 Rule 7 Civil Procedure Rules ,2010 and section 38 of Limitation of Actions Act, the plaintiff claims that he has acquired title to a portion of land measuring three (3) acres of the suit land, LR number Kamagambo/Koluoch/450 by prescription and or adverse possession. Thus, he has sued the defendant for:-

a) A declaration that the defendants' right to recover a portion measuring 3 acres of LR. Number Kanyamkago/Koluoch/450 (the suit land) is barred under the Limitations of Actions Act Cap 22 of Laws of Kenya, and their title over a portion in occupation/use of the plaintiff thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of 3 acres for un-interrupted period exceeding 12 years with effect the year from 1980.

b) That there be an order that the plaintiff be registered as the proprietor of the portion measuring 3 acres of land parcel number Kanyamkago/Kaluoch/450 in place of the 1st defendant and/or the register thereof be rectified to reflect the plaintiff's ownership of the aforesaid 3 acres under his use and occupation.

c) That the defendant herein be ordered to execute all the requisite papers necessary to have the plaintiff be registered as owner of the portion of LR. Number Kamagambo/Koluoch/450, measuring 3 acres, decreed by the court, 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.

d) Costs of this originating summons be borne by the defendant.

e) Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.

2. The originating summons is premised on the plaintiff's supporting affidavit sworn on even date and annexed documents which include copies of photographs, his deceased mother's identity card and certificate of death in respect of her mother and photos of his homestead and location of the suit land (**PExhibit 1 (a) to (e)**) and copies of official search certificate dated 26th April, 2013 (PExhibits 2 and 3).

3. The originating summons is further premised on grounds (a) to (r) inter alia;-

i. The plaintiff has peacefully and openly occupied and cultivated a portion measuring 3 acres of LR. Number Kamagambo/Kaluoch/450 measuring 3 acres for uninterrupted duration exceeding 20 years with effect 1980 and has thus acquired ownership by way of prescription or adverse possession.

ii. That the 1st defendant is currently the registered proprietor of LR. No. Kamagambo/Kaluoch/450 wherein the plaintiff has freely and continuously occupied and cultivated for over 20 years and the 2nd 3rd and 4th respondent also contend that the suit land belonged to them, albeit they are not registered as such.

iii. That whereas the 1st defendant is the registered owner, his title in respect of the 3 acres occupied by the plaintiff, of the entire suit land inclusive the 3rd acres owned and occupied by the plaintiff albeit acquired by the defendant fraudulently, has been extinguished and the same acquired by the plaintiff by operation of law.

4. The defendants opposed the plaintiffs claim by way of the 1st defendant's 19 paragraphed replying affidavit sworn on 14th March 2015 supported by the 2nd defendant's 11 paragraphed replying affidavit sworn on 15th April 2015. Annexed to the 1st defendant's replying affidavit are documents marked as MOO1-1 to MOO-05 which include his replying affidavit sworn on 8th May 2013 in Rongo PMs Misc. Succession cause No. 103 of 2013 in the matter of the estate of Meshack Okumu (deceased) and the plaintiff's supporting affidavit sworn on 29th April, 2013 thereof. He averred therein that the allegations made by the plaintiff are false, illegal in substance, misdirected, incapable of proof and substantiation and substantially frivolous.

5. This suit was initially filed at Kisii ELC and on 4th May 2015, the court (Okongo J) gave directions including that the suit be heard by viva voce evidence pursuant to the consent of counsel for the respective parties to the suit. On 29th March 2017, the suit was transferred to this court for hearing and determination.

6. I note that on 17th July, 2017, learned counsel for the plaintiff filed agreed issues for determination dated 20th June 2017. The issues are:-

i. Whether the homestead of the plaintiff is on land parcel no. Kamagambo/Koluoch/450 or not.

ii. Whether the plaintiff has been in possession of the disputed portion or not, and if so, for how long and what are the legal effect thereof.

iii. Whether the charge on bank loan amounts to interruption or not.

iv. Whether settling the bank loan charged against Kamagambo/Koluoch/450 amounted to a sale or not.

v. Whether burial of a person per se is evidence of occupation and use or not.

vi. Whether the defendants has been in physical occupation and use of his part of the land since 1977 or not ? and if not what is the legal effect thereon

7. The plaintiff (PW1) testified on 24th April, 2018 and relied on his statement dated 20th June 2017 as part of his evidence in chief as well as his list of documents of even date (PExhibits 1 to 7). The said exhibits include pictures of the plaintiff's homestead (PExhibit 1) and copy of certificate of official search for the suit land (PExhibit).

8. PW2, **JOHN OPIYO ONGONA** also relied on his statement dated 20th June 2017 as part of his evidence in chief. He testified, inter alia, that the original owner of the suit land is Pitalis Nyalele Opiyo (deceased) who was his elder brother. That the said deceased sold the land to Zakayo Ngani (deceased) who was father of the 1st defendant and also to PW1.

9. The 1st defendant (DW1) testified on 31st January 2019 and called no witness. He relied on his list of documents dated 18th October 2017 in respect of the suit land (DExhibit 7).

10. Learned counsel for the plaintiff filed submissions dated 15th April, 2019 wherein counsel urged this court to find that the plaintiff has satisfied the ingredients of adverse possession and that he is entitled to the orders sought in the originating summons. Counsel cited the case of **Kenya Tea Development Authority –vs- Jackson Gachuhi (2006) eKLR**, in support of the submissions.

11. Learned counsel for the defendants filed submissions dated 10th April, 2019. Counsel submitted that the plaintiff has not adduced evidence that would qualify him to prove that he has acquired title to the suit land by adverse possession and that the 1st defendant is the absolute and indefeasible owner of the suit land. He cited **Black's Law Dictionary 9th Edition, Wambungu –vs- Njuguna (1983) KLR 172, Kimani Ruchine –vs- Swift Rutherford and Company Limited (1980) KLR 10 and John Mwatela Shede –vs- Vitahhbhai Bhulabhai Patel (2010) eKLR**, among others, to fortify his submissions.

12. I have anxiously considered the entire pleadings, evidence of PW1, PW2 and DW1 as well as submissions. In the instant suit, the issues for determination are whether the plaintiff has established the ingredients for adverse possession as elucidated by the Court of Appeal in the case of **Wilson Kazungu Katana and 101 others –vs- Salim Abdallah Bakshwein and another (2015) eKLR**. The ingredients are that :-

a) The land must be registered in the name other than the applicant.

b) The applicant's occupation of the suit land was open, continuous and exclusive in adverse manner to the title of its owner

c) The applicant must have been in occupation of the suit land for a period in excess of twelve (12) years having dispossessed or

discontinued possession of the owner.

13. On the first ingredient, the plaintiff (PW1) stated on grounds (b) of the originating summons and at paragraph 8 of his supporting affidavit to the originating summons that the 1st defendant is the registered owner of the suit land. By his replying affidavit, the 1st defendant (DW1) also stated that he is registered owner of the suit land.

14. PW1 relied on his statement dated 20th June 2017, which was adopted as his evidence in chief. He stated, inter, alia,

“...he (1st defendant) had the entire land registered in his name without effecting a subdivision and separating our land out of the common title hitherto held by the original owner.”

15. PW2 further relied on his statement dated 20th June 2017 as part of his evidence in chief. At paragraph 9 of the said statement, he stated that the entire land is registered in the name of DW1.

16. I am alive to the definition of the term **“Proprietor”** under section 2 of the Land Registration Act, 2016 (2012). PExhibits 2 and 3 reveal that DW1 was registered as the proprietor of the suit land on 4th January 1977 under the **Repealed Registered Land Act (Cap 300)** as also observed in **Wainaina –vs- Murai and others (1976-80) 1 KLR 283 at 289 and 290**. So, it is common ground that the suit land is registered in the name of DW1 herein.

17. In respect of the second ingredient, PW1 contended that he has peacefully and openly occupied and cultivated a portion measuring three (3) acres of the suit land. He testified that he has lived thereon since 1980. That he built his house on the suit land and he relied on the photos thereof (PExhibit 1).

18. PW2 stated that the portion of the suit land occupied by PW1 is well delineated and separated on the ground with clear boundary and natural fence. That PW1 lives on the portion of land.

19. On the other hand, DW1 stated that he acquired the whole of the suit land from the late Pitalis Nyalele Opiyo by way of purchase in 1973 as per DExhibit 1. During cross examination, DW1 testified inter alia, that:-

a) He had no written agreement to show the alleged purchase.

b) He never lives on the suit land .

c) He sold the suit land to the 2nd defendant and that he had no agreement and transfer thereof.

d) He has never transferred the land to 2nd defendant.

e) He has never filed any complaint or case against PW1 in relation to the suit land.

20. In the foregoing scenario, is DW1 the proprietor of the suit land as a bonafide purchaser of value? In the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura –vs- Attorney General and 4 others (2017) eKLR**, the Court of Appeal held that the appellants' deliberate failure to enter into a written sale agreement with the 2nd defendant and failure to pay stamp duty for the transfer, if any, and failure to keep a copy of transfer, portrayed him quite negligent in his business transaction. The same applies to DW1 whose acquisition of title to the suit land as shown in PExhibits 2 and 3 and DExhibit 1 was not bona fide in the circumstances.

21. It was the testimony of PW1 that after the late Pitalis, Nyalele Opiyo sold three (3) acres of the suit land to his late father Zakayo in 1975, they commenced cultivation of three (3) acres of the land and he built thereon in 1984 and 2000. That his mother was buried on the suit land in the year 2004 as shown on PExhibit 1 (d).

22. It is evident that PW1 claims title to the suit land by way of adverse possession in respect of three (3) acres of the suit land. In the case of **Muthuita-vs- Wanoe and 2 others (2008) 1KLR (G &F) 1024**, it was held that it is essential that adverse possession should be of the whole or a defined portion of the land in question; see also **Gatimu Kunguru –vs- Muya Gathangi (1976) KLR 253**.

23. The 1st defendant (DW1) asserted that he sold the suit land to the 2nd defendant. He did not tender in evidence any agreement and transfer to that effect. Nonetheless, mere change of ownership of land in dispute does not interrupt adverse possession as recognized in the case of **Githu –vs- Ndeete (1984) KLR 776**.

24. It has emerged from the evidence that DW1 does not occupy the suit land and he has not taken any steps to assert his title to the land. PW1 has been in open and notorious occupation and possession of three (3) acres of the suit land as shown in PExhibits 1 (a) to (d) hence his possession of the said portion of land has been exclusive in adverse manner to the title of DW1, (the registered owner).

25. With regard to the third ingredient, it was the evidence of PW1 that he has lived on the portion of the suit land since 1980. PW2 and DW1 confirmed that PW1 lives on the land. Clearly PW1 has established exclusive occupation of the portion of the suit land. There has been no discontinuation of his possession of the land by DW1 since 1980. Thus, there is ouster of DW1 from the land followed by adverse possession, occupation, development and cultivation by PW1 as held in **Wainaina, Gatimu Kinguru and Kenya Tea Development Authority cases (supra)**

26. It is trite law that rights and registration of land can be challenged on the grounds including adverse possession; see **Kimani Ruchine case (supra)**. The title of DW1 to the suit land has been challenged by PW1 who claims ownership of three (3) acres of the suit land by way of adverse possession.

27. In the case of **Kazungu Katana (supra)**, it was held that a person asserting adverse possession over the land in question must prove the same. PW1 has proved by way of PExhibit (a) to (d), 2 and 3, among others, and as fortified by PW2 that he has been in open and notorious occupation of three (3) acres of the suit land hence dispossessed or discontinued possession of the owner (DW1).

28. In the premises, the plaintiff has proved his claim against the defendant jointly and severally on a balance of probability. The defendants' defence in form of a replying affidavit to the originating summons, is blunt and it fails.

29. Accordingly, I enter Judgment for the plaintiff against the defendants jointly and severally in terms of issues (1) to (4) on the face of the plaintiff's originating summons dated 8th May 2013.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of JULY 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Oguttu Mboya learned counsel holding brief for O.M. Otieno Learned counsel for the plaintiff.

Mr. G.S. Okoth learned counsel for the defendants

Tom Maurice – Court Assistant.