



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 879 OF 2015

(FORMERLY H. C. C. C. NO. 114 OF 2011 (O.S))

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (NOW REPEALED)

AND

IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATIONS OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF PARCEL OF LAND NO. SUNA EAST/WASWETA 1/13108

AND

IN THE MATTER OF AN APPLICATION TO BE REGISTERED BY ADVERSE POSSESSION

BETWEEN

JOB OGUTU WERE.....1ST PLAINTIFF

RICHARD ASOL OKOWA.....2ND PLAINTIFF

JAMES OMOLO OLOO.....3RD PLAINTIFF

MOSES WAYUMBA OKOTH.....4TH PLAINTIFF

(Suing on behalf of themselves and on behalf of the members of the Holy Trinity Church in Africa)

HOLY TRINITY CHURCH IN AFRICA.....5TH PLAINTIFF

VERSUS

HERA GOSPEL FELLOWSHIP MINISTRY.....1ST DEFENDANT

JAMES HESBORN ALANDO.....2ND DEFENDANT

JUDGEMENT

1. Job Ogutu Were, Richard Asol Okowa, James Omolo Oloo, Moses Wayumba Okoth, on behalf of themselves and all other members of Holy Trinity Church in Africa, Holy Trinity Church in Africa, the 1st to 5th Plaintiffs respectively commenced this proceedings vide the originating summons dated the 2nd August 2011, against Heka Gospel Fellowship Ministry and Janes Hesborn Alando, the 1st and 2nd Defendants respectively, seeking to be declared the owners of Suna East/Wasweta/13103, the suit land, for being in possession of the same for more than 12 (twelve) years, and costs. The summons are supported by the affidavit sworn by the 4th Plaintiff on the 2nd August 2011 in which he among others depones as follows;

a) That by agreement for sale of land of the 15th December 1987, the 5th Plaintiff bought a portion of land from the then

parcel known as Suna East/Wasweta 1/100 from Johanes Odero Ajiki and paid the whole purchase price. That at the time of the said transaction, the 2nd Defendant was a member of the 5th Plaintiff and served as the Finance chairman, and that the purchase price was sent and paid through him.

b) That the 5th Plaintiff took possession of the portion of land it bought, fenced it and constructed a church building and pastor's house thereon. That the land parcel Suna East/Wasweta/100 was subsequently subdivided into parcels 8820 to 8822 with the portion bought by the 5th Plaintiff being parcel 8822, which was registered with the 2nd Defendant to hold in trust for 5th Plaintiff.

c) That Suna East/Wasweta/8822 was later subdivided into parcels 13102 and 13103. That parcel 13102 belonged to the 2nd Defendant having bought it from the owner and occupied it, while parcel 13103 was the portion bought by the 5th Plaintiff and its members and have continued using it every Sunday from 1987 to date.

d) That following differences between the Plaintiffs and the 2nd Defendant, the latter left the 5th Plaintiff's church and established the 1st Defendant, which he heads as chairman and one of its trustees. That the Defendants are now claiming the land the 5th Plaintiff had bought and which the 2nd Defendant transferred to the name of the 1st Defendant on the 24th April 2005.

e) That the 5th Plaintiff membership has continued to occupy Suna East/Wasweta/13103 undisturbed, peacefully and as of right without any interference from the Defendants since 1987, a period exceeding 24 years to date, inspite of it being transferred by the 2nd Defendant to the 1st and 2nd Defendants.

f) That the Defendants have never occupied or used the suit land, or a portion of it or received any profits from it as the 5th Plaintiff has been using it exclusively.

g) That the Plaintiffs have severally asked the Defendants to surrender the title to the suit land to them without success.

h) That the Defendants' title to the suit land has been extinguished by operations of the law and they now hold the title in trust for the Plaintiffs and the same should be registered in the name of the 5th Plaintiff.

2. The Plaintiffs' claim is opposed by the Defendants through the replying affidavit sworn by the 2nd Defendant on the 12th September 2011 among others deponing as follows;

a) That in 1984, he bought a portion of Suna East/Wasweta 1/1863 from Janes Odero Ajiki which after subdivision was registered as Suna East/Wasweta/8822. That he later subdivided that parcel into 13102 and 13103 for his two wives, namely Teresa Alando and Felista Auma respectively.

b) That in 2005, he sold Suna East/Wasweta 1/1303 to the 1st Defendant to raise funds for his daughter, Jemima Alando who was proceeding to the U.S.A for further studies.

c) That he had allowed the 5th Plaintiff to temporarily use the nursery school structure he had erected on the suit land on Sundays. That the 5th Plaintiff lodged a boundary dispute against him with the Land Registrar in 2006 but after the dispute was heard, the 5th Plaintiff was found not to own any land there to sustain a boundary dispute claim. That the 5th Plaintiff then lodged a claim with the Land Dispute Tribunal who ruled in their favour. That the 1st Defendant filed an appeal and the Provincial Land Disputes Appeals Committee decided in favour of the 1st Defendant.

d) That though he was at one time a member of the 5th Plaintiff, he had never been entrusted with any money to buy land for the church from Suna East/Wasweta 1/100. That it is not true to say the 5th Plaintiff fenced the plot, constructed a church building and pastor's house thereon.

e) That Suna East/Wasweta 1/13103 is occupied by the 1st Defendant and not the Plaintiffs. That the 5th Plaintiff was using the nursery school as a worship place until he stopped them resulting to the Land Disputes Tribunal case, and now this case, which he prayed to be dismissed with costs.

3. The 1st Defendant also opposed the Plaintiffs' claim through the replying affidavit sworn by Zedekia Opondo, the General Secretary on the 14th September 2011 deponing to the following among others;

a) That the claim against the 1st Defendant is defective as it is sued in its name instead of its officials.

b) That the 1st Defendant bought a portion of Suna East/Wasweta 1/8822 from the 2nd Defendant, which after subdivision was registered as Suna East/Wasweta 1/13103. That the 1st Defendant took possession and occupation of the parcel and have been using the nursery school that had been erected there by the 2nd defendant for worship purposes since then to date.

c) That the Plaintiffs had with authority of the 2nd Defendant temporarily used the nursery school for worship but were later

stopped and the structures they had begun erecting were demolished after their eviction.

d) That the 5th Plaintiff had lodged a claim of land against the 1st Defendant before the Land Disputes Tribunal but lost on appeal.

e) That the 1st Defendant is the one that is in occupation of the suit land and not the 5th Plaintiff.

4. The hearing commenced on the 16th February 2015 when Moses Wayumba Okoth, the 4th Plaintiff, testified as PW1. He was recalled for further examination in chief on the 18th March 2018 and after cross-examination, the Plaintiffs closed their case. The Defendants testimonies were taken on the 9th October 2018 when Joseph Oduor Odero, Joshua Ochola Nyaloo, James Hesborn, the 2nd Defendant, and Zedeka Opondo testified as DW1 to DW4 respectively. Then on the 22nd January 2019, one Peninah Achieng Odero testified as DW5. The Defendants then closed their cases.

5. The learned Counsel for the Plaintiffs and Defendants filed their written submissions dated the 13th March 2019 and 6th June 2019 respectively.

6. The following are the issues for the Court's determinations;

a) Whether the 5th Plaintiff use and occupation of the suit land was as a purchaser (owner) or with permission of the 2nd Defendant.

b) When the 5th Plaintiff use and occupation of the suit land commenced.

c) Whether the 5th Plaintiff use and occupation of the suit land was adverse to the title of the registered proprietor and if so, from when.

d) Whether the 5th Plaintiff has acquired the title of the suit land through adverse possession.

e) Who pays the costs.

7. The Court has carefully considered the pleadings by the parties, affidavit and oral evidence as presented by PW1, DW1 to DW5, the written submissions by both counsel and come to the following findings;

a) That while the Plaintiffs' claim to have entered into an agreement with one Johannes Odero Ajiki to buy portion of land measuring "100 x 50 feet" from parcel 100 at Kshs. 3000/=, and that the portion was later subdivided and registered as Suna East/Wasweta 1/13103 in the name of the 2nd Defendant who was then their member and Finance chairman, the 2nd Defendant has denied the claim. The Plaintiffs therefore have a duty under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya** to prove their claim on a balance of probabilities as it were. That towards that direction the 4th Plaintiff, who was then an official of the 5th Plaintiff, testified and produced a copy of what he called the sale agreement bearing the Marindi sub-location stamp dated 15th December 1987. That it is the Plaintiffs evidence that the 2nd Defendant signed the agreement on behalf of the 5th Plaintiff. Though the 2nd Defendant denied knowledge of that transaction over parcel 100, insisting that the parcel 8822 he bought came from parcel 1863, the court has after perusing the copy of the green card/register for Suna East/Wasweta 1/100 produced by the Plaintiffs, confirmed that Johannes Odero Ajiki was one of its registered proprietors and that the title was closed on the 21st July 1981 upon being subdivided into parcels 1863 to 1866. That it therefore does not add up for the sale agreement entered into in 1987 to refer to parcel 100 because if that reference was meant for Suna East/Wasweta 1/100, that parcel was then non-existent having been closed in 1981.

b) That as none of the parties availed to the court the green card/register for Suna East/Wasweta 1/1863 the court is unable to confirm who was registered with it by the time it was subdivided to create among others Suna East/Wasweta 1/8822, whose green card/register shows was first registered in the name of the Johannes Odero Ajiki on the 12th July 1993, and was later on 6th December 1995 transferred to the 2nd defendant of identity card No. 3968780/66. That the green card/register further shows that the title was closed on the 7th June 2004 upon being subdivided into parcels 13102 and 13103. That the later parcel is the one claimed by the Plaintiffs and the foregoing findings clearly shows that its history is traced to Suna East/Wasweta 1/100, contrary to the 2nd Defendant's claim.

c) That the Plaintiffs' case is that they established a church building and pastor's house in 1990 on the portion of the land they bought which is disputed by the 2nd Defendant who insists that he is the one who allowed the 5th Plaintiff to use the nursery school he had erected for church services on Sundays only. That the Plaintiffs and the 2nd defendant have not availed any documentary evidence in support of their respective claims of being responsible for the said constructions. That however, the 2nd Defendant testified that the nursery school and office cum store on the suit land were erected around 1987, and that the 5th Plaintiff has been using it for church services. That the 1st Defendant has not taken possession of the suit land even after becoming the registered proprietor as the 5th Plaintiff has continued being in possession through the order obtained from the court. The 1st Defendant through the testimony of DW4 confirmed it had not taken possession of the suit land after buying it because the 5th Plaintiff sued them before the land Registrar, and then the Tribunal. That from the evidence tendered by both sides, the court finds that the 5th Plaintiff has been using the buildings on the land parcel now described as Suna East/Wasweta 1/13103 registered in the name of the 1st Defendant from about 1990 to date.

d) That while the 5th Plaintiff believed that they were using the said land on the basis of being owners following the sale agreement of 1987, the 2nd Defendant supported by DW1 and DW5, who are son and widow to Janes Odero Ajiki, the vendor, disputed that claim insisting that the suit land was part of Suna East/Wasweta 1/8822 which had been bought by the 2nd defendant. That DW1 and DW5 most probably may never have known of the 5th Plaintiff's interest in the sale agreement between Janes Odera Ajiki and the 2nd Defendant, but confirmed that on the plot bought by the 2nd Defendant are two churches operating from there. That actually DW5 said the "church was built by the church members who were worshipping there." She went on to testify that "there is also a Sunday school on the land next to the church", and agreed that "the church was already built on the land by the time my husband died" many years ago. That from the foregoing, the court finds that the 5th Plaintiff has been in exclusive and continuous occupation of the portion of Suna East/Wasweta 1/1863, that after subdivision fell onto Suna East/Waweta 1/8822, and currently Kisumu known as Suna East/Wasweta 1/13103 and registered with the 1st Defendant. That their occupation of the said land was with permission of the late Janes Odero Ajiki, as the vendor. That the occupation became adverse when the title of Suna East/Wasweta 1/8822 was passed over to the 2nd Defendant on the 6th December 1995. That by the time this suit was filed on the 2nd August 2011, the 5th Plaintiff had been in continuous and uninterrupted occupation for about sixteen (16) years.

e) That at the expiry of twelve (12) years from 6th December 1995, which was on or about 6th December 2007, the title to the suit land, then held by the 1st Defendant following the transfer affected by the 2nd Defendant on the 26th April 2005 following a sale transaction, was extinguished by operations of the law and the 1st Defendant continued to hold the title in trust for the 5th Plaintiff, who acquired the title through adverse possession.

f) That as the Plaintiffs have succeeded in their claim and under **Section 27 of Civil Procedure Act, Chapter 21 of Laws of Kenya** costs follow the event, the Defendants will meet the Plaintiffs' costs.

8. That flowing from foregoing, the court finds that the Plaintiffs have proved their claim on adverse possession over the suit land against both Defendants on a balance of probability. The court therefore enters judgment for the Plaintiffs against the Defendants and orders as follows;

a) **That the 5th Plaintiff is entitled to the whole of Suna East/Wasweta 1/13103 by reason of their being in adverse possession of the same for a period exceeding twelve (12) years.**

b) **That the Defendants' proprietary interests over the said land has been extinguished since 6th December 2007 by virtue of the 5th Plaintiff's adverse possession.**

c) **That the Defendants have since 6th December 2007 been holding the title of the suit land in trust for the 5th Plaintiff, and the title of the said land should now be transferred to the 5th Plaintiff.**

d) **That the 1st Defendant is hereby directed to transfer the suit land to the 5th Plaintiff.**

e) **The Plaintiffs' costs to be met by the Defendants.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF **SEPTEMBER** 2019

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Mr. Orengo for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE