



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 250 OF 2017 (O.S)

(Formerly Kisii Elc case no. 346 of 2016 (O.S)

CLEMENSIA NYABASAMBA MOHERAI (Suing as the legal

Representative of the estate of

MARIA WANKURU GESONGO –Deceased).....PLAINTIFF

VERSUS

SUSANA MBUSIRO MACHERA.....DEFENDANT

JUDGMENT

A) Introduction

1. The suit property herein is LR NO. Bukira/Buhirimonono/4019 measuring approximately 62 feet by 42 feet. The suit property is a sub-division of LR No Bukira/Buhirimonono/3114 (the original property).
2. The plaintiff is represented by Mr. Singei learned counsel instructed by Abisai and Company Advocates.
3. The defendant appears in person.

B) The plaintiff's case

4. The instant suit was commenced by way of an originating summons dated 24th October 2016 and filed in court on 26th October 2016 pursuant to sections 7 and 38 of the Limitation of Actions Act Chapter 22 laws of Kenya, section 1A,1B of the Civil Procedure Act (Cap 21) and Order 37 Rules 7 and 14 of the Civil Procedure Rules 2010 and all other enabling provisions of law. The plaintiff, Clemensia Nyabasamba Moherai (suing as the legal representative of Maria Wankuru Gesongo-Deceased) claims to have acquired title of the suit property. She is seeking determination of issues 1 to 5 set out on the face of the originating summons.
5. The originating summons is anchored on the grounds 1 to 8 on its face. The grounds include that:-

a) LR NO. Bukira/Buhirimonono/4019 measuring 63 X 42 feet was hitherto registered in the name of SUSAN MBUSIRO MACHERA.

b) The applicant's mother ie Maria Wankuru Gesongo (now deceased bought the suit property pursuant to a sale of Land Agreement dated 25th May 1985 from one Samwel Marwa mwita (respondent's late father in law).

c) The applicant and the other family members have been in long, open, continuous and uninterrupted occupation of the suit property since 1985, having entered the suit property at the permission of the respondent's family pursuant to the aforementioned transaction.

d) The applicant's interest(s) over the suit property merits registration.

6. The originating summons is further supported by a 28-paragraphed affidavit sworn on even date by the plaintiff and annexed documents marked as "CNM-1,2,3A,3B,3C and 4" dated 24th October 2016 (PEXhibits 1 to 4). The documents include copies of an agreement, a certificate of official search, photographs of the plaintiff's homestead and grant of letters of administration ad Litem respectively. The plaintiff deponed, inter alia, that following the land transaction between her deceased mother and the deceased father in law of the defendant,

the family of the plaintiff took immediate possession of the suit property. That the respondent further subdivided the original property and registered the same in her name. That the plaintiff and her family members reside on the land which they cultivate and that three (3) of their family members were buried therein. That the plaintiff and her family have been in long, open, continuous and uninterrupted occupation of the suit property since 1985 thus precipitating the instant suit.

7. The plaintiff (PW1) testified and relied on her supporting affidavit sworn on even date as well as her list of documents (PExhibits 1 to 4). She stated that her mother who died in 2002 bought the suit land from the father in law of the defendant.

8. In his submissions dated 8th February, 2019 learned counsel for the plaintiff gave brief facts of the case and framed three (3) issues for determination namely whether the plaintiff has established a case of adverse possession, whether she is entitled to submit property by adverse possession and who should have the costs of the suit. Counsel cited **sections 7, 13(1) and 38 (1) of the Limitation of Actions Act (Cap 22) as well as Article 60(1) (b) of the Constitution of Kenya, 2010** and relied on the case of **Jaber Mohsen Ali and another v Pricillah Boit and another (2014) eKLR** in support of her case.

C) The Defendant's Case

9. The defendant opposed the originating summons by way of her 9-paragraphed replying affidavit sworn on 14th September 2018. She averred, inter alia, that she properly acquired titles in respect of the suit property in her name having inherited the same from her deceased mother. That the plaintiff lacks locus standi to originate this suit which is incompetent, frivolous, vexatious, a sham, misplaced and an abuse of the court process. She is seeking dismissal of the suit with costs.

10. The defendant (DW1) relied on her response to the originating summons and list of her documents dated 12th September 2018. In particular, she did refer to document number 1 namely a certificate of official search in respect of the suit land (DEXh1), in her evidence.

11. In her submissions dated 14th October 2019, the defendant termed the plaintiff's claim not genuine, time barred and should be disallowed. That under the Registered Land Act, a sale agreement is only valid for a period of six (6) months from the date of the transaction

D) Points for determination

12. I have carefully considered the pleadings, including the issues for determination set out on the face of the originating summons, the evidence of PW1 and DW1 and the rival submissions in this suit. The plaintiff's claim is premised on the cited provisions of the law which are noted accordingly. So, has the plaintiff proved adverse claim against the defendant?

13. The points for determination herein are as recognized in the case of **Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another (2015) eKLR**, where the Court of Appeal restated the ingredients of the concept of adverse possession thus:-

a) The parcel of land in question must be registered in the name of a person other than the applicant.

b) The applicant must be in open and exclusive possession of that piece of land in adverse manner to the title of the owner.

c) The applicant must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

E) Analysis of the evidence and the law

14. On the first point, PW1 stated under issue number one (1) for determination set out in the originating summons as well as ground one (1) thereof and paragraph 11 of her supporting affidavit that the suit property is registered in the name of the defendant. PExhibit 2 shows that the proprietor of the suit property is the defendant with effect from 13th November, 2014. I also bear in mind the meaning of the term "**Proprietor**" under **section 2 of the Land Registration Act, 2016 (2012)**.

15. In the case of **Wainaina v Murai and others (1976-80)IKLR 273 at 289/90**, Simpson J (as he then was), made an observation which I absolutely endorse and he stated that:-

"The land in question is registered under the Registered Land Act an Act cited in section 37 of the Limitation of Actions Act..."

16. There is no dispute that the suit property is registered in the name of the defendant under the Registered Land Act (Cap 300 –Repealed) as disclosed in DEXh1. Moreover, at paragraph 5 of her replying affidavit, DW1 stated in part that;

"...I am having the properly acquired titles in respect of the suit parcel in my name..."

17. As regards the second and third points for determination, the plaintiff stated at ground 7 of the originating summons and paragraphs 14, 18 and 20 of her supporting affidavit that she is in open, continuous and uninterrupted possession of the suit property. The defendant merely denies the plaintiff's assertion. The evidence of PW1 as discerned in PEXh3, clearly proves that she is in open and notorious occupation of the suit property.

18. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see **Kimani Ruchine and another v Swift Rutherford Company Limited and another (1976-80) IKLR 1500** and restated in **Titus Ong'ang'a Nyachieo v Martin**

Okioma Nyauma and 3 others(2017) eKLR.

19. The plaintiff asserted that she has possessed and occupied the suit property since 1985. It was affirmed by DW1 who during cross examination stated as follows:-

“...The family of PW1 lives on the suit land. The mother of PW1 died and was buried on the same land. They have built and lived on the land since 1985...”

20. PW1 deponed at paragraphs 14, 17, 19, 20 and 21 of her supporting affidavit that her family and herself have been in the suit property openly, continuously and without interruption since 1985. In her evidence, she relied on the said affidavit and statement which speak to the possession and occupation as noted in **Jaber Ali case (supra)**.

21. It is an important and integral part of the process of proving adverse possession that the land in possession of an adverse possessor be definite as held by the Court of Appeal in **Githu v Ndeete (1984) KLR 776 and Kazungu Katana case (supra)**. In that regard, it was the evidence of PW1 that the suit property is 63 feet by 42 feet in area.

22. It was the contention of PW1 that the defendant subdivided the original parcel of land in her (defendant) favour to the detriment of PW1 and her family. In **Githu case (Ibid)**, it was held that mere change of ownership of land which is the subject matter of a claim for title under adverse possession can not, per se, defeat this claim.

F) Determination/Disposition

23. In the end, it is the finding of this court that PW1 has established that the suit property is registered in the name of DW1. That PW1 has possessed and occupied the said property in an open and exclusive manner for a period in excess of (12) twelve years having dispossessed DW1 of the property. Thus, the plaintiff has proved her claim for adverse possession over the suit property against the defendant on a balance of probabilities.

24. A fortiori, judgment be and is hereby entered for the plaintiff against the defendant in terms of orders sought in the originating summons dated 24th October 2016 and in particular that:

a) A declaration that the plaintiff and any other person claiming under her by way of adverse possession, have acquired title LR. NO. /4019 measuring 63 x 42 feet registered in the name of Susan Mbusiro Macheru, hitherto being a sub-division of plot No. 3114 and further sub-division which came into possession and ownership of Susan Robi Mbusiro by virtue of having succeeded the estate of Samwel Marwa alias Maroa Mwita.

b) The defendant is ordered and directed to execute and /or sign all the necessary transfer instruments to facilitate the transfer and registration of the suit property Bukira/Buhirimonono/4019 measuring 63x 42 feet in the name of the applicant in the default, the Deputy Registrar of this Honourable court be granted liberty to execute the transfer instruments in favour of the applicant herein.

c) The costs of this suit be borne by the defendant.

DELIVERED, SIGNED and DATED in open court at MIGORI this 31st OCTOBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Ms. Okota and Mr. Singei learned counsel for the plaintiff.

The defendant in person.

Tom Maurice – Court Assistant