



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 593 OF 2017

(formerly Kisii ELC CASE NO. 375 OF 2013 (O.S))

SUSLIAH ATIENO WERE

HERINE AKINYI WERE

(Suing as the legal Administratrix of

GEORGE WERE OCHICH, DECEASED.....PLAINTIFFS

VERSUS

HARISON OBADE ODANGO.....1ST DEFENDANT

JOHN OGWENO OBADE.....2ND DEFENDANT

JUDGMENT

1. By an originating summons dated 11th September 2013 and filed in court on even date under Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 and section 38 of the Limitation of Actions Act (Cap 22), the plaintiffs namely Susliah Atieno Were and Herine Akinyi Were (suing as the legal administrator of George Were Ochich -(Deceased), have sued the 1st defendant and 2nd defendants, Harison Obade Ondago and John Ogweno Obade respectively, claiming ownership of the suit land, LR No. Central Kasipul/Kamuma/6241 by way of adverse possession.

2. The suit land is a subdivision of LR. NO. Central Kasipul/Kamuma/1406 (the original parcel of and). Thus, the plaintiffs who are represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates, are seeking the following reliefs;

a) A declaration that the defendants' right to recover the whole LR. NO. Central Kasipul/Kamuma/6241, is barred under the Limitation of Actions Act, Chapter 22 of Laws of Kenya and their title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid portion of parcel of land herein for a period exceeding 28 years.

b) There be an order that the plaintiffs be registered as the proprietors of LR. NO. Central Kasipul/kamuma/6241, jointly as the legal Administratrix of the estate of George Were Ochich, now deceased, in place of the 2nd defendant who currently holds currently holds the title in respect of the suit land.

c) There be an order restraining the defendants either by themselves, agents servants and/or employees from interfering with the plaintiffs' peaceful possession and occupation of LR NO CENTRAL KASIPUL/KAMUMA/6241 in any manner whatsoever and/or howsoever.

d) The Deputy Registrar and /or the Executive officer of the Honourable court High Court be directed and/or ordered to execute the transfer instruments and attendant documents, to facilitate the transfer and registration of LR NO. Central Kasipul/Kamuma/624142, in favour of the plaintiffs.

e) Costs of this originating summons be borne by the defendants.

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

3. The originating summons is supported by the 1st defendant's affidavit sworn on even date and copies of documents marked as "SAW1" to "SAW8", among them, a certificate of death No. 796666, grant of letters administration ad litem in respect of the deceased, George Ochich Were, a green card/ land register and a certificate of official search annexed to the affidavit. By an authority, of even date, the second plaintiff authorized the first plaintiff to plead, act and or swear affidavit(s) as the case may be, on her behalf herein.

4. The originating summons is further premised on grounds (a) to (v) set out on the face of it. The grounds include that:-

i. LR.No. Kasipul/Kamuma/6241,(herein referred to as the suit land), was hitherto part and parcel of LR NO. Central Kasipul /Kamuma/1406 (hereinafter referred to as the original parcel of land).

ii. However, on or about the 21st day of March 2013,the original parcel of land herein was sub-divided and thereby gave rise LR NO.S Central Kasipul/Kamuma/6241 and 6242.

iii. Upon the sub-division of the original parcel of land, the homesteads of the plaintiffs herein fell on and/or forms part of LR NO. Central Kasipul/Kamuma/6241.

iv. The plaintiffs' occupation and possession of LR NO. Central Kasipul/Kamuma/6241 (hereinafter referred to as the suit land) have been continuous and without interruption for a duration of over 28 years.

v. The plaintiffs' entry into the said portion of parcel of land was pursuant to a lawful sale agreement entered into between the plaintiffs' husband and one George Were Ochich, now deceased and the 1st defendant herein, in November 1985.

vi. The entry of the plaintiffs into the suit land and the continued occupation thereof, well after the lapse of the 6 months period, details in terms of paragraph (j) was /is adverse to the interest of the defendants.

vii. The title and/or interest of the defendants herein, over and in respect of the suit land, has lapsed and extinguished.

5. The defendants who were duly served by the plaintiff, did enter appearance on 2nd October 2013 through Achillah T. O and co Advocates. However, they did not file and serve any replying affidavit to the originating summons within the prescribed period of time or at all. Their counsel indicated that they intended to seek leave to apply to cease acting for them by their letter **TOA/GEN/1028/0Y Ref TBA dated 26th February 2014.**

6. On 24th March 2017, J.M Onyango, J sitting at Kisii Environment and Land Court ordered the transfer of the instant suit to this court for hearing and determination. Upon the transfer, the defendants were duly served for hearing as per affidavits of service sworn on 9th March 2019, 28th May 2019 and 1st June 2019, by a duly authorized process server Mr. J. O Okeyo. However, the defendants did not either respond to the notice or attend court thus this suit was heard inspite of their absence.

7. The plaintiff (PW1) testified on 27th March 2019 and relied on her statement dated 30th April 2014. She also relied on her list of documents of the same date,(PExhibits 1 to 12). PW1 stated inter alia,

“ The defendants are my workmates . They sold land to my late husband, George Were Ochich (deceased).....”

8. PW2 , the second defendant and co-wife of PW1, gave evidence and relied on her statement dated 30th April 2019. Basically, her testimony fortified the evidence of PW1 in material aspects.

9. The plaintiffs' submissions dated 30th August 2019 filed on 3rd September, 2019 through their counsel Oguttu, Ochwangi , Ochwal and company advocates are considered. The authorities cited therein include **Githu –vs- Ndeete (1984) KLR 775** which applied the decision in **Gatimu Kinguru –vs- Muya Gathangi (1976) KLR 253 and section 28 of the Land Registration Act, 2016 (2012)** was referred to.

10. I have duly evaluated the plaint, the testimonies of PW1 and PW2 as well as the plaintiffs' submissions. I am guided by the decision of the Court of Appeal in **Galaxy Paints co Ltd v Falcon Grounds Ltd(2000) 2EA 385** on the issues for determination in a suit generally. Issues (i) to (v) for determination set out in the originating summons are hereby endorsed accordingly.

11. As regards title to the suit land, is the registration of the suit land in the name of a person other than the plaintiff as held by the Court of Appeal in **Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another (2015) eKLR ?** PExhibits 3 and 4 show that the original parcel of land LR NO. Kasipul/Kamuma/140 was registered in the name of John Ogweno Obade who is also the proprietor of the suit land as revealed in PExhibits 8 and 9 herein.

12. Admittedly, the suit land was registered under the **Registered Land Act (Cap 300 repealed)**. In that regard, the decision of Simpson J (as he then was) in **Wainaina v Murai and others (1976-80) IKLR 283 at 289/290** is hereby approved and he rendered himself, inter alia;-

“ The land in question is registered under the Registered Land Act an Act cited in section 37.....”

13. This court is conscious of the meaning of the term “proprietor” under section 2 of the Land Registration Act 2016(2012). I also note the interests, rights and certificate of title under **sections 24,25 and 26 of the same Act** respectively. I further note **section 28 (h) of the same Act** in respect of adverse possession.

14. The testimony of PW1 was in part that the defendants are village mates. That the defendants sold land to her land husband, George Were Ochichi (deceased). She further stated that;-

“Our husband was buried on the suit land, LR NO. CENTRAL KASIPUL/KAMUMA/624. We claim it by way of adverse possession . It was formerly LR NO. CENTRAL KASIPUL/KAMUMA/1406. We have lives on the same for thirty (30) years”

15. Additionally, has the applicant must be in open and exclusive possession of the suit land in an adverse manner to the title of the owner? The evidence of PW1 and PW2 with PExhibits 11 and 12 speak to possession and occupation of the suit land by the applicant (PW1) against the title of the owner of the suit land (DW2).

16. Moreover, has the plaintiff been in the occupation of the suit land for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner? PExhibits 12, paragraphs 20, 22, 24 of the supporting affidavit of PW1 and paragraphs 20,22 and 23 of his statement, support ground (f) of the originating summons regarding the period of the plaintiffs possession of the suit land. So, the threshold in **Kazungu Katana case (supra)** has been attained by the plaintiffs in this suit.

17. Notably, Order number 3 sought in the originating summons is to restrain the defendants from the suit land. (I think the plaintiff meant an injunctive relief). It is trite law that three (3) pillars anchor the foundation of an order of injunction; interlocutory or permanent and the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially; see **Kenya Commercial Finance Co Ltd -vs- Afraha Education Society (2001) volume 1EA 86 and restated in Nguruman Limited v Jan Bonde and Nielsen and 2 others (2014) eKLR.**

18. In **National Bank of Kenya Ltd –vs- Shimmers Plaza Ltd (2009) KLR 278 at 283** it was observed that an injunction is an equitable and discretionary remedy. That the duration of an order of injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. This court is mandated to grant preservation orders including interim and permanent injunctions under **section 13(7)(a) of the Environment and Land Court Act, 2015(2011).**

19. The instant case was heard by way of formal proof. In **Kirugi and another v Kabiya and 3 others (1987)KLR 347**, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof.

20. In conclusion, it is the finding of this court that the plaintiffs’ are entitled to the reliefs sought herein as their case for adverse possession is unchallenged, firm and cogent. It has been proved against the defendants jointly and severally on a balance of probabilities as recognized in **Kazungu Katana case (supra) and the decision in Ahmed Abdulkarim –vs- Member for Lands and Mines (1958) EA 436.**

21. Accordingly, judgment is hereby entered for the plaintiffs against the defendants jointly and severally in terms of orders (1), (2), (3),(4) and (5) as set out in the -Originating summons dated 18th September 2013.

22. For the avoidance of doubt, as regards order number 3 sought therein, an order of permanent injunction shall issue accordingly.

23. *It is so ordered.*

DELIVERD SIGNED and DATE at MIGORI this 16th day of OCTOBER 2019.

G.M. A. ONGONDO

JUDGE

In presence of:-

V. Migai holding brief for Oguttu Mboya learned counsel for the plaintiff.

Court Assistant – Tom Maurice