



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 278 OF 2017 (O.S)

(Formerly Kisii Elc case No. 552 of 2015 (O.S)

ENOS ORONY OMOLLO.....PLAINTIFF

VERSUS

RICHARD OTIENO DANDE.....DEFENDANT

JUDGMENT

A-INTRODUCTION

1. The property in dispute is LR N0. Kamagambo/Kabuoro/3565 measuring approximately 0.4 hectares in area (the suit land). It formed part of the original parcel of land number Kamagambo/Kabuoro/1538 situate in Migori County.
2. The plaintiff is represented by O M Otieno and company Advocates. The defendant is represented by learned counsel Mr. Jack Bunde of Ochillo and Company Advocates.

B- THE PLAINTIFF'S CASE

3. On the 16th December 2015, the plaintiff, Enos Orony Omollo commenced the present suit by way of an originating summons dated 15th December 2015 under **sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 37 Rule 7 of the Civil Procedure Rules, 2010 and section 38 of the Limitations of Actions Act(Cap 22)**. He claims to have acquired the title of the entire suit land, LR No. Kamagambo/Kabuoro/3565 measuring 0.4 hectares by way of adverse possession.
4. Thus, the plaintiff has sued the defendant Richard Otieno Dande for determination of the following issues:-
 - a) A declaration that the defendant's right to recover the entire parcel of land otherwise, known as Kamagambo/Kabuoro/3565, measuring approximately, 0.4 hectares, is barred under the Limitation of **Actions Act Cap 22 of Laws of Kenya**, and his title over the said parcel of lands 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 aforesaid portion of 0.4 hectares for a period exceeding 12 years.
 - b) **THAT** there be an order that the Land Registrar (Migori County) do register the plaintiff as the proprietor of the entire parcel of land measuring 0.4 hectares otherwise known as Kamagambo/Kabuoro/3565 in place of the defendant and/or the register thereof be rectified to reflect the plaintiff's ownership of the aforesaid land.
 - c) **THAT** the defendant herein be ordered to execute all the requisite papers necessary to have the plaintiff be registered as the owner of the entire parcel of land otherwise known as Kamagambo/Kabour/3565, measuring 0.4 hectares , 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) **THAT** this Honourable Court be pleased to issue permanent order of injunction against the defendant, his agents, servants and/or employees from whatsoever manner, interfering with the plaintiff's occupation and/or use over parcel of land otherwise known as Kamagambo/Kabuoro/3565, measuring 0.4 hectares under the plaintiff's occupation.
 - e) Costs of this originating summons be borne by the defendant.
 - f) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

5. Briefly, the originating summons is premised on the plaintiff's supporting affidavit sworn on even date and annexed documents marked as "Exhibits 1 to 11 (a) and (b)" including copies of certificate of official search, minutes, land registration card and photographs depicting the situation on the ground. The originating summons is further based on six (6) grounds on its face which include:-

i. THAT the defendant is currently the registered proprietor Kamagambo/Kabuoro/3565, wherein the plaintiff has freely and continuously utilized and cultivated the entire ground acreage measuring 0.4 hectare for over 12 years.

ii. THAT the defendant herein has now threatened to evict the plaintiff from subject parcel of land otherwise known as Kamagambo/Kabuoch/3565 with total acreage measuring 0.4 hectares contending that the said land belongs to him.

6. The plaintiff (PW1) testified on 18th March 2019 and relied on his statement dated 15th December, 2015 in his evidence. He also relied on his list of documents dated 15/12/2015 which include copies of certificate of official search, certificate of death, photographs, green cards/register, mutation and certificate of confirmation of grant.

7. By his statement of the same date, PW1 testified, inter alia, that the suit land formed part of the original parcel of land which was ancestral land and was succeeded and registered in the name of his father, Mariko Ogalo (Deceased) who died on 9th September, 1997. Paragraph 14 of his statement reads:

"That besides, the mutation culminating to the creation of the suit land, that is Kamagambo/Kabuoro/3565, were done secretly after the death of my father and without involving any member of my family and the surveyor never visited the grounds as a result of which the portion of land parcel number Kamagambo/Kabuoro/1538 whereon I had occupied and establish a home was secretly alienated and registered in the name of JANE GRACE DANDE as parcel number Kamagambo/Kabuoro/1365"

8. In his submissions dated 19th July 2019, learned counsel for PW1 made reference to the orders sought in the originating summons, the replying affidavit, the evidence of PW1, and Land Registrar's report dated 9th August 2018. Counsel submitted that the plaintiff has proven the elements of adverse possession and urged the court to allow the Originating summons.

9. Counsel also cited **section 107 of the Evidence Act (Cap 80)**, and relied on the decision in **Kenya Tea Development Authority -vs- Jackson Gachuhi (2006) eKLR** as he framed and analysed the ingredients of adverse possession in favour of the plaintiff.

C-THE DEFENDANT'S CASE

10. The gist of the defendant's case is hinged on his replying affidavit filed in court on 23rd March 2016, whereby he opposed the originating summons. He termed the same unmeritorious and sought its dismissal with costs. The defendant deponed, inter alia, that:-

"The defendant by his deceased wife, Jane Grace Dande bought the suit land from the plaintiff's father, Mariko Ogalo (deceased) and it was subdivided into LR Nos. Kamagambo/Kabuoro/3564 and 3565 for the deceased Mariko Ogalo and the deceased Jane Grace Dande respectively. That the defendant's deceased wife took possession and occupation of the said subdivision before the issuance of title deed in 1998 but thereafter the defendant obtained the same in his name"

11. The defendant (DW1) further deponed that the other subdivision, LR No. Kamagambo/Kabuoro/3564 was further subdivided into LR Nos. Kamagambo/Kabuoro/3604 and 3605 and registered in the name of the deceased Mariko Ogalo and Tabitha Achieng respectively. That upon the death of Mariko Ogalo, the plaintiff became the legal representative, got registered as proprietor of LR No. Kamagambo/Kabuoro/3604 and that he has never possessed and occupied the suit land. He relied on the annexed copies of documents marked as "ROD 1 to ROD 9" which include copies of green card, search certificates and title deed thereof.

12. On 18th March 2019, Mr. Jack Bunde, learned counsel instructed by Ochillo and company Advocates for the defendant told the court that :-

" We pray that defendant's statement dated 11/4/2016 and list of documents dated even date be adopted as his evidence and Exhibits as well as defendants further list of documents 20/2/2019 as DExhibit 8. The defendant's case is closed."

13. Accordingly, the defendant's list of documents dated 11th April 2016 (DExhibits 1 to 7), and the defendant's further list of documents dated 20th February 2019 (DExhibit8) as well as the defendant's statement dated 11th April 2016 were adopted as his evidence.

14. On his part, learned counsel for the defendant, gave the background of the case and respective cases of the parties. Counsel referred to DExhibit8 which is report by the Land Registrar, Migori County and the provisions of the law including **Halsbury's Laws of England, 4th Edition volume 28 paragraph 768 and the Court of Appeal decision in Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui (2017) eKLR** that adverse possession is a common law doctrine. He submitted that the plaintiff has not proved that he has acquired the suit land by way of adverse possession and urged the court to dismiss the plaintiff's suit with costs.

D- ISSUES FOR DETERMINATION

15. I have anxiously studied the entire pleadings, the evidence of respective parties and rival submissions including case law and issues framed for determination in this suit. I am guided by the Court of Appeal decision in the case of **Great Lakes Company (U) Ltd v Kenya Revenue Authority (2009) KLR 720** on issues for determination in a suit generally. I also note issues 1 to 9 in the plaintiff's list of issues

dated 29th April 2016 herein.

16. So, it is my considered view that the points for determination in this suit boil down to what amounts to adverse possession as pronounced by the Court of Appeal in **Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another (2015) eKLR** thus:-

a) The parcel of land 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 an 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

17. On the first issue, paragraphs 4, 21 of the statement of PW1 as well as paragraphs 2 and 21 of his supporting affidavit reveal that the suit land is registered in the name of DW1. Grounds (c) and (g) also disclose that DW1 the current registered proprietor of the suit land as shown in PExhibits 2 and 7.

18. In his replying affidavit, DW1 stated that he obtained title deed (DEXh7) for the suit land upon the death of his wife, Jane Grace Dande. Further, DEXh7 reveals that DW1 was registered as the proprietor of the suit land on 4th September 2013.

19. Moreover, DEXh8 reads in part that:

“According to the records in Migori Land Registry, the contentious land has a title deed registered in the name of RICHARD OTIENO DANDE who does not use in any way or occupy it”

20. Quite clearly, it's common ground that the suit land is registered in the name of DW1 under the repealed **Registered Land Act (Cap 300)** ; see also the decision of Simpson J (as he then was) in **Wainaina v Murai and others (1976-80)IKLR 283 at 289 and 290** which I endorse accordingly.

21. I am very conscious of the meaning of the term “**proprietor**” under **section 2 of the Land Registration Act, 2016(2012)** as read with **sections 24, 25, 26 and 30 of the same Act**. I also note **sections 27 and 28 of the repealed Registered Land Act** regarding proprietorship to land.

22. Be that as it may, in the case of **Kimani Ruchine and another v Swift Rutherford co Ltd and another (1976-80) IKLR 1500**, which applied the decision in **Salim –vs- Boyd (1970) EA 550**, it was held that rights and registration can be challenged on the grounds including adverse possession.

23. As regards the second issue, it is discernable from grounds (b) and (h) of the originating summons that PW1 has been in open, peaceful and uninterrupted possession of the suit land in adverse manner to the title of DW1. The said assertion is denied by DW1 who stated, inter alia;

“ The plaintiff has never been in possession and occupation of land parcel Number Kamagambo/Kabuoro/3565”.

24. On 18th March, 2019, by consent of Mr. Omotto for the plaintiff and Mr. Bunde for the defendant, DEXhibit 8, was adopted by the court. In that regard, I endorse the decision of Mutungi J in **Andrew Marigwa - vs- Josephat Ondieki Kebati (2017) eKLR** regarding such reports. DEXh8 also shows that the first and third born sons of PW1 occupy the suit land.

25. It is not in dispute that the area of the suit land is 0.4 hectares. On that point, I approve the view of Madan J(as he then was) in the case of **Gatimu Kinguru v Muya Gathangi (2008) IKLR 1007 at 1015 (G and F)**, that it is essential that adverse possession should be of the whole or a definite portion of the land in dispute.

26. According to the observations of the Land Registrar in DEXh8, the plaintiff through his agents have established homes on the suit land. That they fenced and cultivate nappier grass and maize thereon as clearly shown in the photographs (PEXhibit 11).

27. It is trite law that possession of the land in dispute can take different forms including fencing and cultivation; see **Kimani Ruchine (supra)** applied in **Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others (2017) eKLR .**

28. In respect of the third issue, DEXhibit8 further shows that DW1 does not use or occupy the suit land. PW1 stated that he has established a home on the suit land as disclosed in PEXhibit 11. Thus, PW1 through his agents have been in open, peaceful, continuous and physical possession, of the suit land for a period in excess of twelve years having dispossessed DW1 herein as noted in **Kazungu Katana case and Halsbury's Laws of England (supra)**.

29. According to paragraphs 7 to 15 of the statement of PW1 and PEXhibits 4, 5 and 12, the deceased by way of transfer acquired the suit land which was a subdivision of the original parcel of land. This court is aware of **section 26(1) of the Land Registration Act, 2016(2012)** with regard to absolute acquisition of title to land by way of transfer subject to exceptions set out thereunder. The fact of subdivision of the original land and transfer of the same suit land permeates the replying affidavit of DW1.

30. It is trite law that mere change of ownership through subdivisions and transfer of the land in dispute under adverse possession cannot, perse, defeat the claim; see **Githu v Ndeete (1984) KLR 776**.

31. In conclusion, it is the finding of this court that the plaintiff has established the ingredients of adverse possession over the suit land. He has proved his case against the defendant on a balance of probabilities.

32. Wherefore, judgement be and is hereby entered for the plaintiff against the defendant in terms of orders 1, 2, 3, 4 and 5 sought in the plaintiff's originating summons dated 15th December 2015 and filed on 16th December 2015.

33. It is so ordered

DELIVERED DATED and SIGNED at MIGORI this 15th day of OCTOBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Sam Onyango holding brief for Mr. Jack Bunde learned counsel instructed by Ochillo and company Advocates for the defendant.

Court Assistant – Tom Maurice