



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 83 OF 2017

DAVID KURIA NJOROGE.....PLAINTIFF

VERSUS

SHABIR HAMISI.....1ST DEFENDANT

EMILY WALENIAORA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated 4/5/2017 and filed in court on the same date the plaintiff sought the following orders against the defendants jointly and severally:-

- (a) A declaration that the land comprised of parcel Nos. Kwanza/Kwanza Block 7/Tonyoto/153 and 168 belong to the plaintiff herein and further that the defendants have no proprietary interest whatsoever in the said land.
- (b) An order that the defendants and anybody else in occupation claiming under them do forthwith move out of the land comprised in parcel Nos. Kwanza/Kwanza Block 7/Tonyoto/153 and 168 and failing which they be forcefully evicted.
- (c) Interest.
- (d) Costs.
- (e) Any other relief that this court may deem fit to grant.

2. According to the plaint **Hamisi Zuberi** was the 1st defendant's father. He sold to the plaintiff **19 acres** being a portion of land **LR. No. 7580** in the **1980s** and put him in possession thereof. That land was large and the plaintiff's name was included in the farm area list. Subsequently the farm land was subdivided and titles issued to individuals including the plaintiff who got parcel **Nos. Kwanza/Kwanza Block 7/Tonyoto/168** (measuring **8 acres**) and **Kwanza/Kwanza Block 7/Tonyoto/153** (measuring **11 acres**) which are separated by a river. However before his titles were issued Hamisi Zuberi's wife and two sons the 1st defendant being one of them lodged a Land Disputes Tribunal case claiming **9 acres**. This was after Hamisi Zuberi had died in **2005**. The Land Disputes Tribunal awarded them the **9 acres** and was adopted as a judgment of the court in **Kitale CMCC No. 2 of 2009**. On appeal to the Rift Valley Provincial Appeals Committee (**Appeal No. 17 of 2009**) the appeal was allowed and the appeal award was also filed in **Kitale CMCC No. 2 of 2009** the same case in which the tribunal award had been filed. Meanwhile the claimants had occupied **plot No. 168** (8 acres) and an additional **1 ½ acres** within **plot No. 153** despite stay orders issued in **Kitale CMCC No. 2 of 2009**. Subsequently the claimants challenged the Provincial Appeals Committee award in **Kitale HCCA No. 1 of 2010** which was dismissed with costs on 31/1/2017. Hamisi Zuberi's wife and her one son then died and left the 2nd defendant who was the son's wife, together with the 1st defendant on the suit land. Owing to the termination of all the proceedings mentioned above (save the tribunal decision) in favour of the plaintiff he avers that the defendants are trespassers on both LR. No. 168 and 153 hence the prayers in this suit.

The Defendants' Defence and Counterclaim

3. The defendant entered appearance and filed defence and counterclaim dated 23/5/2017 and filed on 29/5/2017. The defendants defence denies the claim and aver that the plaintiff colluded with the officials of Tonyoto Farm to secure registration of the land in his name; that the decisions in favour of the plaintiff were made on basis of the technicalities and not merit and they rightfully occupy 9 acres. In the counterclaim they pray for the following orders:

- (a) An order that the defendants are entitled to remain on and utilize 9 acres by way of adverse possession.

(b) An order directing the land registrar to cancel title in favour of the plaintiff and issue the defendants with a title deed for 9 acres.

(c) Costs.

(d) Any other relief.

4. This suit proceeded to hearing on 28/2/2019 and 25/7/2019.

The Plaintiff's Reply to Defence and Counterclaim

5. In his reply to defence and defence to counterclaim filed on 20/6/2017 the plaintiff join issues with the defendants on the matters contained in the defence and reiterates the contents of the plaint. He denies that the decisions of Tribunal and the Rift Valley Appeal Committee were based on technicalities and asserts that the Rift Valley Provincial Appeal Committee heard the parties and received documents in evidence. The claim for adverse possession by the defendants in their counterclaim was also denied on the basis that titles to the suit lands were issued in the year 2012 and therefore a claim based on adverse possession would be premature. It was also averred that in the light of appeals decision the question of ownership of the land is *res judicata*.

The Plaintiff's Evidence

6. The PW1, Isaac Marasi, Archivist at Kitale Law Courts testified on 28/2/2019. He produced the original file record for Kitale CM Land Case No. 2 of 2009 Hatifa Hamisi and 2 Others -vs- David Kuria Njoroge as P. Exhibit 1.

7. PW2 Melaine Mjomba, a Clerical Officer at the Kitale High Court Civil Registry testified on the same date. She produced the original file record for Kitale High Court Civil Appeal No. 1 of 2010 between Ratifa Hamisi and Others -vs- David Kuria Njoroge as P. Exhibit 2.

8. PW3, David Kuria Njoroge, the plaintiff herein testified on 28/2/2019. He adopted his statement dated 4/5/2017 as evidence-in-chief in this case. He reiterated the matters in the plaint and produced several documents in evidence as follows:

(a) Sale agreement for 19 acres between him and Hamisi Zuberi (P. Exhibit 3).

(b) Certified copy of title for Plot No. 168 (P. Exhibit 4).

(c) Certified copy of title for plot No. 153 (P. Exhibit 5).

The Defendant's Evidence

9. DW1, Shabir Hamisi, 1st defendant testified on 25/7/2019. His evidence was that the 2nd defendant is his sister-in-law who is the widow to his late brother Zuberi Chogo Hamisi. That the plaintiff had leased the suit land now comprised in the two parcels No. 168 and 153 from their father; that there was no agreement for sale; that he came and bought 10 acres but never bought the 9 additional acres. That the defendants live on the land comprising of the 9 acres that remained. That is more than 30 years old. That he acknowledges that the plaintiff got title documents over the land but they are not valid. On cross-examination he admitted that his mother is Ratifa Hamisi and his father is Hamisi Zuberi. He admitted that there was a tribunal dispute seeking 9 acres and that the tribunal decision in favour of the claimants therein was reversed by the appeals committed. That they took possession of the land pursuant to the land disputes tribunal decision and that he does not know whether the appeal that they filed against the Provincial Appeal Committee decision was dismissed or not.

SUBMISSIONS

10. The plaintiff filed written submissions on 22/8/2019. I have perused through court record and found no submissions filed on behalf of the defendants. I have considered those submissions.

DETERMINATION

11. The issues for determination

(1) Was the registration of the plaintiff as the proprietor of the suit lands irregular?

(2) Are the defendants entitled to the 9 ½ acres that they occupy which forms part of the plaintiff's land by way of adverse possession?

(3) What orders should issue?

12. The issues are addressed as herein under:

(1) Was the registration of the plaintiff as the proprietor of the suit lands irregular?

13. The plaintiff has set out clearly how he acquired the suit land. He produced a certified copy of the agreement dated 13/3/1988 (**P. Exhibit 3**) which shows that he purchase 19 acres from Hamisi Z. Mulusa and his wife is identified in the agreement as Ratifa M. Five persons are listed as having witnessed the agreement and their signatures alongside their names. The proceedings before the Tribunal and the Appeals Committee have been proved by production of the original file records for **Kitale CMC Land Case No. 2 of 2009** and its resultant appeal **Kitale HCCA No. 1 of 2010**. It is clear that the tribunal dispute lodged by the claimants who were the predecessors to and relatives of the defendants was processed to the highest level - appellate level - and that in the end those proceedings ended in favour of the plaintiff herein. The judgment in the Appeals Committee case was registered in **Kitale CMC Land Case No. 2 of 2009**. In contrast with this evidence the defendants have not put forward any evidence to prove that the registration of the plaintiff as the proprietor of the suit land is irregular. I agree with the plaintiff when he states in his reply to defence and counterclaim that the issue of ownership of the suit land is *res judicata* having been determined in the series of proceedings set out hereinabove. The finding of this court is that the titles issued to the plaintiff in respect of the two parcel of land were regularly issued.

(2) Are the defendants entitled to the 9 ½ acres that they occupy which forms part of the plaintiff's land by way of adverse possession?

14. Adverse possession is provided for by **Section 38 (1) Limitation of the Actions Act** that provides as follows:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

15. **Order 37 rule 7 of the Civil Procedure Rules** states as follows:

7. (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.”

16. The procedure provided for by the rules is that the claim for adverse possession shall be by way of an originating summons.

17. In **Edwin G. K. Thiongo & another v Gichuru Kinuthia & 2 others [2015] eKLR** the Court of Appeal was of the view that a claim for adverse possession could not be competently brought by way of a counterclaim in the manner in which the defendants have done in these proceedings.

18. However in the more recent case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR**, the Court of Appeal, quoted with approval the case of **Gulam Miriam Noordin v Julius Charo Karisa [2015] eKLR Malindi Civil Appeal No.26 Of 2015 (Makhandia, Ouko & M'inoti, J.J.A.)** in which that question arose.

19. In the **Gulam** case the court had observed as follows:

“That position is no longer tenable. Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons.”

20. Later on in the **Gulam** case (supra) the court stated as follows:

“When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's was so extinguished. By Section 3(2) of Appellate Jurisdiction Act we order the appellant do transfer the suit property to the respondent at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar, High Court, Malindi will execute on behalf of the appellant all the necessary transfer documents.”

21. There is no doubt then that the court has moved shifted from the position that a claim for adverse possession may only be commenced by way of an Originating Summons.

22. On this issue it must be remembered that for a claimant to establish that he is entitled to land by way of adverse possession he must prove that he has been in actual possession of that land in manner adverse to the interest of the title holder for a period of at least **12 years**.

23. He must also establish that he has been in possession *nec per vim, nec clam, nec precario*, that is, open, uninterrupted, notorious, exclusive and continuous possession for the aforesaid period.

24. In the case of **Kweyu vs Omuto 1990 KLR 709** the Court of Appeal stated as follows:

“Thus whereas possession is a matter of fact the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings on facts - see KJ Rustomji on the Law of Limitation and Adverse Possession, Volume 2 5th Edition at pages 1374 and 1375. At pages 1366 and 1367 this author as the following to say:

“By adverse possession is meant a possession which is hostile, under a claim of colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers and indefeasible title upon the possessor.”

25. The preliminary inquiry of this court regarding adverse possession will focus on whether the defendants have been in possession of the suit land for the requisite period of **12 years**.

26. In this court’s view there is evidence that they have lived on the land for more than **12 years**.

27. However an adverse possessor’s claim must be raised against an identifiable title holder against whom the period of **12 years** can begin to run.

28. In the case of **Edwin G. K. Thiongo & another v Gichuru Kinuthia & 2 others [2015] eKLR Civil Appeal No. 267 Of 2007** the Court of Appeal **Sichale, Odek & Kantai, JJ.A** stated as follows:

”As can be discerned from the record, the vendor and the respondents were step brothers and the suit land belonged to their father, the late Mbaria Gachoka. The vendor and the respondents lived on the suit land and the court in entering judgment in favour of the respondents noted that the respondents had lived on the land for a period of over 40 years. However, the elders award which we have stated was adopted as the judgment of the court, gave the vendor plot No. Dagoretti/Thogoto/836. This is the plot that the vendor sold to the 1st appellant and who subdivided it into two. The 1st appellant and the predecessor of the 2nd appellant were registered as owners of plots No. Dagoretti/Thogoto/1191 and Dagoretti/Thogoto/1192 on 17th May, 1990 and 25th April, 1995 respectively. The suit, the subject of this appeal was filed on 3rd April, 2002, before the expiry of 12 years. In our considered view, the learned judge erred in finding that the respondents had acquired the land under the doctrine of adverse possession on the basis that they had been on the land for over 40 years. The occupation by the respondents of the suit land before the registration of the suit land in favour of the 1st and 2nd appellants was not adverse, as they lived on this land by virtue of being the children of the late Mbaria Gachoka. Their claim to the 1st and 2nd appellants land did not span for the period of over 40 years that they had been on the land as the 1st appellant became a registered owner on 17th May, 1990. The period of limitation could only run from that date and as stated above, this suit was filed on 3rd April, 2002 before the expiry of the 12 years.”

29. Before **2012** title had not been issued in respect of the suit land and therefore there was no paper title holder against whom time could run. Before then the defendants had been living on the suit land as the descendants of Zuberi Hamisi. Adverse possession could not be inferred against him and the defendants do not seek that inference in this suit. However it has been established that Zuberi Hamisi sold the land to the plaintiff before it was registered land.

30. The plaintiff was registered as the proprietor in the year **2012**. Time began running that year. However it ceased running when the plaintiff filed the instant suit for eviction in **2017**. By then only 5 years of the requisite 12 years had run in favour of the defendants. For orders declaring adverse possession to exist to issue all the ingredients of adverse possession must be in existence at the same time. However in the instant case, one crucial condition for grant of adverse possession orders - the full run of the statutory 12 year period - has not been successfully established.

31. There must also be an intention to hold the land against the interests of the title holder. In the case of **Kweyu (Supra)** the Court of Appeal held as follows:

“The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely.....the intention of the dispossessor is to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right.”

32. The defendants only came to know of the title to the plaintiff later. They compound this by disputing the title held by the plaintiff. I am persuaded by the case of **Haro Yonda Juaje v Sadaka Dzenge Mbauro & another [2014] eKLR** in which Angote, J observed as follows:

“Can one claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land and that he only learnt of the true owner a few years ago (less than 12 years)? I do not think so. I say so because as was held in the Wambugu case (supra), the mere fact that one has been in possession of land for more than 12 years is not enough. In fact, the assertion by a claimant that he was not aware that the land was registered in favour of some person against whom time could start running means that he did not have the *animus possidendi* to acquire the land by way of adverse possession and he can therefore not be able to succeed to defeat the title of the true owner.”

33. When title of the registered owner is denied this so dilutes the claim of adverse possession as makes it unmaintainable.

34. It is clear therefore that the entire limitation period having not run in favour of the defendants and *animus possidendi* not having been established by the defendants, it is futile to launch an inquiry into whether their possession was peaceful, open and uninterrupted. The

defendants' claim must fail.

(3) What orders should issue?

35. In view of forgoing I find that the plaintiff has established his claim against the defendants on a balance of probabilities and he is entitled to the prayers sought in the plaint. I therefore enter judgment in favour of the plaintiff against the defendants jointly and severally and I issue the following orders:

(a) A declaration that the land comprised of parcel Nos. Kwanza/Kwanza Block 7/Tonyoto/153 and 168 belong to the plaintiff herein and further that the defendants have no proprietary interest whatsoever in the said land.

(b) The counterclaim is dismissed.

(c) An order that the defendants and anybody claiming under them do forthwith vacate the land comprised in parcel Nos. Kwanza/Kwanza Block 7/Tonyoto/153 and 168 and in default they be forcefully evicted.

(d) The defendants shall bear the costs of this suit and of the counterclaim.

Dated, signed and delivered at Kitale on this 9th day of October, 2019.

MWANGI NJOROGE

JUDGE

9/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ndarwa holding brief for Kiarie for plaintiff

Ms. Arunga for defendants

COURT

Judgment read in open court at 12.45 p.m.

MWANGI NJOROGE

JUDGE

9/10/2019