



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 545 OF 2017

(Formerly Kisii Elc Case no. 162 of 2014 (O.S))

JOSEPH OTIENO MILOWA.....1ST PLAINTIFF

EZEKIEL OTIENO OSODO.....2ND PLAINTIFF

VERSUS

JOHNSON ODIDA OKECH.....DEFENDANT

JUDGMENT

1. By an originating summons dated 10th of April, 2014, and filed in court on 17th April, 2014 under Order 37 Rule 7 (1) and (2) of the Civil Rules, 2010, the plaintiffs namely Joseph Otieno Milowa and Ezekiel Otieno Osodo sued the defendant, JOHNSON ODIDA OKECH and they claim to be in adverse possession of a portion of land parcel No. Kabuoch/K-Koguta/1999 measuring approximately 3 ½ acres (the suit land). They are represented by G.S. Okoth and Company Advocates.

2. Thus, the plaintiffs are seeking determination of the issues, inter alia;-

i. Whether there was a contract of sale of land between Janes Milowa Ombagwa (deceased) and the defendant herein concerning a portion of land parcel No. Kabuoch/K-Koguta/1999 measuring approximately 3 ½ acres? And if so what the consideration thereof and was the same paid in full?

ii. Whether the deceased purchaser took possession of or was in occupation of the said land till his demise in the year 2005; and if so for how many years was he in possession thereof before his death?

iii. Whether the deceased proprietor being the father to the plaintiff's herein put the plaintiff's in possession or occupation thereof; and if so when did the plaintiffs start to occupy the same?

iv. Whether the plaintiffs by virtue of being the sons to the aforesaid purchaser of the suit portion of land have acquire rights by adverse possession and should now be registered as the proprietors of the said portion of land?

v. Whether the defendant is obligated to transfer the said portion of land parcel No. Kabuoch/K-Koguta/1999 measuring approximately 3 ½ acres to the plaintiffs who are now in possession and occupation of the said portion of land?

vi. Whether the defendant should be stopped from claiming ownership of the said portion of land by virtue of the fact that he had sold the same to Janes Milowa Ombagwa (deceased) the father to the plaintiffs and give the possession thereof?

3. The originating summons is anchored on a supporting affidavit by the 1st plaintiff, Joseph Otieno Milowa sworn on even date for and on behalf of the 2nd defendant and himself. The said affidavit is accompanied by copies of documents including an agreement dated 7th August 1995 marked as "JO-1" (PExhibit 4), a certificate of official search dated 18th June 2012 marked as "JO-2" (PExhibit 1), certificate of death No. 121,212 issued on 22nd August 2011 in respect of the deceased, Janes Milowa Ombagwa, the father of the 1st plaintiff (PExhibit 3) and a limited grant of letter of administration ad litem issued to the 1st plaintiff in Homa-Bay SRM's Court Succession cause number 168 of 2011 (PExhibit 6).

4. Briefly, the plaintiff's claim is that on 6th April, 1989, the deceased Janes Milowa Ombagwa and the defendant entered into Exhibit 5 for the sale of the suit land. That immediately the deceased and his family members, among them, the 1st plaintiff, settled on the land until the demise of the deceased on 4th April, 2005. That the plaintiffs have been in occupation and possession of the suit land peacefully, continuously and without any interruption for over 30 years hence provoking the instant suit.

5. The defendant through Odingo and Company Advocates entered an appearance herein by way of a memorandum of appearance dated 29th April, 2014 and filed in court on 23rd May 2014. Learned counsel Mr. Kaburi and Mr. Gembe held brief for Mr. S. Odingo learned counsel for the defendant on 23rd March 2017 and 14th March 2019 respectively.

6. The defendant failed to file and serve any reply to the originating summons in spite of court's directions of 19th November 2018. He has not given any reasons for such failure.

7. On 22nd July, 2019, the present suit was heard in the absence of the defendant's counsel as the date was taken in the presence of counsel for the respective parties and in the spirit of **Article 159 (2) (b) of the Constitution of Kenya, 2010**. The 1st plaintiff (PW1) relied on his statement dated 27th February 2019 and list of documents dated 6th November 2018 (PExhibits 1 to 8). In support of their case, PW1 called three (3) witnesses namely Margaret Achieng Otieno (PW2), Patricia Adhiambo Oreta (PW3) and Daniel Ochieng Milowa (PW4).

8. In his submissions dated 3rd September 2019, learned counsel for the plaintiff gave brief facts of the case and invited the court to determine whether the plaintiffs are entitled to the suit land by adverse possession and whether this court has jurisdiction to grant the orders sought herein. Counsel cited the relevant law namely **section 28 (h) of the Land Registration Act, 2016 (2012), the case of Public Trustee –v- Wanduru (1984) KLR**, the decision in **Mtana Lewa –vs- Kahindi Ngala Mwangandi (2015) e KLR**, the case of **Wambugu – vs- Njuguna (1983) KLR 172** and **section 38 of the Registered Land Act (Cap 300)**.

9. Counsel submitted that the plaintiffs have adduced enough evidence to prove that they are entitled to the suit land. He urged this court to grant the orders sought in the originating summons.

10. I have carefully considered the plaintiff's case in its entirety and their submissions including the authorities cited therein. I bear in mind the Court of Appeal decision in **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720** regarding issues for determination in a suit generally. I approve the issue for determination framed in the plaintiffs' submissions. So, have the plaintiff's proved their case against the defendant to the requisite standard to entitle them to the reliefs sought on the face of the originating summons?

11. The originating summons is brought under **Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules, 2010** which provides:-

“ (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.”

12. In the case of **Wainaina –vs- Murai and other (1976-80) 1 KLR 382 at 289 of 290** Simpson J (as he then was) made an observation which I endorse for being relevant herein that the land in question was registered under the **Registered Land Act (Cap 300 repealed)** an act cited under **section 38 (supra)** In the instant suit, the suit land is approximately 3 ½ acres in area and is comprised of land registered in the name of the defendant as at 9th July 2003 under the Registered Land (Cap Repealed) as revealed in PExhibits 1,2,4, and 5.

13. On whether the plaintiffs are entitled to the suit land, PW1 relied on PExhibits 1 to 8 and asserted that he has acquired ownership of the land by way of adverse possession. He prayed for a declaration and costs in his favour accordingly.

14. The testimonies of PW2, PW3 and PW4, who relied on their respective statements as part of their evidence reveal that PW1 and the 2nd plaintiff have acquired interest in the suit land. The plaintiffs have challenged the rights and registration of the defendant by way of adverse possession; see **Tayebali Adamji Alibhai –vs- Abdul Hussein. Adamji Alibhai (1938) 5 EACA 1** applied by Kneller J in **Kimani Ruchine and another –vs- Swift Rutherford Company Ltd (1976-80) 1 KLR 1500 and Salim –vs- Boyd (1971) EA 550**.

15. The plaintiffs have demonstrated by way of PExhibit 8 that they are in possession and occupation of the suit land. In that regard, I approve the position taken by Madan J (as he then was) in **Gatimu Kinguru –vs- Muya Gathangi (1976-80) KLR 317 at 325** where he held that :-

“The defendant's possession was open and notorious..... There was ouster of the plaintiff from the land followed by adverse possession, occupation development and cultivation of the land by the defendant”

16. The instant suit is hinged on **sections 7,13 and 38 of the Limitation of Actions Act (Cap 22)** as well as other legal provisions. I subscribe to the view of Ouko, JA in **Mtana Lewa case (supra)** at page 230 of 24 paragraph 4, inter alia,

“and that the third party has asserted a hostile title and dispossessed the true owner.....”

17. The evidence of PW1, PW2, PW3 and PW4 discern that the plaintiffs have had open and notorious occupation and possession of the suit land for a period in excess of 12 years. In view of the holding in **Wambugu case (supra)**, the plaintiffs' evidence and the prevailing circumstances, the plaintiffs have dispossessed the defendant of ownership of the suit land.

18. I find the plaintiffs' case unchallenged, steadfast and cogent. They have proved the same against the defendant on a balance of probabilities (see the Court of Appeal decision in **Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another (2015) eKLR**).

19. Accordingly, I enter Judgment for the plaintiffs jointly and severally against the defendant as hereunder:-

- a) A declaration that the plaintiff have acquired by adverse possession an absolute title to three and half (3 ½) acres of LR NO. Kabuoch/K-Koguta/1999 which they possess and occupy.*
- b) A declaration that the plaintiffs are entitled to an order under section38 of the Limitation of Actions Act (Cap 22) to be registered as joint proprietors of that suit land namely three and half (3 ½) acres in place of the defendant who shall execute a valid transfer in favour of the plaintiffs free from any encumbrances, in default the executive officer of this court to execute accordingly.*
- c) The defendant should be and stopped from claiming ownership of the said portion of land by virtue of the fact that he had sold the same to Janes Milowa Ombagwa (deceased) the father to the plaintiffs and given the possession thereof.*
- d) A permanent injunction to issue against the defendant, his agents, servants or anybody deriving authority from him, restraining him from evicting, dispossessing or in any way interfering with the plaintiff's occupation, use and quite enjoyment of the said portion of land.*
- e) Whether the defendant should be ordered to pay compensation to the plaintiffs for any losses incurred through the acts of the defendant in refusing to relinquish his claim to the suit land and subsequently transfer the same to the plaintiff.*
- f) Who should pay the costs of this suit.*
- g) The defendant to bear the costs of this suit*

DELIVERED, DATED and SIGNED at MIGORI this 8th day of OCTOBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Singei holding brief for Mr. G.S. Okoth learned counsel for the plaintiff.

Tom Maurice – Court Assistant