



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 673 OF 2017

(Formerly Kisii ELC Case no. 27 of 2012 (O.S))

JOSEPH OMBURO OPUDO.....PLAINTIFF/RESPONDENT

VERSUS

MARK OTIENO OKODE.....1ST DEFENDANT/APPLICANT

CALEB OKODE.....2ND DEFENDANT/APPLICANT

JUDGMENT

1. On the 30th day of January 2012, the plaintiff, Joseph Omburo Opudo through G.S. Okoth and Company Advocates commenced the instant suit by way of an originating summons dated 16th January 2012 pursuant to Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010. He claims to have acquired title to the suit land, **LR NO. GEM/KOMOLO/412** measuring approximately 4.4 hectares by way of adverse possession and for determination of questions 1 to 8 on the face of the originating summons.

2. The originating summons is anchored on the plaintiff's supporting affidavit sworn on even date together with accompanying documents marked as "JO-1" to "JO-7B" which include copies of the green card, adjudication record and a certificate of official search in respect of the suit land. The plaintiff deponed, inter alia, that he is sole surviving child of Benard Apudo Buong (deceased) who was on 23rd July 1976 registered as the sole proprietor of the suit land which is the ancestral family land measuring approximately 4.4 hectares in area. That the deceased had inherited the suit land from his late father, Buong, who was first registered in the adjudication register on 13th March 1972. He also deponed that he was born in 1975, grew up, got married and sired children while living on the suit land and that he still lives thereon together with his wife and two children. That the deceased died on 8th November 1998 and bequeathed the suit land to him as the sole heir to his estate.

3. The plaintiff further deponed that in November 2005, Jeremiah Ogindi Awiti entered the suit land and started cultivating the same. That upon raising the complaint with the Chief, Gem West location and the District Officer, Rangwe Division, he was advised to effect a search in the land registry which he did and it showed that on 5th September 1986, the whole land was transferred and registered in the name of Joshua Okode Aloo, a brother in law to Jeremiah Ogindi Awiti. He then filed a case before Rangwe Division Land Disputes Tribunal against Jeremiah Ogindi Awiti. The dispute was heard and determined in favour of the plaintiff who has had quiet, continuous and uninterrupted occupation of the suit land for over 20 years thus provoking the instant suit.

4. In a replying affidavit sworn on 23rd February 2012 by the 2nd defendant (DW2) for and on his own behalf and on behalf of the 1st defendant, the plaintiff's claim is denied. The defendants seek dismissal of the suit with costs. The 2nd defendant deponed, inter alia;

a) "THAT I am a brother to the 1st defendant herein, Mark Otiemo Okode and we are sons to the late, Joseph Okode Aloo.

b) THAT prior to his death as foresaid, my deceased father purchased land parcel No. Gem/Komolo/412 from one Benard Apudo Buong who is now also deceased.

c) THAT I verily know that the plaintiff has no direct right of claim of property from the estate of the late Benard Apudo Buong, but has rightful and lawful claim of inheritance from the estate of the late Odemba Buong where his mother was married.

d) THAT I verily know that the plaintiff has not come to the Honourable court with clean hands as the claim herein is fictitious and has no basis besides being misconceived since a period of 12 years has not elapsed since he entered the suit land despite the orders by the provincial administration and Land Disputes Tribunal's ruling and in the circumstances, the claim herein is made

in bad faith and is not or at all meritorious.

e) THAT the plaintiff has not acted in accordance with the law as he has not obtained letters of Administration Ad litem to act as such in place of the deceased ,Benard Apudo Buong hence the suit herein is a none starter and should not be entertained before a competent court of law.”

5. On 24th October 2013, Okongo J sitting at Kisii Environment and Land Court (ELC) gave directions that the originating summons and the replying affidavit be treated as plaint and statement of defence respectively. That the matter be heard by way of viva voce evidence. On 22nd May 2017, Kullow J sitting at Kisii ELC Kisii ordered that the suit be transferred to this court for hearing and determination.

6. During hearing of the suit on 26th September 2018, the plaintiff (PW1) relied on his supporting affidavit sworn on 16th January 2011 and list of documents annexed to the affidavit and marked as “JO-1 to 7B” (PEXhibits 1 to 7B). He called a witness Lucia Adongo Omburo (PW2) who relied on her statement dated 3rd April, 2014 as part of her evidence in this suit.

7. The 1st defendant (DW 1) as well as Caleb Otieno Okode (DW 2) did testify that PW1 should vacate the suit land. DW 2 relied on his replying affidavit sworn on 23rd February 2012 and copy of title deed issued on 19th September 1986 in respect of the suit land (DEXhibit 1).

8. In his submissions dated 2nd April, 2014 and filed on even date, learned counsel for the plaintiff urged this court to allow the orders sought in the originating summons. He relied on the case of **John Imbaize Vodoye –vs- Ann Chebet and another (2017) eKLR and Samwel Nyandiga Ondiwa –vs- Joash Winyo Ongayo and AFC Kisii ELCC No. 115 of 2013** as persuasive decisions and **Ndatho –vs- Itumo and 2 others (2002) eKLR, Philip Odhiambo and 3 others –vs- Mathew Ismael Ouma Achieng (2015) eKLR**, to buttress his submissions.

9. On the other hand, the defendants submitted that the plaintiff has not filed any evidence to prove that the suit land belongs to him and urged the court to dismiss the suit with costs by their submissions dated 10th May 2019 and filed in court on 13th May 2019. They also submitted that the plaintiff filed a claim in the Land Disputes Tribunal at Rangwe but the claim was dismissed and court adopted the same on 27th October 2011. That their late father, Joshua Okode Aloo obtained the suit land through due diligence and was procedurally registered as it’s owner hence the plaintiff is a trespasser thereon.

10. I have duly considered the original summons, the replying affidavit, the testimonies of PW1, PW2, DW1 and DW2 as well as submissions of the respective parties. Bearing in mind the Court of Appeal decision in the case of **Galaxy Paints Company Ltd –vs- Falcon Grounds Limited (2000) 2EA** with regard the issues for determination in a suit generally, I endorse questions 1 to 8 on the face of the originating summons that:-

a) Whether there was a contract of sale of land between the plaintiffs’ father, Benard Apudo Buong and the deceased proprietor Joseph Okode Aloo concerning land parcel no. Gem/Komolo/412? And if so what was the consideration thereof and was the same paid in full and what was the size of the portion purchased and was the agreement written or oral.

b) Whether the deceased proprietor put the purchaser in possession or occupation and whether the vendor ever surrendered possession of the said land to the purchaser.

c) Whether the said occupation of the said land by the beneficiaries of the estate of Benard Apudo Buong amount to adverse possession and if so what is the effect thereof

d) Whether Joseph Okode Aloo now registered as the proprietor on second registration acquired the registration fraudulently or through a valid contract of sale? And if so do the rights of his beneficiary override the rights of the occupiers who have acquired rights by adverse possession.

e) Whether an injunction should issue against the defendant their agents, servants or anybody deriving authority from them, restraining them from evicting, dispossessing or in any way interfering with the plaintiff’s occupation, use and quite enjoyment of the suit land.

f) Whether the defendant should be ordered to pay compensation to the plaintiff for any losses incurred through the acts of the defendant in refusing to transfer to the plaintiff the suit land.

g) Who should pay the costs of this suit.

h) That such orders may be issued by the court as may attain the ends of justice.

11. On the first issue, I note the supporting affidavit of PW1 and paragraph 4 of the replying affidavit of DW2 who also testified, inter alia, that the suit land belongs to his late father, Okode Aloo who died in the year 2004. That his said father bought the land from the late Benard Apudo Buong who was an uncle to PW1 in 1986. PW1 and PW2 disputed the allegations made by DW 2.

12. During cross-examination, DW2 maintained that his late father bought the suit land in 1986. On further cross-examination, he stated thus:-

“..... We hold a legal title deed to the land. We have no document between my late father and the late father of PW1 in relation to the sale of the land.....” (Emphasis added)

13. In the case of **Sumaria and another –vs- Allied Industries Ltd (2007) 2 KLR**, it was observed that the plaintiff had based it's claim on the verbal agreement made in 1986 and did not allege any agreement in writing. The law of Contract Act and the amendment by Act No. 21 of 1990, was referred to. The same applies very handy as regards the defendants' allegations in response to the plaintiff's claim hence there was no written agreement with any consideration or at all in respect of the alleged sale of the suit land.

14. On the second, third and fourth issues, PW1 asserts that he has lived on the suit land quietly and continuously without any interruption since 1975. During cross-examination he testified that :-

“ I was born in 1975 and I have been living on the land.....”

15. The statement of PW2 is in absolute support of the evidence of PW1. I note the same accordingly.

16. DW1 and DW2 stated that PW1 and not themselves does cultivate the land. That PW1 built on the land in dispute.

17. It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute ; see **Kimani Ruchine and another –vs- Swift Rutherford company Limited and another (1976-80) 1KLR 1500** applied in **Titus Ong'ang'a Nyachio –vs- Martin Okioma Nyauma and 3 others (2017) eKLR**.

18. It is admitted by DW1 and DW2 that PW1 built on the suit. Thus, it cements the plaintiff's claim that he has established himself together with family members on the land. Accordingly, I approve the decision of Madan J (as he then was) in **Gatimu Kunguru –vs- Muya Gathangi (1976-80) 1 KLR 317** where he held, inter alia;

“The defendant's possession was open and notorious..... There has been no discontinuation of possession by the plaintiff since 1959.....There was ouster of the plaintiff from the Land followed by adverse possession, occupation, development and cultivation of the land by the defendant.....” (Emphasis laid)

19. I take into account the authorities cited in the submissions and PExhibits 1 to 7 (B) as well as DExhibit 1. I am aware that a person asserting adverse possession must prove the same as provided under **sections 107 and 108 of the Evidence Act (Cap 80)** and the Court of Appeal decision in **Wilson Kazungu Katana and 101 others –vs- Salim Abdullah Bakshwein and another (2015) eKLR**.

20. It is evident that plaintiff has had adverse entry, exclusive physical possession with manifest unequivocal intention of dispossessing the owner of the suit land. His possession of the land has been open, uninterrupted and adverse to the title of the registered owner; see **Kazungu Katana case (ibid) and Philip Odhiambo case (supra)**.

21. As regard an injunctive relief, PW1 has established that he is the lawful owner of the suit land to which he is entitled under **Article 40 (1) of the Constitution of Kenya, 2010**. It is important to note that under **section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)**, a permanent injunction is available to him and I would grant the same in the circumstances.

22. In conclusion, I find that the plaintiff has proved that he has acquired the ownership of the suit land by adverse possession. He has established so on a balance of probabilities against the defendant jointly and severally as recognised in the case of **Ahmed Abdulkarim –vs- Member of Lands and Mines (1958)EA 436 at 441**.

23. Wherefore, Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in the following terms:-

a) A declaration that the plaintiff has acquired by adverse possession an absolute title to the suit land LR.No. Gem/Komolo/412 which is in his possession and occupied by him.

b) A declaration that the plaintiff is entitled to an order under section 38 of the Limitation of Actions Act (Cap 22) to be registered as the proprietors of the suit land in place of the defendants or any other person and a valid transfer in the plaintiff's favour free from any encumbrances shall be executed by the Deputy Registrar of this court accordingly.

c) A permanent injunction to issue against the defendants their agents, servants or anybody deriving authority from them, restraining them from evicting, dispossessing or in any way interfering with the plaintiffs occupation, use and quite enjoyment of the suit land.

d) The costs of this suit be borne by the defendants.

24. It is so ordered.

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 G.S. Okoth learned counsel for the plaintiff

Defendant in person

Tom Maurice – Court Assistant