



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 356 OF 2017

(Formerly Kisii Elcc No. 381 of 2012)

MAGABE NYOHERO MAHIRI.....APPLICANT/PLAINTIFF

-VERSUS-

CHARLES MWITA MBUSIRO (Sued as personal

Representative of the estate of

DANIEL MBUSIRO MWITA -Deceased).....RESPONDENT/DEFENDANT

JUDGMENT

A. Introduction

1. At the heart of the present dispute is a portion of land parcel LR No. Bukira/Bwisaboka/2208 measuring approximately 4½ acres in area (Hereinafter referred to as the suit land), situate within Migori County. The suit land is part of land reference No.Bukira/Bwisaboka/1217 (the original parcel of land) registered in the name of the defendant, Charles Mwita Mbusiro (sued in his capacity as personal representative of the estate of Daniel Mbusiro Mwita- deceased 1) who has now subdivided the same to LR. NO. Bukira/Bwisaboka/2207 and the suit land.
2. The plaintiff, Magabe Nyohero Mahiri is represented by learned counsel, Ms. Okota and Mr. Singei instructed by M/s Abisai and Company Advocates.
3. The defendant is represented by learned counsel, Mr. J.N. Nyagesoa of the firm of Nyagesoa and Company Advocates.

B.The plaintiff's case

4. On 15th October 2012 the plaintiff initiated the instant suit by way of an originating summons dated 12th October 2012 pursuant to Order 37 Rule 7 (1) of the Civil Procedure Rules, Chapter 21 of the Laws of Kenya, Section 38 of the Limitation of Actions Act Chapter 21 laws of Kenya and Article 60 (1) (a) of the Constitution of Kenya, 2010. The plaintiff is seeking the following orders:-

a) **Spent**

b) **Spent**

c) **THAT** this Honourable court do declare that the plaintiff has acquired adverse possession of part of LR NO. Bukira/Bwisaboka/1217 registered now in the name of Charles Mbusiro who has subdivided the same to LR NO. Bukira/Bwisabka/2207,2209 of which the plaintiff now is in occupation of the said land for fourteen (14) years since 1998.

d) **THAT** this Honourable court be further pleased to order LR NO. Bukira/Bwisaboka/2208 be subdivided and that a portion measuring 4 ½ acres be delineated, and given a number and registered in the name of the plaintiff.

e) **THAT** this Honourable court do issue an injunction restraining the defendant from interfering with the applicants enjoyment of the said 4 ½ acres of LR NO. Bukira/Bwisaboka/2208.

f) **THAT** this court be pleased to order for any other relief deemed fit and just to grant the circumstances.

5. The originating summons is premised on four (4) grounds set out on it's face which include that:-

i. The plaintiff moved into the suit land LR NO. Bukira/Bwisaboka/2208 in 1998 and has remained thereon uninterrupted since.

ii. The respondent has now subdivided the suit land with a view to taking away the plaintiff's right under the Limitation of Actions Act.

6. The originating summons is further based on the plaintiff's 13-paragraphed supporting affidavit sworn on 18th September 2012. The plaintiff averred, inter alia, that he started residing on part of the suit land on 22nd November 1998 and since then, his occupation thereon has been definite, open, continuous and uninterrupted thus conferring him the right of adverse possession to the land. That he has since intensively developed the suit land on which he has planted maize, potatoes, cassava, banana, coffee and trees since that time to date. To the said affidavit, he did attach a copy of a grant of letters of administration in respect of the estate of Daniel Mbusiro Mwita- deceased 1 (PEXhibit 2) and copies of record or green card of the suit land (PEXhibit 1) which are part of list of documents dated 18th September 2012 (PEXhibits 1 to 8c).

7. In his testimony, the plaintiff (PW1) relied on his statement dated 18th September 2012 and PEXhibits 1 to 8(c) which also include copies of a caution dated 5th July, 2011 (PEXhibit 3), a sale agreement dated 22nd November 1998 (PEXhibit 5) and photographs (PEXhibit 8 (a) to (c)). He stated that he bought 4 ½ acres of the suit land from James Ngwena Mbusiro, a son of the defendant at Kshs. 90,000/= being the purchase price thereof. That he has built, cultivated and buried two (2) of his children on the land but the defendant has failed to process title to the land in his favour.

8. PW1 called his neighbours namely Jackson Wangwi Giyabe (PW2) and Mahiri Matiko (PW3) in support of his claim. The said witnesses relied on their respective statements dated 18th September 2012. They separately stated that PW1 has lived on the suit land and cultivated the same having bought it in 1998 as per PEXhibit 5.

9. Learned counsel for the plaintiff filed his submissions dated 26th July, 2019 wherein reference was made to the facts of the case, and framed three (3) issues for determination including whether the plaintiff has established his claim for adverse possession over the suit land. Counsel relied on the case of **Jaber Mohsen Ali and another –vs- Prisillah Boit and another (2014) eKLR, Sections 3 and 13 (1) of the Limitation of Actions Act (Cap 22) and Article 60 (1) 1 (b) of the Constitution of Kenya, 2010**, to buttress the submissions. Counsel submitted that the defendant is caught up with laches and that this court can not aid him hence urged the court to allow orders sought in the originating summons.

C. The defendant's case

10. By a 32 –paragraphed replying affidavit sworn on 22nd November 2012, the defendant opposed the originating summons and sought its dismissal with costs. The defendant deponed, inter alia, that the suit land is registered in the name of Daniel Mbusiro Mwita (deceased 1). That the originating summons is defective, bad in law and sought that the same be struck out on the grounds that :-

i. That the plaintiff is non suited.

ii. That the deceased did not sell any land to the applicant.

iii. That the person who allegedly sold the suit land did not have any authority/consent from the deceased.

iv. That no power of attorney was given to the person who sold the suit land by the deceased.

11. The defendant further deponed that PW1 bought the suit land from Penina Mbusiro Mwita (deceased 2) and that PW1 did not obtain a grant in respect of the estate of deceased 2. That the sale between PW1 and deceased 2 who did not have authority to sell the land, is as null and void. That the plaintiff's claim was filed in bad faith, meant to embarrass the defendant and that the plaintiff is not entitled to the orders sought in the originating summons.

12. The defendant's counsel was duly served for hearing of this suit as demonstrated by affidavit of service sworn on 12th March, 2019. The said counsel failed to appear for the hearing on 27th July, 2019. Thus, the defendant's case was deemed closed; see **Article 159 (2) (b) of the Constitution of Kenya, 2010** that justice shall not be delayed.

13. The defendant neither testified nor called any witness(es) in this suit.

14. On 11th November 2019, the defendant's counsel filed submissions of even date and urged the court to apply the case law cited and the law to strike out and or dismiss the plaintiff's claim with costs. Counsel did submit inter alia, that the plaintiff has not proved the three (3) elements of adverse possession through photographs and other evidence. He cited **sections 107 and 109 of the Evidence Act and section 13 of the Limitation of Actions Act (supra)**.

D. Issues for determination

15. It is trite law that issues for determination in a suit generally flow from either the pleadings or as framed for the court's determination; see **Galaxy Paints Company Limited –vs- Falcon Grounds Limited (2000) 2 EA 385**.

16. I have duly considered the entire originating summons, the replying affidavit, the evidence of PW1, PW2 and PW3 as well as the rival submissions including issues 1 to 3 in the plaintiff's submissions. So, the issues for determination are compressed as to whether the plaintiff

has established his claim for adverse possession to the required standard as held by the Court of Appeal in the case of **Wilson Kazungu Katana and 101 others –v- Salim Abdalla Bakshwein and another (2015) eKLR** thus :-

“From all these provisions what amounts to adverse possession ? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in adverse manner to the title of the owner, lastly he must have been in that occupation for a period in excess of twelve years (12) having dispossessed the owner or these having been discountenance of possession by the owner.....” (issues emphasised)

E. Analysis of the evidence and the law

17. In respect of the registration of the suit land, PW1 stated at paragraph 8 of his affidavit in support of the originating summons that deceased 1 died on 6th July, 2003 before he could transfer four and half (4 ½) acres of the suit land in his favour. He relied on PExhibits 1 and 2 which disclose that the suit land is registered in the name of deceased 1 as at 12th November, 2003 and that he (PW1) is the personal representative of deceased 1 with effect from 19th July, 2011 respectively.

18. Additionally, the statement of PW1 at paragraph 2 reads;-

“I know Charles Mwita Mbusiro who has taken out letters of administration in respect of the estate of Daniel Mbusiro Mwita, the registered owner of LR NO. Bukira/Bwisaboka/1217. I purchased part of the said land from the family of Daniel Mbusiro. Charles Mwita Mbusiro subdivided the land to Bukira/Buhirimonono/2207, 2208 and 2209 and I remained on 2208” (Emphasis added)

19. I note that the suit land is registered under the Registered Land Act Cap 300 Laws of Kenya (the repealed Act) as also noted by Simpson , J (as he then was) in the case of **Wainaina –vs- Murai and others (1976-80) 1 KLR 283 at 289**, a persuasive authority which I approve accordingly. This court is quite aware of the term “Proprietor” under **section 2 of the Land Registration Act, 2016 (2012)** and the relevant provisions namely sections 24,25,26, and 30 of the same Act.

20. Furthermore, PExhibit 7 at part B- (**proprietorship section**) reveals that the suit land is a subdivision of the original parcel of land. Quite clearly, the suit land is registered in the name of deceased 1 as it’s proprietor with effect from 12th November 2003.

21. At paragraph 5 of his replying affidavit the defendant did affirm that the suit land is registered in the name of deceased 1. So, the first issue for determination is resolved thereby.

22. On whether PW1 has been in open and exclusive possession of the suit land in adverse manner to the title of the owner, PW1 stated that he has lived, used and carried out development on the suit land as per PExhibit 2 and as observed in **Gatimu Kinguru case (infra)**. That he has been in open and uninterrupted occupation of the same for the past 24 years.

23. PW1 stated that he bought the suit land measuring 4 ½ acres in area from James Ngwenja Mbusiro son of the defendant (DW1). It is essential that adverse possession should be of the whole or a defined portion of land as held in **Muthuita –vs- Wanoe and 2 others (2008) 1 KLR (G and F) 1024** which applied the decision of Madan, J (as he then was) in the case of **Gatimu Kinguru –vs- Muya Gathangi (1976-80) 1KLR 317**.

24. It is evident that PW1 has been in open and exclusive possession of the suit land and of right as revealed in PExhibits 1 to 8 (c); see the Court of Appeal decision in **Wanje –vs- Saikwa (No. 2) (1984) KLR, 284**.

25. Additionally, has PW1 been in possession of the suit land for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner? Well, PW1 stated succinctly that he has been in uninterrupted occupation of the suit land for over twenty four (24) years thus it supports ground (1) of the Originating summons and paragraphs 5 and 6 of his supporting affidavit.

26. PW1 has asserted his title to the suit land by virtue of his open and continuous occupation of the suit land. In **Wanyoike Gathure –vs- Beverly (1965) EA 514 at 518**, Miles J observed that the applicant’s possession must be unbroken or no any endeavours made to interrupt it; see also **Jaber Ali case (supra)**.

27. **Sections 25(b) and 28 (h) of the Land Registration Act 2016 (2012)**, provide that ownership of registered land is subject to, among other claims, adverse possession. In the case of **Salim –vs- Boyd (1971) EA 550 applied in Kimani Ruchine and another –vs- Swift Rutherford Company Ltd and another (1976-80) 1KLR 1500**, it was held that rights and registrations of land can be challenged on the grounds including adverse possession.

28. I consider the defendant’s entire replying affidavit and weigh the same against the entire plaintiff’s case. The defendant was afforded sufficient time to ventilate his case (fair hearing) under **Articles 25 (c) and 50 (1) of the Constitution (supra)** but he failed to give evidence. Nonetheless, I bear in mind his pleadings and submissions in their entirety.

29. As provided under **Sections 107 and 108 of the Evidence Act (Cap 80) and Kazungu Katana (supra)**, a person asserting any claim including adverse possession, must prove the same. In the instant suit, PW1 has proved that he has been in exclusive, uninterrupted possession of the portion of the suit land for a period in excess of twelve (12) years as noted in **Salim and Kazungu Katana cases (supra)**. The defendant is the legal representative of the estate of deceased 1 who is the registered proprietor of the suit land as discerned in PExhibit 6 and guided by the Court of Appeal decision in **Troustik Union International and another –vs- Jane Mbeyu and another (1993) eKLR**.

Thus, the defendant has been dispossessed of the land in the obtaining circumstances.

30. In the case of **Ahmed Abdulkarim –vs- Member for Lands and Mines (1958) EA 436 at 441**, it was held that the plaintiff has to prove adverse possession on the balance of probabilities. The plaintiff's evidence is very cogent and credible herein. He has established his case against the defendant on the balance of probabilities and he is entitled to the orders sought in his originating summons. The nature of the injunction sought in this suit and to which he is entitled, is a permanent injunction as envisaged in section **13 (7) (a) of the Environment and Land Court Act, 2015 (2011)** and the Court of Appeal decision in **Nguruman Ltd –vs- Jan Bonde Nielsen and 2 others (2014) eKLR**.

31. Wherefore, Judgment be and is hereby entered for the plaintiff against the defendant in the following terms:-

a) A declaration that the plaintiff has acquired adverse possession of part of LR NO. Bukira/ Bwisaboka/1217 registered now in the name of Charles Mbusiro who has subdivided the same to LR NO. Bukira/Bwisaboka/2207,2208, 2209 of which the plaintiff now is in occupation of the said land for fourteen (14) years since 1998.

b) An order that LR. NO. Bukira /Bwisaboka/2208 be subdivided and that a portion measuring 4 ½ acres be delineated and given a number and registered in the name of the plaintiff.

c) THAT a permanent injunction restraining the respondent from interfering with the plaintiff enjoyment of the said 4½ acres of LR NO. Bukira/Bwisaboka /2208.

d) Costs of the suit shall be borne by the defendant.

32. It is ordered accordingly.

Delivered, SIGNED and Dated in open court at Migori this 28th Day of NOVEMBER 2019.

G.M.A ONG'ONDO

JUDGE

In presence of

Mr. Abisai learned counsel for the plaintiff

Tom Maurice – Court Assistant