



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 50 OF 2017

(formerly Kisii Elcc No. 286 of 2016)

JOHN NGON OLWERU.....PLAINTIFF

-VERSUS-

MARGARET OGUTU ANGIR.....1ST DEFENDANT

WALTER OTIENO ANGIR.....2ND DEFENDANT

JUDGMENT

A. Introduction

1. At the heart of the present suit is all the parcel of land reference number Kabondo/Kodhoch East/ 446 measuring approximately 1.0 hectares (3.1 acres) in area situate in Homa-Bay County, Kenya (Hereinafter referred to as the suit land).
2. The plaintiff, John Ngon Olweru commenced the suit by way of an originating summons dated 20th September 2016 and filed in court on 26th September 2013 for adverse possession over the suit land. The 1st and 2nd defendants namely Margaret Ogutu Angir and Walter Otieno Angir respectively, opposed the originating summons through a replying affidavit of 33 paragraphs sworn on 17th October 2016 by the 2nd defendant.
3. On 24th November 2016, the court gave directions that the originating summons and the replying affidavit be converted to a plaint and a statement of defence respectively. That the suit be heard by viva voce evidence. The suit was transferred from Kisii Environment and Land Court to this court for hearing and determination on 7th February, 2017.
4. Pursuant to court orders of 30th May 2017, Mr. Thomas T.O. Nyakado Land Registrar Rachuonyo East , South and North Sub Counties and E.O Abundu, Land Registrar of the same sub counties filed their respective reports dated 21st July 2017 (DExhibit 7 a) and 22nd August 2017 (DExhibit 7 b). The court adopted DExhibits 7 (a) and (b) on 21st November, 2017.
5. The plaintiff is represented by learned counsel Mr. Kerosi Ondieki of Nyagaka, Mosota, Isaboke, Kerosi Ondieki and Associates Advocates.
6. The defendants appear in person with effect from 11th December 2018 further to a notice of intention to act in person dated 30th April, 2018. Previously, they were represented by the firm of M/s Oguttu Mboya and Company Advocates.

B.The plaintiff's Case

7. In the originating summons brought under Order 37 of the Civil Procedure Rules 2010, Articles 40 and 159 of the Constitution of Kenya 2010, the plaintiff is seeking the following orders;-

- i. **THAT this Honourable court be pleased to declare that the plaintiff has the rights of possession, prescription and occupation of all that parcel No. Kabondo/Kodhoch East/446 measuring 3.1 acres or thereabouts.**
- ii. **THAT this Honourable Court be pleased to declare that the plaintiff is entitled to an order under section 38 of the Limitation of Actions Act.**

iii. THAT this Honourable court be pleased to deem that the plaintiff is entitled to an order under section 38 of the limitation of Actions Act and be registered as the proprietor of all that parcel of land No. Kabondo/Kodoch East/446 measuring approximately 3.1 acres free from all encumbrances.

8. The originating summons is anchored on an 11-paragraphed supporting affidavit of even date sworn by the plaintiff and five (5) grounds on its face which I take into account accordingly. The affidavit is supported by annexed documents namely copies of sale of land agreement in Dholuo language (PEXhibit 4), sale of land agreement translated to English (PEXhibit 5), an order dated 11th June 2015 in Homa-Bay High Court Succession cause No. 280 of 2015 (PEXhibit 6) and green card in respect of the suit land (PEXhibit 2). The plaintiff deponed inter alia, that in 1985, he bought the suit land from the original registered owner, Samwel Angir Ojwang, obtained PEXhibit 1 and strangely found that the defendants are now the registered owners of the suit land. That he has occupied the suit land peacefully and uninterruptedly since 1985.

9. The plaintiff (PW1) adduced evidence on 12th February 2019, relied on his supporting affidavit and list of documents dated 20th September 2016 (PEXhibits 1 to 5) including proceedings in Homa-Bay High Court Succession No. 280 of 20-15 (PEXhibit 1). He stated that he has occupied the suit land since 1985 and he maintained so during cross examination.

10. On 10th July, 2019 and 8th October 2019, learned counsel for the plaintiff was granted a latitude to file and serve submissions. However, he failed to comply accordingly.

C. The Defendants' Case

11. In the 1st defendant's replying affidavit, the defendants deponed, inter alia, that plaintiff's originating summons is brought with falsehood and that there is no evidence exhibited that the plaintiff has been in occupation of the suit land as alleged in the originating summons. That the plaintiff owns, resides and occupies LR NO. Kabondo/Kodhoch East/447 which shares a common boundary with the suit land. That in the year 2006, the plaintiff destroyed the said boundary, extended his cultivation into a portion of the suit land prompting the plaintiff to raise a protest with the area chief.

12. The defendants further deponed that the plaintiff's occupation over the suit land has not subsisted for a period over 12 years to warrant the present claim. They did annex to the affidavit, copies of a certificate of official search dated 13th October 2016 in respect of LR NO. Kabondo Kodhoch East/447 (DEXhibit 5), a letter by the chief, Kawuor location dated 13th October 2016 (DEXhibit 6) and a copy of green card in respect of the suit land (DEXhibit 2). That the originating summons is misconceived, meant to defraud the cause of justice and amounts to an abuse of the course of justice hence they sought its dismissal with costs.

13. The 2nd defendants (DW1) testified and did rely on his replying affidavit and their list of documents dated 17th October 2016 (DEXhibits 1 to 5) as well as the reports (DEXhibits 7 (a) and 7 (b)).

14. The defendants filed submission dated 15th August 2019 whereby they termed PEXhibits 4 and 5 afterthought and mere forgery. The defendants submitted that for adverse possession to succeed, the applicant's occupation of the suit land must be continuous and factual, among other ingredients. In support of their submissions, the defendants relied on authorities including **Mungania –vs- Imanyara (1985) eKLR and sections 7 and 22 of the Land Control Act Cap 302 laws of Kenya**. They urged the court to order the plaintiff to vacate the suit land and pay costs of this suit.

D. Points for Determination:

15. I have anxiously studied the entire pleadings, evidence of PW1 and DW1 as well as the defendants' submissions. I am guided by the Court of Appeal decision in **Great Lakes Company (U) Ltd -vs- Kenya Revenue Authority (2009) KLR 720** on issues for determination in a suit generally.

16. The parties herein did not frame issues for determination by this court. Nonetheless, the issues for determination flowing from the originating summons and the replying affidavit are the ingredients of adverse possession doctrine as held by the Court of Appeal in **Wilson Kazungu Katana and 101 others –vs- Salim Abdallah 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 there having been discountenance of possession by the owner.....” (points emphasised)

E. Analysis and disposition

17. On the first point, in his supporting affidavit at paragraph 3, PW1 deponed that he bought the suit land from the original registered owner, Samwel Angir Ojwang (deceased) as per PEXhibits 4 and 5. That the suit land is now registered in the joint names of the defendants.

18. PEXhibit 2 reveals that the suit land was registered in the name of the said deceased original owner on 4th October 1995 and its title deed issued accordingly. On 7th June 2016, the land was registered in the joint names of the defendants.

19. DEXhibit 2 also shows that the suit land is registered in the names of the 1st and 2nd defendants with effect from 21st June 2016. The fact of registration of the land in the name of the 1st and 2nd defendants jointly with Washington Owino Angir, Joshua Omondi Angir and

Maurice Calvins Ochieng in shown in DExhibits 3 and 4.

20. Quite clearly, the suit land is registered under the Land Registration Act, 2016 (2012). I am very aware of the definition of the term **“Proprietor”** under section 2 of the said Act. Interest conferred by registration, rights of a proprietor, certificate of title to be held as prima facie conclusive proof of proprietorship and overriding interests are provided for under sections 24,25,26 and 28 respectively of the same Act.

21. It is common baseline that the suit land is not registered in the name of PW1 but in the names of the 1st and 2nd defendants and 3 others. Therefore, does the plaintiff’s claim amount to an encumbrance or an overriding interest over the proprietor’s title to the suit land ?

22. In respect of the second point, it is pretty clear that DW1 is the registered owner of the suit land. Can sections 25 (b) and 28 (h) of the Land Registration Act, 2016 (2012) come into play in favour of PW1 in the prevailing circumstances?

23. The aspect of instrument of title as proof of ownership of land was discussed by the Court of Appeal in the case of **Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR** where it was held inter alia;

“..... and the registered proprietor must go beyond the Instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances” (Emphasis supplied)

24. The rights and registration of the land can be challenged on the grounds including adverse possession; see **Kimani Ruchine and another –vs- Swift Rutherford Company Ltd and another (1976-80) 1 KLR 1500** and the decision in **Salim –vs- Boyd (1971) EA 550**.

25. I take into account the evidence of PW1 including PExhibits 1 to 7 (b) in support of the plaintiff’s claim. By relying on Dexhibits 1 to 7 (b), DW1 denied the plaintiff’s claim and stated that PW1 owns his own land LR NO. Kabuondo/Kodhoch/447 approximately 2.6 acres in area but encroached the suit land to the extent of 1.0 acres.

26. During cross examination, DW1 stated that PExhibits 4 and 5 are false and that PW1 still stays on 1.0 acres of the suit land. That DW1 did move out the suit land and that he does not live thereon due to the conduct of PW1. That PW1 has been in occupation of the suit land for less than twelve (12) years and it is affirmed by PExhibit 6.

27. There can be no dispossession of the portion of the suit land if use and enjoyment of the suit land is not possible; see generally **Halsbury’s Laws of England, 3rd Edition pages 251 and 252**.

28. Notably, the plaintiff (PW1) erected a homestead on part of the suit land as per the diagram in PExhibit 7 (b). Finding number 5 in PExhibit 7 (b) is fortified by the said diagram.

29. It is evident that PW1 is in occupation of 1.0 acres of the suit land on which he has a homestead. In the case of **West Bank Estates Ltd –vs- Arthur (1966) 3 WLR 790** it was held that evidence of cultivation should be definite as to the area and time; see also **Muthuita –vs- Wanoe and 2 others (2008) 1 KLR (G and F) 1024**.

30. Be that as it may, there were totally no conspicuous boundaries between the suit land and LR NO. Kabondo/Kodhoch/447. By PExhibit 7 (a), the boundaries were well established hence open and exclusive possession of the suit land by PW1 can not arise in the obtaining scenario.

31. As regards the third point, PW1 averred at paragraphs 3 and 8 of his supporting affidavit that he has been in peaceful and uninterrupted occupation of the suit land since 1985. In his evidence in chief, he stated :-

“ I bought the suit land in terms of the said portion with the deceased, Samwel Angir Ojwang father of the 2nd defendant as per PExhibits 4 and 5. I live on the suit in terms of it’s said portion since 1985 to date.”

32. It is trite law that possession can take different forms including cultivation of the land in dispute; see **Kimani Ruchine (supra)**.

33. In the premises, I find that the plaintiff has not satisfied the triple cumulative ingredients of adverse possession over the suit land. He has not proved his claim against the defendants jointly and severally on a balance of probabilities.

34. By the way, the defendant is at liberty to move the court for an order of eviction of the plaintiff from the 0.1 acres of the suit land.

35. Accordingly, the plaintiff’s claim against the defendants jointly and severally in terms of orders (a), (b) and (c) sought in his originating summons dated 20th September 2016 and filed in court on 26th September 2013, be and is hereby dismissed with cost to the defendants.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of November 2019.

G.M.A. ONGONDO

JUDGE

In presence of :-

The Plaintiff in person

The 2nd Defendant in person

Court Assistant – Tom Maurice