



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 73 OF 2018

TOBIAS OCHUODHO WAMBI.....PLAINTIFF/APPLICANT

-VERSUS-

ATHANASIO ODHIAMBO.....DEFENDANT/RESPONDENT

JUDGMENT

A. Introduction

1. The subject matter of the instant suit is land parcel LR NO. Kamagambo/ Kanyimach/412 measuring approximately 2.6 hectares in area (hereinafter referred to as the suit land). It is situate within Migori County, in Kenya. The suit land was originally registered in the name of the late Peteris Gunia Opiyo (deceased) who was the father of the defendant, Athanasio Odhiambo.
2. The plaintiff, Tobias Ochuodho Wambi is represented by learned counsel, Mr. Nyariki of Nyariki and Company Advocates.
3. The defendant is represented by learned counsel, Mr. Odondi Awino of M/s Odondi Owino and Company Advocates.
4. The court gave directions relating to the pleadings and hearing of this suit on 4th October 2018.

B.The plaintiff's case

5. The plaintiff commenced the instant suit by way of an originating summons dated 22nd May 2018 filed on 23rd May 2018 claiming to have acquired the whole of the suit land by adverse possession. He has sought the following orders;-

- a) **THAT** the plaintiff Tobias Ochuodho Wambi be declared the absolute owner of the whole of land parcel Kamagambo/Kanyimach/412 which he has occupied, and used uninterruptedly since 1973 to date.
- b) **THAT** the defendant ATHANASIO ODHIAMBO be ordered to execute all necessary documents for transfer of the whole of land parcel Kamagambo/Kanyimach/412 in favour of the plaintiff failing which Deputy Registrar and or executive officer of this court be empowered to execute the same in place of the defendant.
- c) **THAT** the defendant by himself, his servants, agents assigns family members, legal representative and/or any other person or persons howsoever be restrained by an order of this court from in anyway or manner interfering with and/or dealing with the plaintiff's quiet enjoyment possession, occupation and use of the said parcel of land Kamagambo/Kanyimach/412 which the plaintiff has quietly enjoyed the occupation, possession and quiet enjoyment since 1973- todate.
- d) **THAT** the issue of land is for legal ownership as he has actual possession.
- e) Cost of the summons.
- f) Any other relief, orders or grants this court will deem fit just and proper to grant.

6. The originating summons is premised on the plaintiff's supporting affidavit sworn on 22nd May 2018 whereby the plaintiff deponed , inter alia, that he has lived on the suit land since 1974. That the deceased father fraudulently did misrepresent himself to the adjudication officers thereby fraudulently obtained the registration of the suit land through succession proceedings and transfer. That the plaintiff sued the defendant in Homa-Bay case number 84 of 1988. That the plaintiff has settled on the suit land on which he has built two (2) semi-permanent houses.

7. On 9th July, 2019, the plaintiff (PW1) testified and relied on his statement dated 22nd May 2018 and his supporting affidavit sworn on even date as well as a list of documents also evenly dated (PExhibits 1 to 3) in favour of his claim. PW1 called no witnesses to reinforce his claim in this suit.

8. Learned counsel for the plaintiff filed his submissions dated 5th September 2019 and filed on even date wherein reference was made to the orders sought in the originating summons and the evidence of the plaintiff and the defendant. Counsel relied on **Mbira –vs- Gachuhi (2000) 1 EALR 13, Jandu –vs- Kirplal and another (1975) EA 225, Mtana –vs- Kahindi Ngala Mwangandi (2005) eKLR, Kweyu –vs- Omutut (1990) KLR 709 and Wambugu –vs- Njuguna (1983) KLR 172**, to buttress his submissions for adverse possession.

C. The defendant's case

9. In his 14 –paragraphed replying affidavit sworn on 31st May 2018, the defendant opposed the originating summons and sought its dismissal with costs. The defendant averred inter alia, that the suit land is registered in his name. That the plaintiff did not particularise the allegation of fraud in the originating summons. That the plaintiff is the holder of LR NO. Kamagambo/Kanyimach/413. He relied on documents marked as “AO1” to “AO6” (DEXhibits 1 to 6) which include a copy of the adjudication record, copies of their respective titles (DEXhibits 2 and 3) and photos (DEXhibit 6).

10. The defendant (DW1) testified and relied on his statement undated statement filed on 4th October 2018 and his replying affidavit sworn on 31st May 2018. He also relied on DEXhibits 1 to 6. He stated that he has title to the suit land and that the plaintiff is in actual occupation of the land.

11. On 8th August 2019, the defendant's counsel filed submissions dated 6th August 2019. He referred to DEXhibit 4 and submitted that the plaintiff has not established his claim for adverse possession. He urged the court to dismiss the suit.

D. Issues for determination

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

13. I have duly considered the entire originating summons, the replying affidavit, the evidence of PW1, DW2 and the rival submissions. The issues for determination are condensed 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

14. With regard to the registration of the suit land, PW1 stated at paragraph 2 of his affidavit in support of the originating summons that the deceased fraudulently obtained registration of suit land. He relied on PEXhibit 1 which reveals that the suit land was registered in the name of deceased as at 29th October 1984 and the title deed was issued on the same day.

15. Notably, 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 very 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 as well as **section 27 and 28 of the repealed Act**.

16. The defendant stated that he has title deed of the suit land. Entry numbers 8 and 9 in PEXhibit 1 tell that the defendant got registration of the same on 7th March 1994. As at 17th October 1977, the suit land was registered in the name of the deceased. Therefore, the first issue is resolved in the circumstances.

17. On the second issue, PW1 stated that he has been in actual possession and use of the suit land since 1974. That he has carried out development on the suit land and DW1 confirmed the same; see **Gatimu Kinguru –vs- Muya Gathangi (1976-80) 1KLR 317**.

18. PW1 stated that the suit land is measuring approximately 2.6 acres in area. 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 & F) 1024**.

19. It has emerged from the evidence that DW1 has title to the suit land initially registered in the name of the deceased. That PW1 has been in open and exclusive possession of the suit land and of right as revealed in PEXhibits 1 to 3 ; see the Court of Appeal decision in **Wanje –vs- Saikwa (No. 2) (1984) KLR, 284**.

20. PW1 has asserted his title to the suit land by virtue of his open and continuous occupation of the suit land since 1994. DEXhibit 6 affirms that position. 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.

21. Quite clearly, **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.

22. 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 who is registered as the owner of the suit land has been disposed of the land.

23. 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 defendant’s contention fails as the plaintiff has established his claim against the defendant on the balance of probabilities.

24. To that end, the plaintiff is entitled to the orders sought in this suit. The nature of the restraint order sought herein and to which he is entitled is a permanent injunction as provided for under section **13 (7) (a) of the Environment and Land Court Act, 2015 (2011)** and as held in the case of **Nguruman Ltd –vs- Jan Bonde Nielsen and 2 others (2014) eKLR**.

25. Accordingly, Judgment be and is hereby entered for the plaintiff against the defendant in terms of orders 1,2,3 and 5 sought in the originating summons dated 22nd May 2018 and filed in court on 23rd May 2019.

26. It is so ordered.

Delivered, SIGNED and Dated in open court at **Migori** this **27th Day of NOVEMBER 2019**.

G.M.A ONG’ONDO

JUDGE

In presence of

Mr. Kiseru learned counsel holding brief for Ondondi Owino learned counsel for the plaintiff

Tom Maurice – Court Assistant