



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 89 OF 2017

(Formerly Kisii Elc Case No. 55 of 2013) Consolidated with formerly Kisii HCCC No. 176 of 2013)

FREDRICK OWICH DAMBA.....PLAINTIFF

**STACUS DHAGO DMBA(Suing as the legal and Personal Representative
to the estate of FREDRICK OWICH DAMBA – Deceased)**

VERSUS

SAMWEL MARANGA CHACHA.....1ST DEFENDANT

WAMBURA CHACHA.....2ND DEFENDANT

SAMUEL AMUKUNA.....3RD DEFENDANT

NZOTO OTOGORO.....4TH DEFENDANT

JUDGMENT

A. Introduction

1. The instant Judgment is with regard to two (2) consolidated suits namely:-

a. The lead file, formerly Kisii ELcc No. 55 of 2013; Stacus Dhago Damba (suing as the legal representative of the estate of Fredrick Damba – Deceased and the original plaintiff –vs- Samwel Maranya Chacha and 4 others (Hereinafter referred to as the 1st suit).

b. Formerly Kisii HCCc No. 176 of 2013 Peter Mwitaa Chacha; Samwel Meranya Chacha and 3 others –vs- the original plaintiff in the lead file (Hereinafter referred to as the 2nd suit).

2. The consolidation of the 1st and 2nd suits was made on 29th January, 2015 pursuant to an order of the court (Samson Okongo J,) thus :-

“ By consent”

i. Kisii HCCC No. 55 of 2013 are Kisii HCCC No. 176 of 2013 be and are hereby consolidated.

ii. Kisii HCCC No. 55 of 2013 shall be the lead file.”

3. On 14th February 2017, the consolidated suit was transferred from Kisii Environment and Land Court to this court for hearing and determination.

4. By notice of motions applications dated 24th April 2018 and 18th September 2018, M/s. Ochillo and Company Advocates for the plaintiff in the 1st suit sought the substitution of the original plaintiff with the present plaintiff. On 4th October 2018, Ms Okota learned counsel instructed by M/s Abisai and company Advocates for the defendants did not oppose the applications hence the same were allowed

accordingly.

5. The property in dispute is LR NO. Bugumbe/Masaba/523 measuring approximately 9.6 hectares in area (the suit land). It is a subdivision of LR NO. Bugumbe/Masaba/73 (the original parcel of land) situate in Kuria West sub County within Migori County.

B.The plaintiff's case

6. By an amended plaint originally dated 12th February 2013, the original plaintiff sued the defendants jointly and severally for:-

i. A permanent mandatory injunction directing the defendants their servants/Agents to stop trespassing unto the title Bugumbe/Masaba/523 and carrying thereon illegal activities and vacate the title Bugumbe/Masaba/523 altogether and in default eviction order do issue.

ii. Costs of the suit

iii. Any other remedy this Honourable court may deem fit to grant.

7. Briefly, the plaintiff claims that the original plaintiff is the absolute registered proprietor of the suit land having purchased the same from the late Charles Onyango Jaoko on 3rd February 1993. That the late Charles Onyango Jaoko had purchased the land from the late Nyasu Chacha Maranya on 29th April, 1984. That the 1st defendant in the 1st suit sued Charles Onyango Jaoko and the Original plaintiff in Migori SPMCC No. 734 of 1995.

8. The plaintiff further claims that as the said suit was pending before the court, the 1st and 2nd defendants trespassed into the suit land and purportedly leased and sold portions of the suit land to the 3rd, 4th and 5th defendants and retained other portions for themselves. However, the suit was dismissed for want of prosecution on 5th November 2008. A subsequent application for reinstatement was also dismissed on 5th April, 2012. The defendants continued to use the portions of the suit and denied the plaintiff quiet possession and enjoyment of the same hence provoking the instant suit.

9. In his replying affidavit sworn on 26th March 2014, in the 2nd suit, the plaintiff deponed inter alia, that the defendants who are the plaintiff in the 2nd suit, do not have locus standi to mount their originating summons for adverse possession of the suit and that the claim lacks merit, is misconceived and should be dismissed for lack of triable issues. That he is the sole proprietor of the suit land which was duly transferred to him upon sale by Charles Onyango Jaoko who had purchased the same from the deceased, Chacha Maranya who was the registered owner of the original parcel of land measuring approximately 27 acres in area.

10. The plaintiff further deponed that the suit land was a subdivision of the original parcel and he obtained its ownership through lawful purchase. In support of his claim, he annexed to his affidavit documents marked as "FOD 1" to FOD 8 (b)" which include copies of title deed, a certificate of official search and sale agreement in respect of the original parcel land. He also attached thereto a copy of green card, title deed, consent of the Land Control Board and transfer as regards to the suit land.

11. The plaintiff (PW1) testified that he is a personal representative of the original plaintiff and relied on his statement dated 17th October 2018 as part of his evidence. He further relied on his list of documents dated 17/10/2018 (PExhibits 1 and 2) and list of documents dated 29/1/2015 (PExhibits 3 to 9).

12. Learned counsel for the plaintiff filed submissions dated 30th October 2019 wherein reference was made to the background of the suit and the evidence of the parties including the claim for adverse possession by the defendants. Counsel cited authorities, inter alia, **Githu –vs- Ndeete (1984) KLR 776 and Kimani Ruchine and another –vs- Swift Rutherford Company Ltd and another (1976-80) KLR 1500** on adverse possession.

13. Counsel also submitted that the allegations of fraud are proved while the originating summons for adverse possession lacks merit thus urged this court to dismiss the originating summons with costs and grant the prayers sought in the amended plaint. Counsel relied on **Vijay Morjria –vs- Nansingh Madhusingh Darbar and another (2000) eKLR, Kinyanjui Kamau –vs- George Kamau (2015) eKLR and Katende –vs- Haridas and Company Ltd (2008) 2 EA 174** regarding allegations of fraud and proof of the same.

C. The defendant's case

14. The defendants through Abisai and Company Advocates denied the plaintiff claim in the 1st suit by way of their joint amended statement of defence and counter claim dated 10th December 2018 whereby they sought the following reliefs;

15. The defendants stated, inter alia, that the original parcel of land registered at first registration in the name of Chacha Maranya (deceased), was fraudulently sub divided and transferred to Charles Onyango (deceased) and fraudulently transferred to the deceased original plaintiff. They pleaded particulars of fraud at paragraph 4 of the amended statement of defence and paragraph 14 of the counter claim.

16. In the 2nd suit, the defendants initiated their claim by way of an originating summons dated 12th April, 2013 and filed in court on 17th April, 2013 under order 37 Rule 7 (1), (2) of the Civil Procedure Rules as read with section 38 of the Limitation of Actions Act Chapter 21 Laws of Kenya, the Land Registration Act and Article 60 (1) of the Constitution of Kenya. They are seeking the followings orders:-

a. THAT this Honourable court do declare that the applicants (defendants) have acquired adverse possession of all that land

known as bugumbe/Masaba/73 measuring 9.6 hectares.

b. THAT this Honourable court be further pleased to transfer LR NO. Bugumbe/Masaba/73 to the defendants names.

c. THAT this court be pleased to order for costs to be paid by the respondent (plaintiff) to the defendants.

17. The originating summons is founded on the 1st plaintiff's supporting affidavit of even date and annexed documents marked s PMC- 1 to PMC- 4 including authority by the 2nd to 5th defendants to the 1st defendant to plead on their behalf, copy of the register of the suit land and photographs of homes of the defendants on the suit land. The originating summons is also premised on the grounds that ;-

I. The applicant have been on the suit land for over 12 years.

II. The occupation has been open and known to the respondent

III. The occupation has been continuous.

IV. The respondent has never made any attempt to evict the applicants.

18. The gist of the defendant's claim in the originating summons is that they have occupied the original parcel of land on which they were born and bred for over forty (40) years. That they have been cultivating and residing on the suit land hence acquired prescriptive rights over the suit land.

19. The 1st defendant (DW1) testified on the 16th July, 2019 and relied on his statements dated 14th December 2018 as part of his testimony. He also relied on their list of documents dated 10th December 2018 (DExhibits 1 to 8). He stated inter alia, that he has peacefully lived on the suit land for over 70 years.

20. DW1 called a witness, Peter Mwitwa Chach alias Wambura (DW2) who relied on the originating summons and his supporting affidavit sworn on even date as well as annexed documents marked 1 to 8 (Dexhibits 9 to 13). He stated in part that his brother and himself live on the suit land and that he has resided thereon for the last forty eight (48) years. That the plaintiff has never attempted to evict them therefrom. That the late Fredrick Owich Damba, the original plaintiff fraudulently registered the suit land in his own name.

21. Learned counsel for the defendants filed submissions dated 19th September 2019 wherein facts of the suit were provided and that the suit be dismissed with costs and that the counterclaim be allowed with costs. Counsel identified and analysed three (3) issues for determination including whether the defendant trespassed onto the suit land and whether the plaintiff has satisfied the threshold set in **Giella –vs- Cassman Brown and Company Limited (1973) EA 358**.

22. Counsel further relied on **Joel Kipkurui Arap Koech- -vs- Alice Wambui Mugandu and 3 others (2018) eKLR, Mrao Ltd –vs- First American Bank Kenya Ltd and 2 others (2003) KLR 135 and Esther Ndegi Njiru and another –vs- Leonard Gatei (2014) eKLR**, to buttress his submission. Counsel also cited **sections 107, 108 and 109 of the Evidence Act (Cap 80 Laws of Kenya). Order 10 (1) (a) Rules 2 of the Civil Procedure Rules 2010 and section 80 (1) of the Land Registration Act, 2016 (2012)**, to reinforce the submissions.

D. Issues for determination

23. I have thoroughly considered the entire pleadings, evidence and submissions of the respective parties in the consolidated suits. It is trite law that issues for determination in a suit flow from the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Company Ltd –vs- Falcon Grounds Ltd (2000) 2 EA 385**.

24. In view of the foregone discourse, I take a stand point that the issues for determination herein are condensed as follows;-

a. Has the plaintiff established that the defendant trespassed into the suit land?

b. Have the defendants satisfied the threshold for adverse possession over the suit land?

c. Are the parties entitled to the reliefs sought in their respective pleadings in this matter?

E. Analysis and disposition

25. In respect of the 1st issue, the plaintiff (PW1) stated at paragraphs 3,4 and 5 of the plaint that defendants including DW1 and DW2, trespassed into the suit land. I note PExhibits 1 to 9 and a permanent injunctive relief sought in the plaint to stop the defendants from the alleged trespass.

26. The defendants denied the plaintiff's claim concerning trespass on the suit land. They claim that PW1 obtained the title to the land by fraud and they sought orders in the counterclaim and in the originating summons.

27. According to the Concise Oxford English Dictionary 12th Edition, the term “**Trespass** “ means;-

“Enter someone’s land or property without permission.”

28. Clerk and Lindasell on Torts 18th Edition at paragraph 18 defined “Trespass” as follows :-

“An unjustifiable entry by one person upon the land in possession of another”

29. Similarly, I concur with the considered view of Samson Okongo, J in **Zacharia Onsongo Momanyi –vs- Evans Omurwa Onchagwa (2014) eKLR** that the tort of trespass is actionable per se and that, :-

“Trespass has been defined as any unjustified intrusion of one person upon the land in possession of another”

30. This court is aware of **section 152A of the Land Act, 2016 (2012)** which reads:-

“A person shall not unlawfully occupy Private, Community or Public Land” (*Emphasis laid*)

31. I have weighed the plaintiff’s contention that the defendant did trespass into the suit land against the statement of defence and counterclaim as well as the defendant’s claim for adverse possession. DW1 and DW2 clearly stated that they have lived on the suit land over forty (40) years. In the circumstances, it is my considered view that the possession and occupation of the suit land by defendants can not be termed as trespass.

32. As regards the defendant’s claim for adverse possession of the suit land, I am not unaware of the procedure for asserting this kind of claim by way of originating summons under **sections 37 and 38 of the Limitation of Actions (Cap 22 Laws of Kenya); see also Salim – vs- Boyd (1971) EA 550.**

33. I subscribe to the Court of Appeal decision in the case of **Wilson Kazungu Katana and 101 others –vs- Salim Abdallah Bakshwein and another (2015) eKLR** where it was held that the doctrine of adverse possession dictates that:-

a. The parcel of and must be registered in the name of a person other than the applicant.

b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner.

c. The applicant must have been in that occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession of the owner.

34. On the issue of registration of the land in dispute, I note that under **section 2 of the Land Registration Act, 2016 (2012)** the term “Proprietor” means :-

a. In relation to land or lease, the person named in the register as the proprietor and;

b. In relation to a charge of land or a lease the person named in the register of land or lease as the person in whose favour the charge is made. (*Emphasis supplied*)

35. Rights and interest conferred on registration, the rights of a proprietor and certificate of title to be held as conclusive proof of ownership are provided for under **Sections 24, 25, and 26 of the Land Registration Act respectively (supra)**. Section 7 of the Limitation of Actions Act (Cap 22) bars an owner of a parcel of land from action to recover the same at the expiry of twelve (12) years.

36. PW1 stated that the suit land is registered in the name of the deceased original plaintiff namely Fredrick Owich Damba. His testimony is reinforced by the evidence of DW1 and DW2 herein.

37. In the instant matter, the suit land is registered in the name of the original plaintiff under the Registered Land Act Cap 300 Laws of Kenya (the Repealed Act). Therefore, I am in agreement with Simpson J (as he then was) in the case of **Wainaina –vs- Murai and others (1976-80) 1 KLR at 289** where he remarked, :-

“ The land in question is registered under the Registered Land Act an act cited in section 37”

38. It was the testimony of PW1 that there are houses erected on the suit land. DW1 stated that he has occupied the land for over 70 years and that his brothers, too, live thereon. This was affirmed by DW2 who stated that he has lived on the suit land since 1970.

39. DW2 testified that PW1 has not attempted to evict them from the suit land. DW1 confirmed that title to land has not been challenged by the plaintiff hence the defendants are in possession and occupation of the suit land.

40. In the case of **Gatimu Kinguru –vs- Muya Gathangi (1976-80) KLR 317**, Madan J (as he then was) held in part;

“The defendant’s possession was open and notoriousthere has been no discontinuation of possession by the plaintiff since 959....there was ouster of the plaintiff from the land followed by adverse possession, occupation, development and

cultivation of the land by the defendant.....”

41. It is trite law that the identification of the land in possession of an adverse possession is an important and integral part of the process of proving adverse possession; see **Githu and Katana cases (supra)**. It is evident that the suit land is approximately 9.6 hectares in area.

42. The defendants alleged fraud against the plaintiff at paragraphs 3,4, 14 15, and 16 of their statement of defence and counterclaim. They distinctly pleaded fraud at paragraph 14 thereof as recognized in **Kuria Kiarie case (Infra)**.

43. In **Kuria Kiarie and 2 others –vs- Sammy Magera (2018) eKLR**, it was held fraud and misrepresentation, among others, are grounds for impeaching a certificate of title ; see also **Vijay Morjaria case (supra)**.

44. The Black’s Law Dictionary 10th Edition defines “**fraud**” as :-

“A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment.”

45. The allegations of fraud against PW1 must be proved as required under **Sections 107 to 109 and Salim case (supra)**. According to DW1 and as confirmed by DW2, the suit land is now sub-divided through fraud as pleaded in their defence and counterclaim. **Sections 26 (1) and 80 (1) of the Land Registration act (supra)** provide for impeachment of certificate of title on grounds including fraud. The decision in **Kimani Ruchine case (supra)** is also relevant herein as there is abundant evidence that the plaintiff did not obtain title to the suit land by way of purchase, transfer or transmission.

46. The defendants have proved by way of DEXhibits 1 to 13 that the plaintiff’s registration of the suit land arose on account of transfer emanating from an alleged fraudulent purchase; see **Samwel Kamere –vs- Land Registrar Kajiado (2015) eKLR**.

47. It has emerged from the pleadings, evidence and submissions that the defendants are in possession and occupation of the suit land for a period in excess of twelve (12) years, thereby dispossessed the original plaintiff who is its registered owner. Quite clearly, the doctrine of “**Nec vi, nec clam, nec placario** (No force, no secrecy, no evasion) applies very handy in the instant matter. The defendants have proved adverse possession claim over the suit land against the plaintiff on the balance of probabilities. The plaintiffs’ claim fails as it has not been proved against the defendants jointly and severally on the balance of probabilities.

48. Thus, the consolidated suits are determined as follows :-

a. The plaintiff’s claim in the 1st suit is hereby dismissed.

b. Judgment be and is hereby entered for the defendants jointly and severally against the plaintiff in terms of orders (i),(ii), and (iii) sought in that amended counterclaimed dated 10th December 2018 and filed in court on 14th December 2018 in the 1st suit.

c. Judgment be and is hereby entered for the defendants jointly and severally against the plaintiff in terms of orders 1,2 and 3 sought in their originating summons dated 12th April, 2013 and filed in court on 17th April, 2013 in the 2nd suit.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this 20th day of **NOVEMBER 2019**.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Sam Onyango holding brief for Jack Bunde learned counsel for the plaintiff

Tom Maurice – Court Assistant