



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 129 OF 2016

EPHRAIM GODEKA LUGALIA.....PLAINTIFF

VERSUS

JOHNSTONE ONYINO.....1ST DEFENDANT

SAMSON LUGALIA.....2ND DEFENDANT

STEPHEN BANANG'A.....3RD DEFENDANT

EUNICE ANDEYO.....4TH DEFENDANT

PHOEBE VUGUTSA.....5TH DEFENDANT

MARY AYIERA.....6TH DEFENDANT

JUDGMENT

INTRODUCTION

1. In the plaint dated **24/6/2016** and filed in court on **22/8/2016**, the plaintiff prays for judgement against the defendants for:

(a) An order of eviction of the defendants out of the plaintiff's parcel of land No. Trans Nzoia/Mito Mbili/42 and that they be restrained by way of permanent injunction forever laying claim to, cultivating and/or in any other way from interfering with the plaintiff's peaceful use of his parcel of land No. Trans Nzoia/Mito Mbili/42.

(b) Costs and interest of this suit.

(c) Any other relief this court may deem just and fit to grant in the circumstances.

PLEADINGS

The Plaintiff

2. The plaint states that the plaintiff is the absolute registered proprietor of parcel of land No. **Trans Nzoia/Mito Mbili/42** measuring approximately **9.2 Hectares**; that the defendants have without any justifiable cause or authority unlawfully moved, trespassed and forcefully remained in occupation of the suit land and that the actions of the defendants has deprived him his right to private property which amounts to trespass and enjoyment of his land therefore suffered loss and damage; that the plaintiff has pleaded with the defendants to stop the said trespass but instead the defendants have vowed to remain in occupation and illegal use of the plaintiff land; that demand and notice of intention to sue has been given but in vail. The plaintiff avers that save for **Kitale ELC No. 133 of 2015** there are no pending proceedings or any previously determined suit regarding the subject matter.

The Defence

3. The defendants filed a joint statement of defence on **19/9/2016** denying the claim. In the defence the defendants claim that their late father purchased 20 acres out of the plaintiff's land and that their family has been in possession of that portion for a period of 30 years; that the consideration was settled in both monetary and non-monetary terms; that the plaintiff's and the plaintiff's parents have never utilized the 20 acre portion since its purchase; that the plaintiff's title to the 20-acre portion was extinguished at the expiry of 12 years from the date of

taking up of possession by the defendant's parents and that the plaintiff is guilty of laches and his claim is time barred. They further aver that the plaintiff is estopped by conduct from claiming ownership of the land. They also aver that **Kitale HCCC No. 133 of 2014** between their late mother and the plaintiff exists.

The Plaintiff's Evidence

4. **PW1**, the plaintiff, testified on **22/11/2017** and adopted his statement dated **24/6/2016** and filed on **22/8/2016**. His evidence is that the defendants are his sister's children; that he bought the land in 1978; that he had allowed his sister to reside on the land as he re-arranged his affairs; that he would like the defendants to have 2 acres out of the suit land to reside on as he took back the rest of the land because that is the area of land he had intended to freely give his sister by virtue of kinship; however his sister refused to vacate the entire land even after he gave her a gift of two acres; that he produced his title deed to **Trans-Nzoia/Mito Mbili/42** as **P. Exhibit 1**; he stated that the land is charged and produced the copy of the charge as **P. Exhibit 2**.

5. Upon cross-examination he admitted that his sister's husband was buried on the two-acre portion of land which he had intended to give his sister. The plaintiff maintained that he is the one who built a house for his sister on the land and that he did not object to burials occurring on the two acres as he had relinquished the same to his sister. However he admitted in cross examination that the family had occupied the entire land. He also admitted the suit between him and his sister. Regarding the monies paid to him he termed them as 'rent' and averred that when maize was received by him from his sister's family he would allocate a value and issue a receipt. According to him they were to pay him 10 bags per year. In re-examination he averred that the defendants' family house is built on the two acre portion he had reserved for his sister.

Evidence for the Defence Case

6. **DW1**, the 2nd defendant, **Samson Lugalia**, testified on **8/5/2019** and adopted his statement dated **20/9/2016** as part of his evidence-in-chief. His evidence is that all the six defendants are siblings and that the plaintiff is their mother's brother hence an uncle to them who wants them to be evicted from the suit land. He testified that his father bought the land when **DW2** was still young; that his father and mother died in 2008 and 2015 respectively and were buried on the suit land. Concerning his mother's burial he testified that there was an objection which was taken to court by the plaintiff in **Kitale ELC No. 133 of 2014** but the court declined to bar the burial. He maintained that the family has never been evicted from the land since they were children and that his father kept a record for payment of consideration for the land. He produced some receipts issued by the plaintiff to his father as **P. Exhibit 2(a) - (f)**. He also produced a photocopy of the Identity card of the plaintiff and maintained that all those documents show the money paid by his father was for the purpose of purchasing the suit land. According to him the receipts had been in the possession of his mother. Upon cross-examination by Mr. Khayumbi he stated he has never seen any sale agreement executed between his father and the plaintiff and that he did not know whether his father has ever been taken to the land control board for a consent. He admitted that he was 10 years old when his father bought the land. He further testified that they sold their land in Bunyore in order to buy the plaintiff's land. He admitted that the plaintiff's son whose name is Charles lives on the land with his wife and two children. He also built a house on the land. He also admitted that the plaintiff's caretaker, a Ugandan called Mukenda used to live on the land where the plaintiff had a house. He also stated that he does not know the extent of the land he occupies is. However his brother has leased out a portion of the said land to a man Silvanos. He admitted that there were disputes over the land before the local administration between his parents and the plaintiff and there has not been peace between the two families.

7. **DW2**, **Peter Kipchumba Kibor**, the Senior Chief Milimani Location, testified on **1/7/2019** and adopted his written statement dated **20/9/2016**. His evidence is that he knows the defendants and their father; that he was a member of tribunal (presumably the Land Disputes Tribunal) between **1997 - 1997**; that no dispute over the land arose while the defendants' parents were alive and the defendants were born on the land. However on cross-examination he admitted he has never seen any sale agreement regarding the suit land; that the D.O was handling the dispute between the parties; that the D.O summoned the plaintiff to come to his office and he had spoken of subdivision of the land. On re-examination he testified that he has not seen the plaintiff on the land.

SUBMISSIONS

8. Submissions were filed on behalf of the plaintiff on **18/9/2019**. The defendants filed submissions on **20/8/2019**. I have considered the filed submissions.

DETERMINATION

Issues for Determination

9. The main issues for determination in this matter are identified as follows:

- (a) *Was the land leased or sold to the defendants' parents?*
- (b) *Was the plaintiff's title to the suit land extinguished by operation of the law at the expiry of 12 years from the date of entry by their parents into the suit land?*
- (c) *Are the defendants' trespassers on the plaintiff's land?*
- (d) *What orders should issue?*
- (a) *Was the land leased or sold to the defendants' parents?*

10. I must state at the commencement that this is a complex dispute involving parties related by way of consanguinity. The plaintiff, being brother to the defendant's mother, is the defendants' uncle. The defendant's father is therefore brother in law to the plaintiff. The plaintiff's son is also said to be residing on the suit land.
11. The plaintiff's version of events is that the defendants and their parents have been in occupation of the land by his consent, pursuant to a lease granted to them over the land. However the plaintiff did not produce any lease document to demonstrate that fact save a copy of a typewritten letter dated 3/12/84 which the plaintiff allegedly wrote to the District Officer of the locality vide which he purportedly notified the DO of his decision to allow the defendant's mother to rent the plot No. 42 for 2 years. Notably, this is a date earlier than 15/7/1987, the date on the earliest receipt produced by the defendants as evidence of sale.
12. The defendants on the other hand produced original receipts bearing various dates. The earliest is dated 15/7/87 and the latest is dated 15/2/92. The receipts are all printed with the name of the plaintiff. Below that name in capital letters are the words "Mbale Hardware & General Store: Dealers in Iron Sheets & Paints. Telephone 103, P.O. Box 235, Maragoli."
13. Poignantly on **DExh 2(a)** are the handwritten words: "deposit on purchase of land" the said receipt shows that Kshs. 4000/= was received from the defendant's father on 8/5/1989. **DExh 2(b)** is dated 3/3/1991 and acknowledges Kshs. 20,000/= being "for buying farm." **DExh 2(c)** dated 4/3/1989 acknowledges receipt of Kshs. 29,000/= being deposit "for land". **DExh 2(d)** dated 15/7/87 is for Kshs. 8000/= on account of "Mito Mbili Cherangani Scheme"; **DExh 2(e)** dated 15/2/1992 is for Kshs. 20,000/= being payment of "farm in Kitale." **DExh 2(f)** dated 12/5/1990 is for Kshs. 20,000/= being payment of "cash on maize from Cherangani". The total sum paid to the plaintiff vide the above receipts is **Kshs. 101,000/=**, a value substantially higher than the consideration alleged to have been paid by the plaintiff for the suit land.
14. In my view all the above receipts appear quite genuine. They were not discredited upon cross-examination of the defence witness who produced them. All through the plaintiff's evidence he never referred to them notwithstanding that copies thereof had been filed much earlier together with the defence. His submissions did not mention them. Is there anything the plaintiff could be concealing from this court? In my view the plaintiff must be taken to have admitted the receipts.
15. The plaintiff admitted that he lives in Vihiga from where he operated his business. He never lived on the suit land. The evidence from **DW2** indicated that the plaintiff has never been known to reside on the suit premises, and that the only persons who have been known to reside on the land are the defendants.
16. It is strange that one can allow persons to reside on his land under a lease for a period of 30 years and then purport to evict them without any notice of termination of the lease or correspondence generally on the subject. In any event the plaintiff's lease to his sister, if his own evidence is to be believed, expired two years after the letter dated 3/12/1984 was written.
17. It would be hard to believe that the plaintiff who purported to be able to write a letter such as **PExh 4** to the District Officer notifying him of his purported lease of the land to his sister, made a genuine error and wrote much later on the receipts issued to the defendant's father, who was known to the plaintiff as a purported lessee, words signifying that the monies that he was acknowledging receipt from him were in respect of purchase of land.
18. Between the defendants and the plaintiff only the defendants have some documentary evidence that lends much credence to the transaction that they respectively claim to have taken place in respect of the land.
19. This court notes that the total amount admittedly paid in respect of the land by the defendant's father was considerably more than that that was paid by the plaintiff while purchasing the land. In my view the amounts so paid could not be for lease of the suit land but for its purchase.
20. Though the defendants did not produce any agreement vide which the land was sold to their father, this court is thus inclined to believe the defendants when they state that their father bought the land from the plaintiff.

(b) Was the plaintiff's title to the suit land extinguished by operation of the law at the expiry of 12 years from the date of entry by their parents into the suit land?

21. In opposition to the claim for eviction by the plaintiff the defence states that the plaintiff neglected to take any action for about three decades and thus led the defendants to believe that he never had any claim on the suit land. It is argued that if the plaintiff had any genuine claim then the same lay against the defendant's father who is now deceased. It is alleged that he has never taken possession or exercised ownership of the of the suit land for the three decades. Though not very specifically pleaded it is decipherable that the defendant's claim over the land, alternate to the defence that their parents purchased the land from the plaintiff, is for adverse possession. The plaintiff has identified this issue and responded to it specifically. He cites the case of **Meru High Court Civil Case Number 127 Of 2002 Henry Kithinji M'Mwongo -vs- Mikiugu M'Mwongo** and quotes the following passage from that decision:

"An authorized entry into the proprietor's land with specific terms and conditions of occupancy which terms and conditions the authorized occupier did not breach by using and occupying the proprietor's property in an open and hostile manner inconsistent to the proprietor's title whether such occupation is open, continuous and uninterrupted for a period exceeding 12 years, such occupancy is not adverse to that of the registered proprietor. Similarly gracious and generous gesture by the registered proprietor to a relative to occupy and use land whose terms of occupancy are particularized and limited in use and occupancy even without a limited period cannot amount to adverse possession unless the occupier's occupation is inconsistent with the title of the registered proprietor and such occupancy is open, hostile, continuous and uninterrupted for a period of not less than 12 years. "

22. Adverse possession occurs when one occupied another's land *nec per vim, nec clam, nec precario*, that is to say, the 12 years possession period must be continuous, peaceful, not in secrecy and must be without the authority or permission of the true owner.

23. Neither the plaintiff nor the defendants gave any explanation for the presence of the plaintiff's son's occupation of a portion of the suit land which they admitted. They also never gave any date of entry of the plaintiff's son onto the suit land or averred that his occupation was subject to any conditions. The defendants maintained that their only dispute was with the plaintiff and not with his son.

24. For there to be adverse possession there must be unmistakable *animus possidendi* which means occupation with the clear intention of excluding the owner as well as other people.

25. The defendants have established that they have been in occupation of a portion of the land. It is not known how much land the plaintiff's son occupies in the land comprised in the title or when he commenced his occupation thereof. The defendants have built on the suit land and raised their families thereon. Owing to the dearth of evidence on the matter, this court must assume that the defendants' *animus* is in respect of the specific portion of land that they now occupy and that they meant to convince this court that they have occupied it for a period of more than 12 years that they pleaded in their defence, *nec vim, nec clam, nec precario*. But have they?

26. In the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR Nyeri Civil Appeal No. 22 of 2013 Visram, Koome & Otieno - Odek, JJ.A. the court observed as follows:**

“In Wambugu - v- Njuguna, (1983) KLR 172 at holding 4, this Court held:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.”

27. This position still holds true to date. If the lease in favour of the defendant's mother expired in 1986, then the defendants have been in possession adverse to the plaintiff's rights since that year, the plaintiff's consent and therefore defendant's mother's licence under lease having expired then. From that date to the year 2016 when this suit was commenced is a period of 30 years. So, even if the plaintiff's allegation of lease had been proved, the lapse of the statutory period requisite for a declaration of adverse possession would still have been easy to establish in this matter.

28. However the sale to the defendant's father which this court has found to be the more probable transaction, ended up with a payment of **Kshs. 20,000/=** only paid on **15/2/1992**. The defendants are not therefore in occupation of the suit land without any justifiable cause. Judging that there was evidently a contract with the plaintiff on the basis of which they entered the land of course under their family patriarch, if there was any breach, the plaintiff had to bring the claim for the recovery of the land within 3 years of that date, the claim ought to have been lodged at least by February 1995. No breach is alleged however and **15/2/1992** being the date on which the full purchase price for the land is the one that should be taken to matter, computation of 12 years should begin from that date. 12 years from that date expired on **14/2/2004**. This claim was brought 15 years after the expiry of the statutory period within which the plaintiff should have asserted his right to the suit land.

29. Save the admitted claim filed in 2014, there is no evidence that the plaintiff ever demanded that the defendants should vacate the land, or that he tried to evict them before their parents died. The closest the plaintiff came to asserting title to the suit land was the lodging of the claim against the defendant's mother in the year 2014 whose fate the plaintiff never informed this court.

30. In this court's view, the defendants have not only established that they have lived on the suit land for a period exceeding the statutory 12 years, but that they have also lived peacefully and continuously on the land and that their possession was not secret but was notorious. In my view they have established their claim for adverse possession.

31. However they have not counterclaimed expressly for adverse possession. Should this court grant them prayers that they have not expressly sought? They admit that the plaintiff's son is in occupation of some part of the land under that title. What orders should issue?

32. The ordinary way of lodging a claim for adverse possession is by an originating summons under **Order 37** of the **Civil Procedure Rules**. Should this court grant the defendants no orders for failure to comply with the rules?

33. The Court Of Appeal in the case of **Edwin G. K. Thiongo & another v Gichuru Kinuthia & 2 Others [2015] eKLR Civil Appeal No. 267 of 2007 Sichale, Odek & Kantai, JJ.A** observed as follows:

“The appellants attacked the manner in which the claim for adverse possession was made. They faulted the respondents for filing a counter-claim as opposed to an originating summons.

In Wilson Kenyenga vs Joel Ombori (supra) this Court held:

“Order 36 Rule 3D of the Civil Procedure Rules specifically stipulates as to the manner such claims are brought to court. Such claims for adverse possession are brought by way of originating summons. This is mandatory provision and it has been repeatedly held by this Court that failure to comply with this mandatory provision makes a suit incontestably bad in law.”

Similarly in *Lali Swaleh Lali & Others vs Stephen Mathenge Wachira & Others* (supra) this Court reiterated that under O.XXXVI, “..... it is mandatory under Rule 3D(1) that an application by a person claiming to have become entitled to land by adverse possession under Section 38 of the Limitation of Actions Act, Chapter 22 of the laws of Kenya must be made by originating summons. There is no discretion in the matter and whether or not the issues involved in such an application are intricate, there is no choice in the matter.”

The respondent’s claim to the suit land was made by way of a counter-claim as opposed to an originating summons. In our view, we find that the learned judge of the High Court erred in failing to find that a claim for adverse possession must be made by way of an originating summons and not by way of a counter-claim as was the case before him.”

34. In the case of *Teresa Wachuka Gachira -vs- Joseph Mwangi* [2009] eKLR the Court of Appeal had this to say about procedure regarding adverse possession:

“The mandatory procedure for invoking that section is in Order 36 r 3D of the Civil Procedure Rules and ordinarily the failure to follow that procedure is fatal to the suit. That is because under rule 10 an originating summons may be continued as if the cause had begun by filing a plaint, but the converse is not acceptable - see *E. vs. E.* [1970] EA 604. In this case however, adverse possession was made in a counterclaim, a procedure which was adopted and received acceptance in the *Gatimu Kinguru* case (supra). Whatever the procedure, the onus is on the person claiming adverse possession to prove, in the words of Kneller J. (as he then was) in *Kimani Ruchine v Swift, Rutherford & Co. Ltd* [1980] KLR 10 that:

“The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion).”

35. Order 36 was the then equivalent of the current Order 37 of the Civil Procedure Rules.

36. However, in the case of *Stephen Kaguku Mariba -vs- Kibe Mariba - Nairobi Civil Appeal No. 188 of 2002* the court found that not commencing the suit by way of an Originating Summons is not fatal to the claim.

37. In the case of *Chevron K. Ltd (formerly known as Caltex Oil (K) Ltd) -vs- Harrison Charo Washutu - Malindi Civil Appeal No. 17 of 2018* the defendant claimed adverse possession through a defence and the plaintiff’s claim was dismissed and the defendant’s claim was granted notwithstanding the absence of a counterclaim or that the defendant had not commenced the claim by way of an Originating Summons.

38. In the case of *Joel Chepkwony v Ennes Shisiali Malenya* [2018] eKLR, Kitale Land Case No. 58 Of 2010 this court observed as follows:

“41. In my view, the defendant knew that she was seeking title by way of adverse possession since the day she filed her original defence in this matter and any amendment may have only been arrived at defining the issues in a more erudite manner.

42. Though refined pleadings are necessary to make the work of the court and of a party’s adversaries easier in defining the real issues in controversy where the document filed by a litigant leaves no doubt as to what kind of claim the litigant is making, the court should not ignore it.

43. In this case the court will not ignore the claim for adverse possession merely because the defence was not amended to read “amended defence and counterclaim” as intended. It may be that the defendant left issues of crafting pleadings into the proper form to her legal experts, the advocates who represented her and who, one after the other, let her down and departed from the scene without accomplishing a task as simple as filing an amended defence and counterclaim as earlier ordered by the court. I note that paragraphs 7 and 8 of the plaintiff’s reply to defence dated 12/8/2010 state as follows:

“7. It is denied that the defendant has resided on the land for any duration as alleged, and the defendant is put to strict proof of the allegation.

8. It is denied that the defendant has been in continuous or uninterrupted occupation of the said property, and it is further denied that she is entitled to be registered as the owner of the property by way of adverse possession.”

44. This court therefore deems the pleadings at paragraphs 8 and 9 of the defence as sufficient for the purpose. In view of the pleading by the plaintiff as cited in the foregoing paragraph, denying the plaintiff this remedy for the sole faults of her counsel is to me an over-reliance on formalities and technicality which is discouraged by Article 159 of the Constitution. Substantive justice is to be encouraged.”

39. I consider the situation in the *Joel Chepkwony* case (supra) to apply to the instant suit, for at paragraph 5 of the reply to defence the plaintiff states as follows:

“5. In response to the contents (of the defence) the plaintiff denies ...that they have lived on the said land peacefully uninterrupted for more than 30 years and the defendants are put to strict proof thereof.”

40. The above excerpt confirms that the plaintiff was aware that he would meet the claim of adverse possession at the hearing and he was accorded sufficient opportunity to answer the same, and so he cannot be deemed as ambushed in any way.

41. In **Gulam Miriam Noordin v Julius Charo Karisa [2015] eKLR Malindi Civil Appeal No.26 Of 2015 Makhandia, Ouko & M'Inoti, JJ.A** the court observed as follows:

“The Court has in Teresa Wachika Gachira v Joseph Mwangi, CA 325 of 2003 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario*. It is clear that the change in the court’s approach to this question has, by and by been dictated by the need to do substantive justice. The respondent averred in his statement of defence that;

“4. The defendant further avers that even in the event that the plaintiff title is legal it only confers him the status of the paper owner as the defendant has been in exclusive physical control of the suit property from the 1950 and their occupation has been continuous without interruption from any person and they have rightly acquired the suit premises by way of adverse possession.”

42. This court may therefore issue appropriate orders that will meet the ends of justice in this case notwithstanding the lack of a counterclaim by the defendants.

(c) What Orders should issue?

43. I have considered that the plaintiff’s son is admitted by the defendants to be in occupation of a portion of the suit land. The defendants occupy the rest of the land. This court, intent that justice be done between the parties is of the opinion that the status quo existing on the ground should not be disturbed. For that reason I find that the plaintiff’s claim is partially successful and the defendant’s claim is also partially successful. I issue the following final orders:

(a) The defendants are hereby restrained by way of a permanent injunction from interfering with the plaintiff’s son’s peaceful use of the portion of land comprised in Title Number Trans Nzoia/Mito Mbili /42 which the plaintiff’s son is currently occupying.

(b) A declaration that the defendants have acquired by way of adverse possession the portion of land in Title Number Trans Nzoia/Mito Mbili /42 which they are currently occupying.

(c) The suit land Title Number Trans Nzoia/Mito Mbili /42 shall be subdivided and the defendants shall be registered as proprietors of the portion that they currently occupy in that land.

(d) The plaintiff and his son shall determine who between them should be registered as proprietor of the portion of Title Numbe Trans Nzoia/Mito Mbili /42 currently occupied by the plaintiff’s son.

(e) Each party shall bear their own costs of the suit.

Dated, signed and delivered at Kitale on this 13th day of November, 2019.

MWANGI NJOROGE

JUDGE

13/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Khayumbi for plaintiff

Mr. Wanyonyi holding brief for Ambutsi for defendant

COURT

Judgment delivered in open court at 2.55 p.m.

MWANGI NJOROGE

JUDGE

13/11/2019.