



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 12 OF 2018 (O.S)

JOHN NYAMBOK AWINO.....PLAINTIFF

-VERSUS-

JULIUS OKOLO ANYIMBI.....DEFENDANT

JUDGMENT

1. On 24th January, 2018, the plaintiff, John Nyambok Awino commenced the instant suit by way of an originating summons dated 22nd January 2018 under Order 37 Rule 7 of the Civil Procedure Rules, 2010 as read with section 38 (1) of the Limitation of Actions Act (Cap 22) and the sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya against the defendant, Julius Okolo Anyimbi. Being represented by learned counsel, Mr. Migele instructed by Nyauke and Company Advocates, he claims to have acquired title to the suit land, LR NO. Kanyada/Kalanya/4295 in Homa-Bay County. Thus, he is seeking the following reliefs;-

- i. **THAT** he has acquired title of that parcel of land known as Kanyada//Kalanya/4295 herein referred to as the suit land by virtue of adverse possession.
- ii. **THAT** the defendant's title to the suit land be extinguished by virtue of adverse possession and the suit property be registered in the plaintiff's favour as the proprietor.
- iii. **THAT** the land Registrar (Homa-Bay), register, the plaintiff as the proprietor of the suit land.
- iv. **THAT** the costs of this suit be in the cause.

2. The originating summons is premised on four (4) grounds which include;-

- a) **THAT the plaintiff has for the past twenty four (24) years cultivated and developed the suit property without any interference from the defendant herein.**
- b) **THAT activities of the plaintiff on the above mentioned parcel has been adverse to the interest of the defendant who is the registered proprietor.**

3. The originating summons is further based on a 13-paragraphed supporting affidavit of the plaintiff sworn on 24th January 2018 and a copy of certificate of official search (PEXhibit 1) and photographs (PEXhibit 2) of his homestead on the suit land annexed to the said affidavit. Briefly, the plaintiff averred that the defendant, is the registered owner of the suit land and that he (plaintiff) has been living thereon for the past 24 years peacefully. That since then, the plaintiff had been in open and uninterrupted occupation of the suit land with the full **Knowledge** of the defendant thereby conferring on him rights of adverse possession.

4. On 5th February, 2019, this court gave directions that the originating summons be treated as a plaint. That any replying affidavit of the defendant be treated as a statement of defence. That the suit be heard by way of viva voce evidence.

5. Pursuant to the court order granted on 30th May, 2018, the defendant was served by substituted service on 7th July, 2018 as demonstrated by the affidavit of service sworn on 13th July, 2018. However, the defendant failed to enter appearance and or file any reply to the originating summons within the prescribed period of time or at all.

6. On 23rd September 2019, the suit was heard ex-parte and the plaintiff (PW1) testified and relied on his supporting affidavit as well as PEXhibit 1 and PEXhibit 2. PW1 stated, inter alia;

“ I have used the land since 1994. I live on the suit land. I have developed the same approximately 0.56 hectares”

7. Learned counsel for the defendant filed submissions dated 15th October 2019 wherein he gave brief facts of the case, framed and analysed an issue for determination namely whether or not the plaintiff's claim has been proved. He urged this court to grant the declarations sought in the originating summons as the plaintiff's claim for adverse possession over the suit land has been proved. Counsel relied on the case of **Samwel Miki Waweru –vs- Jane Njeri Richu (227) e KLR** as well as **Jane Maina Kinya –vs- Gerald Kwendaka (2018) eKLR** to fortify his submissions.
8. I have considered the entire originating summons, the plaintiff's supporting affidavit as well as his evidence including PExhibits 1 and 2. I also note the plaintiff's submissions and guided accordingly by the Court of Appeal decision in **Galaxy Paints Company Ltd –vs- Falcon Grounds Ltd (2000) 2 EA 385** on issues for determination in a suit generally.
9. To that extent, the points for determination are whether the plaintiff has established the prerequisites for adverse possession claim as well settled in the case of **Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another (2015) eKLR** where the Court of Appeal held 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.....*” (Emphasised points)**
10. The first point for determination namely whether the suit land is registered in the name of a person other than the plaintiff, is discerned in the originating summons. In his supporting affidavit, PW1 stated at paragraphs 4 and 10 that the defendant was the registered owner of the suit land.
11. This court is fully aware of the definition of the term “Proprietor” under **section 2 of the Land Registration Act, 2016 (2012)** and the related provisions namely sections 24,25, 26 and 30 of the same Act. PExhibit 1 at part B reveals that the defendant is the registered proprietor of the suit land with effect from 15th December 2003 and title deed thereto was issued on 17th May 2005.
12. 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 noted in **Gatimu Kinguru case (infra)**. That he has been in open and uninterrupted occupation of the same for the past 24 years.
13. PW1 stated that the suit land is approximately 0.56 hectares 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 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**.
14. It is evident that PW1 has been in open and exclusive possession of the suit land and of right; see the Court of Appeal decision in **Wanje –vs- Saikwa (NO. 2) (1984) KLR, 284**.
15. Additionally, has PW1 been in that possession 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 in support of ground (1) of the Originating summons and paragraphs 5 and 6 of his affidavit in support of the same.
16. PW1 asserts his title to the suit land by virtue of his open and continuous occupation of the land. In **Wanyoike Gathure –vs- Beverly (1965) EA 514 at 518**, Miles J observed that the possession must be unbroken or no any endeavours made to interrupt it; see also **Maina Kinya case (supra)**.
17. According to **Sections 25 and 28 (h) of the Land Registration Act 2016 (2012)**, 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 Ruchuine and another –vs- Swift Rutherford Company Ltd and another (1976-80) 1KLR 1500**, it was held that such rights and registrations can be challenged on the grounds including adverse possession.
18. **Sections 107 and 108 of the Evidence Act (Cap 80) and Kazungu Katana (supra)** are of abundant help that the 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 the owner of the land has been dispossessed of the land in the obtaining circumstances.
19. 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 contention is very cogent and unchallenged herein. He has established his case against the defendant on the balance of probabilities. Consequently, he is entitled to the orders sought in his originating summons.
20. Wherefore, Judgment be and is hereby entered for the plaintiff against the defendant in terms of orders 1, 2,3 and 4 sought in his originating summons dated 22nd January 2018.
21. It is ordered accordingly.

Delivered, SIGNED and Dated in open court at **Migori** this **13th Day of NOVEMBER 2019**.

G.M.A ONG'ONDO

JUDGE

In presence of :

Plaintiff present,

non-appearance of the plaintiff's counsel as well as the defendant and his counsel.

Tom Maurice – Court Assistant