



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 870 OF 2017 (O.S)

ELISHA ONYANGO ARUKA.....PLAINTIFF

-VERSUS-

MICHAEL OBEL ONDORO.....DEFENDANT

JUDGMENT

1. The plaintiff, **ELISHA ONYANGO ARUKA** commenced the instant suit by way of an amended originating summons dated 13th December, 2017 and filed on 15th December 2017 under Order 36 rule 3 of the Civil Procedure Rules, 2010 as read with section 38 of the Limitation of Actions Act (Cap 22) and the Registered Land Act Cap 300 Laws of Kenya (the repealed Act). Being represented by learned counsel, Mr. Kerario Marwa of Kerario Marwa and Company Advocates, he claims to have acquired title to the suit land, LR NO. Kabuoch/Kachieng/2068 within Ndhiwa in Homa-Bay County. So, he is seeking the following reliefs;-

i. **THAT** this honourable court do declare that the plaintiff has acquired adverse possession of all that land known as Kabuoch/Kachieng/2068 and or possession of the said portion for over 12 years that is to say since 1987 the month of February.

ii. **THAT** this Honourable court do be please to order that plaintiff be registered as proprietor of all that parcel of land measuring 4 acres out of Kabuoch/Kachieng/2068.

iii. **THAT** this Honourable court do issue a permanent injunction restraining the respondent by himself or his agent from interfering with the plaintiff's occupation an enjoyment of the said portion of 4 acres.

iv. Any other relief this Honourable court may deem fit to grant in the circumstances.

2. The originating summons is anchored on two (2) grounds namely:-

a) THAT the applicant has been in uninterrupted occupation of the portion of 4 acres of Land parcel No. Kabuoch/Kachieng/2063 for over 12 years.

b) THAT the said occupation by the applicant has been open and known to the respondent.

3. The originating summons is further based on 8-paragraphed supporting affidavit of the plaintiff and copy of green card marked as EOO1 (PEXhibit 3) together with a copy of minutes of a meeting of 24th January, 2017 (PEXhibit2) annexed to the said affidavit. Briefly, the plaintiff averred that the defendant, Micheal Obel Ondoro has been the registered owner of LR. No.Kabuoch/Kachieng/796 (the original parcel of land) since 1987. That the defendant subdivided the original parcel of land into the suit land and LR NO. Kabuoch/Kachieng/2069 and now owns the suit land.

4. The plaintiff further averred that in February 1989 the defendant sold to him the suit land measuring approximately four (4) acres out of the original parcel of land. That since then until January 2017 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. That in January 2017, the defendant purported to evict him from the suit land hence provoking the instant suit.

5. On 29th January, 2019, this court gave directions that the amended 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.

6. The defendant was variously served including on 8th January 2019 and 9th April, 2019 as demonstrated by affidavits of service sworn on 29th January 2019 and 5th July, 2019 respectively by Peter Ochara Anam, a duly licenced court process server. 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.

7. The suit was heard ex-parte on 8th July, 2019 when the plaintiff (PW1) testified and relied on the originating summons, his supporting affidavit and list of documents dated 6th November 2017 (PEXhibits 1 to 4). In particular, he did refer to a certificate of official search in respect of the suit land (PEXhibit 4).

8. In his testimony, PW1 stated, inter alia;-

“I have been on the portion of the suit land since 1987. I seek orders in amended originating summons. It is four (4) acres. I bought the land in the year 1987, from the respondent.”

9. Learned counsel for the defendant filed submissions dated 2nd October 2019 wherein he gave the background of the case, the law and evidence of PW1. 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 is proved and unchallenged herein.

10. I have studied the entire originating summons, the plaintiff's supporting affidavit as well as his evidence including PEXhibits 1 to 5. I also note the plaintiff's submissions and duly guided by Court of Appeal decision in **Great Lakes Company (U) Ltd –vs- KRA (2009) KLR 720** on issues for determination in a suit generally.

11. In that regard, the points for determination are whether the plaintiff has established the threshold 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 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*)

12. The first point for determination is whether the suit land is registered in the name of a person other than the plaintiff. In his supporting affidavit, PW1 averred in part that the defendant was the registered owner of the original parcel of land which he subdivided into LR NO. Kabuoch/Kachieng/2069 and the suit land. That the defendant owns the latter land.

13. 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. PEXhibits 3 and 4 reveal that with effect from 16/09/2014, the defendant is the registered proprietor of the suit land.

14. The second point for determination is 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 bought the suit land in February 1987 as per PEXhibit1. That he has been in open and uninterrupted occupation of the same until January 2017 when the defendant purported to evict him.

15. In his evidence, PW1 was succinct that the portion of land is approximately four (4) acres out of the suit land. It is essential that adverse possession should be of the whole or a defined portion of land as recognised in **Muthaita –vs- Wanoie and 2 others (2008) 1 KLR (G and F) 1024** which applied the decision of Madan, J (as he then was) in **Gatimu Kinguru –vs- Muya Gathangi (1976-80) 1KLR 317** where it was held in part;-

“The defendant's possession was open and notorious...”

16. It is not in contest 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.**

17. Thirdly, 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? PW1 was emphatic that he has been in uninterrupted occupation of the portion of four (4) acres of the suit land for over twelve (12) years as discerned at ground (a) of the Originating summons and paragraph 6 of his affidavit in support of the same.

18. PW1 asserts his title to the suit land by virtue of his open and continuous occupation of the land by PW1. 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.

19. I bear in mind that the person asserting any claim including adverse possession, must prove the same; see **sections 107 and 108 of the Evidence Act (Cap 80) and Kazungu Katana (supra).**

20. **Sections 25 and 28 (h) of the Land Registration Act 2016 (2012)** stipulate that the ownership of registered land is subject to overriding interest including a claim for adverse possession. Also in the case of **Salim –vs- Boyd (1971) EA 550 applied in Kimani**

Ruchune and another –vs- Swift Rutherford Company Ltd and another (1976-8) 1KLR 1500, it was held that such rights and registrations can be challenged on the grounds of adverse possession, among others.

21. 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 thereby.

22. 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 claim raised by PW1 is quite cogent and unchallenged herein. He has established his case against the defendant on the balance of probabilities. He is entitled to the orders including injunctions as provided at **section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)** as sought in his plaint.

23. Wherefore, Judgment be and is hereby entered for the plaintiff against the defendant in terms of orders 1a, 2 and 3 sought in his amended originating summons dated 13th December 2017. In particular, this court hereby make final orders as follows:-

a) A declaration that the plaintiff has acquired adverse possession of all that land known as Kabuoch/2063 measuring about 4 acres or there about having been in uninterrupted occupation and or possession of the said portion for over 12 years that is to say since February 1987.

b) An Order that the plaintiff be registered as proprietor of all that parcel of land measuring 4 acres out of KABUOCH/KACHIENG/2068 and the defendant to execute the necessary transfer documents in favour of the plaintiff in default the Deputy Registrar of this court to execute the same accordingly.

c) A permanent injunction to issue restraining the respondent by himself or his agents from interfering with the applicant's occupation and enjoyment of the said portion of four (4) acres.

d) The costs of this suit be borne by the defendant.

Delivered, SIGNED and Dated in open court at **Migori** this **12th Day of NOVEMBER 2019**.

G.M.A ONG'ONDO

JUDGE

In presence of :

No appearance of both parties

Tom Maurice – Court Assistant