



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 374 OF 2018

(Formerly Kisii Elc case 235 of 2013

consolidated with Kisii Elc case no. 173 of 2014 (O.S)

***CHARLES AJWANG' ABETI (Suing as the legal representative of
ABETI ATINDA, DECEASED).....PLAINTIFF***

VERSUS

CHARLES OCHORO RABACH.....DEFENDANT

JUDGMENT

A. Introduction

1. This Judgement is in respect of two (2) consolidated suits namely;

a) The lead file, formerly Kisii Elc case No. 173 of 2014 (OS); Charles Ajwang' Abeti (suing as the legal representative of *Abeti Atinda – Deceased*) –vs- *Charles Ochoro Rabach* (Herein after referred to as *DW1*) and;

b) Formerly Kisii Elc case No 235 of 2013; *Charles Ochoro Rabach (DW1)*–vs- *Moses Mogere* (Hereinafter referred to as “*PW5*”).

2. The consolidation was done on 6th November 2014, when the court (Okongo,J) directed and ordered that :-

“By consent the application dated 28/7/2014 is allowed in terms of prayer No. 1 thereof. Kisii High Court land case No. 173 of 2014 shall be the lead file”

3. The property in the present dispute is LR NO. West Kasipul/Kodera- Karabach/168 measuring approximately 4.4 hectares in area (the suit land). It was originally land parcel number Kodera-Karabach/ 49 (the original parcel of land) situate in Homa-Bay County.

4. The plaintiff Charles Ajwang Abeti is represented by M/s G.S. Okoth and Company Advocates. The defendant, Charles Ochoro Rabach (DW1) is represented by M/s Oguttu , Ochwangi, Ochwal and Company Advocates. PW5 appears in person.

5. On the 16th March 2017, the consolidated suits were transferred from Kisii Environment and Land Court to this court for hearing and determination. On 17th January 2018, this court directed that the originating summons dated 2nd April, 2014 and the defendant's replying affidavit sworn on 7th December 2015 be treated as a plaint and a statement of defence respectively and that the hearing of the matter be by viva voce evidence.

B. The plaintiff's case

6. By an originating summons dated 2nd April, 2014 and filed in court on 5th April, 2014, the plaintiff, Charles Ajwang Abeti (PW1) claims to be entitled to be registered as the proprietor of the suit land having acquired title thereto by virtue of adverse possession. In that regard, he is seeking determination of the following questions;-

a) Whether Abeti Atinda –deceased was the registered proprietor of land parcel No. West Kasipul/Kodera-Karach/168.

b) Whether the deceased proprietor put the plaintiff in possession or occupation thereof and if so, when did the plaintiff start to occupy the same.

c) Whether the defendant had fraudulently registered himself as the registered proprietor of land parcel No. West Kasipul/Kodera-Karabach/168 which was original land parcel No. Kodera-Karabach/49 (in the name of Abeti Atinda).

d) Whether the defendant had fraudulently registered himself as the registered proprietor of land parcel NO. West Kasipul/Kodera-Karabach/168 which was originally land parcel No. Kodera-Karabach/49 (in the name of Abeti Atinda).

e) Whether an injunction should issue against the defendant, his agents , servants or anybody deriving authority from him restraining him from evicting, dispossessing or in any way interfering with the plaintiff's occupation, use and quite enjoyment of the suit land.

f) Whether the defendant should be ordered to relinquish his claim to the suit land and move the Land Control Board to rectify the error or fraudulent registration.

g) Whether the defendant should be ordered to pay compensation to the plaintiff for any losses incurred through the acts of the defendant in refusing to have the fraudulent registration or error rectified and subsequently transfer to the plaintiff the suit land.

h) Whether the defendant should pay the costs of this suit.

i) That such orders may be issued by the court as may attain the ends of justice.

7. The originating summons is premised on the plaintiff's supporting affidavit sworn on even date and accompanying documents namely the affidavit in support of summons sworn on even date by William Onyuka Wewo (PW3), Joseph Obonyo Odieny (PW4) and Edward Atinda Ngodhe (PW2). The said summons is also supported by copies a demand letter dated 8th August 2013 by the plaintiffs' counsel, (PEXhibit 1), a certificate of official search dated 14th August 2013 (PEXhibit 2) and a green card /register (PEXhibit 3) in respect of the suit land.

8. Briefly, PW1 claims that the suit land belonged to his deceased father, Abeti Atinda Adel during the land adjudication in the area. That the family members of Abeti Atinda family including himself have been in cultivation of the suit land but later discovered that the same was registered in the name of the defendant (DW1) who is a son of Adongo daughter of Atinda, a sister to his deceased father.

9. PW1 testified and called PW2, PW3, PW4, and Moses Kisiora Mogere (PW5), to fortify his case. He relied on PEXhibits 1,2 and 3 herein.

10. Learned counsel for the plaintiff filed submissions dated 4th October 2019 and relied on the case of **Mtana Lewa –vs- Kahindi Ngala Mwangadi (2015) eKLR and Maina –vs- Hiram Gathiha Maina (2013) eKLR**. Counsel also cited **Black's Law Dictionary** on the definition of the term "**fraud**" and section 27 of the Civil Procedure Act (Cap 21) regarding costs of the suit, to buttress the submissions.

C. The Defendants' Case

11. By his replying affidavit sworn on 7th December 2015, the defendant Charles Ochoro Rabach (DW1) opposed the originating summons and sought it's dismissal with costs. He averred, inter alia, that the deceased, Abeti Atinda did not occupy and or possess the suit land which was only lawfully and legitimately registered in the name of DW1 and not the deceased Abeti Atinda. He relied on copies of a green card, a title deed and certificate of official search marked as COR 1 (a), (b) and (c) (DEXhibits 1 to 3) and also a copy of plaint in Kisii High court Civil case 235 of 2013 marked as "COR 2" (DEXhibit 4).

12. In his plaint dated 27th May 2013 and filed on even date, DW1 has sought Judgment against PW5 for:-

i. An order of eviction do issue directing the defendant, his employees, servants and any other person claiming authority under his name to remove his structures built in the suit land and/or be evicted by lawful means.

ii. Cost of this suit.

iii. Any other relief this honourable court deems fit to grant

13. DW1 asserted that he is the sole registered owner of the suit land. That in January,2012, PW5 unlawfully entered there unto thus provoking this suit.

14. DW1 relied on his statement dated 7th December 2015 and called Philip Mwai Odida (DW2) who relied on his statement dated 25th May 2019 to the effect that the suit land is registered in the name of DW1 and that PW5 occupies the same, among other things. That DW2 is an elder brother to DW1 who cultivates the land.

15. In his statement of defence dated 17th June ,2013 and filed in court on even date, PW 5 stated that the suit land is currently owned and occupied by Abeti family members namely Edward Atinda Ngodhe (PW2), Jeremiah Chuchu Ondiegi, Charles Ajwang Abeti (PW1) and William Onyuka Wewo (PW3). That he was only a contractor on the suit land and that the claim of DW1 should be directed to PW2, PW3 and other family members of Abeti family.

16. In their submissions dated 12th October 2019 and filed on 15th October 2019, learned counsel for the defendant gave the background of the case and identified three (3) issues for determination namely whether the plaintiff and the defendant have proved a claim for adverse possession and trespass respectively on a balance of probabilities and who is to bear the costs of the suits. That the plaintiff failed to adduce evidence to prove his case. Counsel cited sections 107 and 108 of the Evidence Act (Cap 80) and relied on authorities including **Wanje –vs- Saikwa (1984) KLR 284**, **Ndatho –vs- Itumo and 2 others (2002) 2 KLR 637**, **Bhagwani Singh Kalsi –vs- NHC (2017) eKLR** and **Morgan Air Cargo Ltd –vs- Everest Enterprises Ltd (2014) KLR**, in support of the case for the defendant (DW1).

17. PW5 did not submit or at all. Nonetheless, since he was called by PW1, I have already noted the plaintiff's submission herein.

D. Issues for determination

18. I have duly considered the entire pleadings of the respective parties, the testimony of PW1 to PW5, DW1 and DW2 and the rival submission including all the authorities cited therein. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720**.

19. From the issues set out on the face of the originating summons, the defendant's statement of agreed issues dated 14th November 2013 and issues (i) (ii) and (iii) in the defendant's submissions, the issues for determination in the consolidated suits are compressed as to whether:-

a) The plaintiff (PW1) has proved his claim for adverse possession in respect of the suit land on a balance of probabilities

b) The defendant (PW1) has proved on a balance of probabilities that PW5 is a trespasser on the suit land.

c) The parties are entitled to reliefs sought in their respective pleadings.

E. Analysis and determination

20. As regards the first issue, the concept of adverse possession is envisaged in the following maxim:-

“Nec vi;nec clam, nec plecario (no force , no secrecy no evasion)

21. The plaintiff therefore adopted the procedure for asserting his claim for adverse possession by way of the originating summons as provided under sections 7,9,13,17,37 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya; see **Salim –vs- Boyd (197)EA 550 and Mtana Lewa case (supra)**.

22. What amounts to adverse possession was quite clearly elaborated by the Court of Appeal in the case of **Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another (2015) eKLR** that :-

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..... ” (points Emphasised)

23. In the instant suit, who is the registered proprietor of the suit land? According to the testimonies of PW1 and PW2, the suit land is registered in the name of DW1. It was confirmed by PW 4 who stated that DW1 has the title to the suit land.

24. In the words of DW1, the suit land is registered in his (DW1) name since 1979. It was so affirmed by DW2, who told the court that title deed thereto was issued to DW1 in 1979.

25. This court is aware of the fact that the suit land was registered under the Registered Land Act Cap 300 Laws of Kenya (the repealed Act). To that extent, I agree with the observation made by Simpson, J (as he then was) in **Wainaina –vs- Murai and another (1976-80) 1 KLR 283 AT 289 and 290** that :-

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

26. I take into account the definition of the term **“Proprietor”** under section 2 of the Land Registration Act,2016 (2012) as well as sections 24,25, and 26 of the same Act in respect of interest conferred by registration, rights of a proprietor and certificate of title to be held as conclusive evidence of proprietorship respectively. None the less, it is common ground that the suit land is registered in the name of DW1 as per DExhibits 1, 2 and 3.

27. The second and third ingredients of the concept of adverse possession are also to be discerned from the evidence on record. PW1 stated that PW2 uses the suit land. His testimony was confirmed by PW2 who stated during examination in chief inter alia,

“I occupy the suit land.....”

28. The testimony of PW1 that he shifted from the suit property to another property, among other things was further fortified by PW3 and

PW4 who stated that PW2 occupies the suit land. During cross examination, PW1 stated that PW2 and his family members stay on the suit land.

29. PW1 stated that he (PW2) hired PW5 to erect a poultry house on the suit land. He further stated that PW2 cultivated the land which belongs to PW2 and his family. Another witness, PW4 testified that the cultivation is not carried out on the whole of the suit land.

30. In the case of **West Bank Ltd –vs- Arthur (1966) 3 LR 750**, it was held that evidence of cultivation should be definite as to area and time; see also **Muthuita –vs- Wanoe and 2 others (2008) 1 KLR (G and F) 1024** where the decision of Madan , J (as he then was) in **Gatimu Kinguru –vs- Muya Gathangi (1976) KLR 253** was applied accordingly.

31. It is trite law that possession of the land in dispute can take different forms including cultivation; see **Titus Ong’ang’a Nyachieo –vs- Martin Okioma Nyauma and 3 others (2017) eKLR**.

32. It has emerged from the evidence adduced herein that it is PW2 who cultivates the suit land. Therefore PW1 is not in open and exclusive possession of the suit land in an adverse manner to the title held by DW1.

33. Moreover, since PW1 is not in use and enjoyment of the suit land, there can be no dispossession of DW1 as the proprietor of the suit land in such circumstances; see generally **Halsbury’s Laws of England 3rd Edition paragraphs 481 and 482 on pages 251 and 252**.

34. Sections 25 (1) (b) and 28 (h) of the Land Registration Act, 2016 (2012) envisage adverse possession as an overriding interest over registered land. In **Salim case (supra) and Tayebali Adamji Alibhai –vs- Abdulhussein Adamji Alibhai (1938) 5 EACA 1**, among other authorities, it was held that rights and registrations in respect of land can be challenged on grounds including adverse possession.

35. This court is aware of sections 107 and 108 (supra) regarding the burden of proof and incidence of proof respectively. In the case of **Ahmed Abdulkarim –vs- Member for Land and Mines (1958) EA 436 at 441**, it was held that the burden of proof is on the plaintiff to prove adverse possession on the balance of probabilities.

36. The plaintiff has not established that he is in open and exclusive possession of the suit land for a period in excess of twelve (12) years in adverse manner to the title of DW1 hence not even a tenancy at will can not presumed in his favour as held in **Wainaina case (supra)**. The testimonies of PW2, PW4, PW5 and the circumstances negative such presumption. It is pretty clear that the plaintiff’s claim for adverse possession over the suit land is farfetched bearing in mind **Salim, Gatimu Kinguru, Mtana Lewa, Wanje and Kazungu Katana cases (supra)**, amongst other legions of authorities. The testimony of DW1 and DW2 with DExhibits 1 to 5 clearly displace the plaintiff’s claim.

37. As regards, the defendant’s claim against PW2, the **Black’s Law Dictionary 10th Edition** defines the term “Trespass” as;-

“An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property”

38. Similarly, **Clerk and Lindsell 17th Edition paragraph 17 -01** defines “Trespass” thus;-

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

39. It was the evidence of PW1 that PW5 constructed a house for him on the suit land. In his defence statement, PW5 was clear that the suit land which PW2 cultivates, does not belong to him and that he only erected a poultry house and had started building another house thereon.

40. DW1 who is the registered proprietor and in possession of the suit land, did not permit PW5 to enter and erect any structure on the land. On that score, I approve the view of Samson Okongo ,J in **Zacharia Onsogo Momayi –vs- Evans Omurwa Onchagwa (2014) eKLR** that trespass is any unjustified intrusion of the person upon the land in possession of another.

41. Quite plainly, PW5 is in unlawful occupation of the suit which it is owned by DW1. An unlawful occupation of land is prohibited under **section 152 A of the Land Act, 2016 (2012)** which reads;-

“ A person shall not unlawfully occupy private, community or public land.”

42. In the end, it is the finding of this court that PW1, who relied on only PExhibits 1 to 3 without any grant in respect of the estate of Abeti Atinda (deceased), lacks locus standi to mount this suit in view of the Court of Appeal decision in **Troustik Union International and another –vs- Jane Mbeya and another (1993) eKLR**. Therefore, PW1 has failed to prove his claim for adverse possession over the suit land against the defendant on a balance of probabilities.

43. On the other hand, the evidence of DW1 including DExhibits 1 to 5 support the defendant’s claim. I am of the considered view that the defendant (DW1) has proved his claim against PW5 on a balance of probabilities.

44. Thus, the consolidated suits are hereby determined as follows;-

a) The plaintiff’s suit formerly Kisii ELC case No. 173 of 2014 (the lead file herein) initiated by way of an originating summons dated 2nd April, 2014 and filed in court on 5th April, 2014, be and is hereby dismissed with costs to the defendant, Charles

Ochoro Rabach.

b) In the defendants' consolidated suit formerly Kisii ELC case No. 225 of 2015, Judgment be and is hereby entered for the plaintiff, Charles Ochoro Rabach (the defendant in this consolidated suit) in terms of orders (a) and (b) sought in his plaint dated 27th May 2013 and filed in court on 27th May 2013,

c) The defendant, Moses Mogare (PW5) to move out the suit land, LR NO. WEST KASIPUL/KODERA-KARABACH/68 within the next Thirty (30) days from this date in default eviction order to issue accordingly

45. It is so ordered.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this **6th** Day of **NOVEMBER 2019**.

G.M.A ONG'ONDO

JUDGE

In presence of :

Mr. D. Adawo learned counsel for the defendant (DW1)

The plaintiff (PW1) - Present

Tom Maurice – Court Assistant