



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MIGORI

ELC CASE NO. 342 OF 2017

(Formerly Kisii Elc case No. 193 of 2013 (Consolidated with Kisii ELcc No. 475 of 2013)

ALOYCE ODHIAMBO DULO (Suing on his capacity and as the Legal representative of the estate of

(DOMINIC DULO OWUOR).....1ST PLAINTIFF

ISABELA OMOLO DULO.....2ND PLAINTIFF

GEORGE ONONO DULO.....3RD PLAINTIFF

MICHAEL OUMA DULO.....4TH PLAINTIFF

PIUS OKUKU DULO.....5TH PLAINTIFF

Versus

PETER OSORE.....1ST DEFENDANT

DANIEL OYUGA.....2ND DEFENDANT

FRANCIS OGOLA AMOTH.....3RD DEFENDANT

GABRIEL ODONGO.....4TH DEFENDANT

MARGARET OPONDO.....5TH DEFENDANT

JUDGMENT

A. Introduction

1. The instant Judgment concerns two (2) consolidated suits namely;

(a) Formerly Kisii Elcc No. 493 of 2013; Aloyse Odhiambo Dulo (suing on his capacity and as the legal representative of the estate of Dominic Dulo Owuor (deceased) and 4 others -vs- Peter Osore and 5 others (the lead file herein)

and

(b) Formerly Kisii ELCC No. 475 of 2013; Peter Osore and 3 others -vs- Aloyce Odhiambo Dulo and 4 others (the other file herein).

2. The consolidation of the lead file and the other file was pursuant to an order of the court (Samson Okongo,J) made on 1st April, 2014. The order reads in part:

i. "HCCC No.493 of 2013, Aloyce Odhiambo Dulo -vs- Peter Osore and 4 others and HCCC No. 475 of 2013, Peter Osore and 2 others be and are hereby consolidated and HCCC No. 493 of 2013 shall act as the lead file.

ii. The plaintiff in HCCC No. 493 of 2013 is granted leave to amend his plaint within 21 days from the date hereof. The defendants in that case shall be at liberty to amend their statement of defence within 21 days from the date of service.

iii. The plaintiff's in HCCC No. 475 of 2013 are also granted leave to amend their plaint within 21 days from the date hereof. The defendant in that case shall be at liberty to amend his statement of defence within 21 days from the date of service"

3. On 9th July, 2015, pursuant to a consent of the parties in the consolidated suits, the court further ordered as follows;

“By consent, Thomas- Ochieng Abuto (sued on his own behalf and on behalf of the estate of Micheal Abuto Ongeche (deceased) is joined in this suit, Kisii HCCC No. 493 of 2013 as the- 6th defendant.”

4. The property in dispute is land reference number Lambwe East/151 situate in Nyamaji East location in Lambwe East within Homa Bay County, and it is approximately eight (8) acres in area (Hereinafter referred to as the suit land).

5. The plaintiffs in the lead file who are the defendants in the other file are represented by the firm of O.M. Otieno and Company Advocates in both suits.

6. The defendants in the lead file who are the plaintiffs in the other file are represented by the firm of Odhiambo Oronga and Company Advocates in both suits.

7. Initially, the consolidated suits were filed at Kisii Environment and Land Court. They were then transferred to this court for hearing and determination.

B. The gist of plaintiffs' case in the lead file

8. By an amended plaint (Fast track) dated 17th April, 2014, the plaintiffs claim that they are the duly registered owners of the suit land and are entitled to its possession. That up to and including the 16th day of June 2003, Dominic Owuor Dulo (the deceased Dominic herein) was in sole and exclusive possession and occupation of the suit land having settled thereon in the year 1958. That upon the demise of the deceased Dominic, his remains were transported and buried at his original (rural) home at Sakwa to where his other family members moved, settled and leaving the suit land vacant.

9. The plaintiffs further claim that as a result, the defendants took advantage of the absence of the deceased Dominic and his family members from the suit land and without permission, did move into the land and settled thereon. That the defendants erected temporary structures on the suit land causing misuse, waste, damage, destruction and degradation of the land. That by virtue of the defendants' acts of trespass into the suit land, the plaintiffs have been deprived of the use and enjoyment of the suit land. That there have been constant confrontations between the plaintiffs and the defendants in respect of the suit land hence precipitating the instant suit.

10. In the amended plaint, the reliefs sought are as follows:-

a) A declaration that the plaintiffs are the sole and absolute the owner of LR NO. Lambwe East/151, and a permanent injunction be issued restraining the defendants and/or the agents and or servants from cultivating, entering and forcefully using the suit land parcel number Lambwe East/151.

b) That an order of eviction be issued evicting the defendants from land Number Lambwe East/151.

c) Costs of this suit be borne by the defendants.

d) Any other further relief as the Honourable court may deem just to grant.

C. Summary of the 1st, 3rd 5th and 6th defendants' case in the lead file

11. The defendants in the lead file, denied the plaintiff's claim by their statement of defence dated 3rd February 2014 filed in court on 6th February, 2014. They stated therein inter alia, that the 1st defendant and the 3rd defendant entered into a sale agreement with the deceased Dominic for the purchase of an unsurveyed portion of land measuring eight (8) acres and three (3) acres within the suit land in exchange of a consideration of one brown heifer plus kshs. 55,000/= and Kshs 21,000 which was duly paid in instalments respectively. That the 5th defendant has always been in lawful possession and occupation of the suit land with the permission of Micheal Abuto (the deceased Michael herein).

12. The 6th defendant, Thomas Ochieng Abuto did testify as DW3 in this matter. He stated that he witnessed sale of six (6) acres of the suit land between the deceased Dominic and the deceased Michael.

D.The gist of the plaintiffs' case in the other file

13. By a plaint dated 25th November 2013, amended on 14th April, 2014 the plaintiffs in the other file stated, inter alia, that the 1st plaintiff entered into a sale agreement with the deceased Dominic for the purchase of an unsurveyed portion measuring eight acres within the suit land in exchange of a consideration of one brown heifer plus Kshs. 55,000/= which was duly paid in two instalments. That the 2nd and 3rd

plaintiffs entered into sale of land agreement with the deceased Dominic for the sale of three (3) acres and six (6) acres of the suit land respectively and made full payment of the purchase price by instalments. That they live, cultivate and established homes on the suit land and that on 8th October 2013, the defendants threatened to evict them from the land hence provoking the suit in other file.

14. Thus, the plaintiffs sued the defendants in the other file for the following reliefs;-

i. A permanent injunction to issue, restraining the defendant s, its their servants, employees and/or agents from ,in any way alienating charging, transferring or howsoever dealing with disposing, selling, or interfering with the plaintiffs' quite possession of the Land Reference No. Lambwe/East/151.

ii. A declaration that any registration of title in the defendants' name is illegal null and void.

iii. An order directing the Registrar of Lands to forthwith cancel any title issued to the defendants in contravention of the plaintiffs' right of title and ownership.

iv. An order directing the defendants to cause the subdivision of the suit land according to the respective portion of the plaintiffs interest and cause the subdivided portions be registered in the plaintiffs names failing which the registrar do execute such a transfer in favour of the plaintiff.

v. A declaration that the defendants right to recover from the plaintiffs is barred under the Limitation of Actions Act, Chapter 22, section 7 of the laws of Kenya and title extinguished under section 17 of the said Act on the ground that the plaintiffs have been openly, peacefully, and as of right been in occupation of LR number Lambwe/East/151 for a period of over twelve years preceding the defendants' demands to vacate.

vi. Costs of the suit.

vii. Any other relief that this Honourable court may deem just and fit to grant.

E.The Defendants' case in brief in the other file.

15. The plaintiffs who are the defendants in the other file, denied the defendants' claim by their statement of defence dated 17th April, 2014 and filed in court on 22nd April, 2014. The defendants stated inter alia,that the plaintiffs' occupation over the suit land was after 16th June 2003 following the death of the deceased, Dominic That if at all the plaintiffs and or their kinsmen purchased the suit land as alleged or at all, there is nothing to show that the deceased Dominic executed appropriate transfer and registered the suit portions of land in favour of the plaintiffs. That if the deceased Dominic ever executed any agreement with the plaintiffs then the same is null and void. Essentially, the defendants in the other file reiterated the contents of their plaint in the lead file. They sought dismissal of the suit in the other file with costs.

F. Summary of the plaintiffs' evidence:

16. PW1, Isabella Omolo Dulo, the wife of the deceased Dominic testified that her husband moved from the suit land to Sakwa in the year 2002 due to sickness. That he died on 16th June 2003 and did not tell her that he had sold the suit land to any person. That the defendants trespassed into the suit land in the year 2006.

17. PW2, Aloyce Odhiambo Dulo, a son of the deceased, Dominic confirmed that the deceased died on 16th June 2003. That the deceased acquired the suit land in 1958, lived thereon until January 2002 when he left for Sakwa where he died. This witness stated that the defendants entered the suit land in the year 2006. He identified and produced a copy of adjudication record (PExhibit 1), a copy of certificate of official search dated 18/9/2012 (PExhibit 2), a copy of grant dated 21st January 2013 (PExhibit 3), a certificate of confirmation of grant dated 16/8/2013 (PExhibit 4), a copy of the certificate of official search dated 13/10/2013 (PExhibit 5) and a copy of a demand letter (PExhibit 6).

G. Summary of the defendants' evidence

18. The 1st defendant (DW1) testified and relied on his list of documents dated 25th November 2013, Nos. 1 to 5 (DExhibits 1 to 6 respectively). He stated that he purchased eight (8) acres of the suit land from the deceased Dominic.

19. The 3rd defendant (DW2) adduced evidence and referred to Exhibit 2, among others. He stated that he bought three (3) acres of the suit land from the deceased Dominic who had no title thereto and did no transfer the parcel of the suit land to him.

20. The 6th defendant, **THOMAS OCHIENG OBUTO (DW3)** gave evidence and stated that he is legal representative of the estate of the deceased Michael. That on 21st February 1998, he witnessed land sale agreement between the late deceased Dominic and the deceased Micheal in respect of six (6) acres of the suit land.

21. **DW 4, CHARLES GURA ODONGO** the Assistant Chief of Nyamach East sub-location in Homa-Bay County, stated that on 12th December 1998, he witnessed land sale between the deceased Dominic and the deceased Micheal in respect of six (6) acres of the suit land. As the area assistant chief, he told the court that DW1 and DW2 are in occupation of the portion of the suit land.

22. **DW5, JOSEPH MORONGO OKUMU** stated that the deceased Dominic was his long time neighbour , so were DW1 and DW2. That

the deceased (DW5) Micheal was his cousin.

H. The 2nd and 4th defendants' case:

23. The 2nd and 4th defendants were duly served on 19th December 2019, 10th December 2014, 26th March 2017, 27th November 2017 and 2nd March 2018 as shown in affidavits of service sworn on 17th January 2014, 27th February 2015, 19th March 2017, 30th November, 2017 and 9th March, 2018. The 1st and 2nd affidavits aforesaid were sworn by Joshua Otieno Okeyo and Juma William, licenced process servers respectively. The subsequent three (3) affidavits of service were sworn by Mr. O.M. Otieno learned counsel for the plaintiffs.

24. The 2nd and 4th defendants neither entered appearance nor filed any statement of defence in the lead file. Notably, the 2nd defendant was present in court on 9th July, 2015, 27th July, 2018 and 18th July, 2018. Quite clearly, the 2nd, 4th and 6th defendants did not controvert the plaintiffs' case in the lead file.

I. The plaintiffs' submissions:

25. In their submissions dated 5th February 2019 and filed in court on 6th February, 2019, learned counsel for the plaintiffs referred to orders sought in the plaint dated 17th December 2013 and amended on 17th April, 2014, the joint statement of defence dated 3rd February 2014 by the 1st, 3rd and 5th defendants as well as their plaint dated 25th November 2013 and amended on 14th April, 2014 in the other file and orders sought therein. Counsel also referred to the plaintiffs' joint statement of defence dated 17th April, 2014, order dated 1st April, 2014 for consolidation of the suits and the evidence adduced by the respective parties in the consolidated suits.

26. Counsel further framed and analysed two (2) issues for determination namely whether the plaintiffs have proved their case against the defendants on a balance of probabilities and who should bear the costs of the suit. He relied on **Ochura Birundu and another –v- John Olarashar Ole Ngiru Kisii Elc case number 195 of 2013 and Samwel Kirubu Njuki –vs- Margaret Wangari Macharia (2014) eKLR** and urged the court to find in favour of the plaintiff.

J. The 1st, 3rd and 5th defendants' submissions:

27. In their submissions dated 6th February 2019 and filed on even date, the 1st, 3rd and 5th defendants' counsel gave the background and facts of the case in brief as well as framed and analysed four (4) issues for determination in favour of the defendants. Counsel urged the court to grant the reliefs sought in the other file and relied on the three (3) authorities as follows:-

i. Eldoret CoA CA No. 51 of 2015: Willy Kimutai Kitilit –vs- Micheal Kibet [2018] eKLR.

ii. Nairobi Elc case No. 107 of 2011: Munyaka Kuna Co. Ltd –vs- Berdazo Vicezo De Masi (as administrator of the estate of Domenico De Masi) (2018) eKLR.

iii. Nairobi Elc case No. 68 of 2015: Ann Murambu –vs- John Munyao Nyamu (2018) eKLR.

K. Issues for determination:

28. I have duly considered the entire pleadings, evidence and submissions of the respective parties in the consolidated suits. I also bear in mind the list of issues as perceived by the plaintiffs dated 5th May 2014 in the lead file and issues (a) and (b) at paragraph 24 of the plaintiffs' submissions alongside issues 1,2,3 and 4 in the 1st, 3rd and 5th defendants' submissions in this matter.

29. From the foregoing discourse and being guided by the Court of Appeal decision in the case of **Galaxy Paints Company Limited –vs- Falcon Grounds Limited (2000)2EA 385**, I am of the considered view that the issues for determination in the consolidated suits are condensed as hereunder;

(a) Are the plaintiffs the registered owners of the suit land?

(b) Whether the defendants trespassed into the suit land.

(c) In the alternative, have the defendants proved their claim including adverse possession over the suit land against the plaintiffs in the other file suit to the requisite standards?

(d) Are the parties entitled to reliefs sought in their respective pleadings?

L. Analysis and disposition

30. In respect of the first issue, the plaintiff's at paragraph 7 of their plaint in the lead file stated that they are the duly registered owners of the suit land and entitled to the same. However, at paragraph 3 of their statements of defence, the 1st, 3rd and 5th defendants stated that they are strangers to the allegations by the plaintiffs.

31. Besides, PW1 testified in examination in chief that her husband, the deceased Dominic was a fisherman at Lambwe when he was

allocated the suit land by the Government of Kenya during the land adjudication in the area. PExhibit 1, a copy of the adjudication record which was also identified by PW2 speaks to the said allocation of the suit land. PW1 stated that the land was then registered in the name of the deceased Dominic.

32. According to PW2 who is a son of PW1, the suit land belonged to the deceased Dominic who was his (PW2) father having acquired the land in 1958. PW2 testified that he was born and bred on the suit land and he was conversant with the same.

33. PExhibit 2 reveals that the suit land was registered in the name of the deceased Dominic as at 18th September 2012. The plaintiff carried out succession regarding the state of the deceased Dominic as per PExhibit 3. PW2 stated in examination in chief in part that they did succession and the suit land was transferred to them on 8th October 2013.

34. During cross –examination, PW2 maintained his testimony as follows:-

“It is my father who owned and who was staying on the suit property. All documents of title were with my father. I was an adult in 2002”

35. In the words of DW1, DW2, DW3 and DW4, the suit land was sold to them by the deceased Dominic as shown in DExhibits 1,2 and 3 in this matter. In cross –examination, DW1 and DW3, stated that the deceased Dominic owned the suit land as at the year 2003. DW4, the area senior Assistant chief was emphatic during cross –examination that the deceased Dominic owned the suit by 1973.

36. All in all, PExhibit 5 reveals that the suit land was registered under the Registered Land Act Chapter 300 Laws of Kenya (the repealed Act). It is pretty clear from part B of PExhibit 5 that PW1, PW2 and the other plaintiffs are the registered proprietors of the suit land with effect from 8th October 2013.

37. As regards the second issue, PW1 and PW2 testified that the defendants entered the suit land in the year 2006 without their permission. PW1 testified in examination in chief thus:-

“ I did not authorize any one to occupy the suit property. I was informed of the trespass in the year 2006. When I last visited the suit property in November 2003, there was no one on the land apart from our home”

38. During cross-examination, PW1 stuck to her guns that the defendants entered the suit land in the year 2006. The evidence of PW1 in that respect was reinforced by the testimony of PW2 who testified in examination in chief in part:

“.....When I went back in the year 2006, I found that some people had entered the property”

39. It is not disputed by the defendants that they are in occupation of the suit land and that in the year 2003, they received a notice in the form of DExhibits 5 to vacate the same. The notice also not in dispute as discerned in PExhibit 6.

40. In Clerk and Lindsell on Torts (18th Edition) paragraph 18-01, the term “**Trespass**” is defined as :-

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

41. Similarly, I approve the view of Samson Okongo, J that trespass is any unjustified intrusion of one person upon the land in possession of another and that it is actionable per se; see **Zachariah Onsongo Momanyi –vs- Evans Omurwa Onchagwa (2014) eKLR.**

42. This court is quite conscious of sections 27 and 28 of the Repealed Act concerning absolute proprietorship of land. **Section 2 of the Land Registration Act 2016 (2012)** defines the term “**Proprietor**” and I take into account sections 24, 25 and 26 of the same Act. The plaintiffs including PW1 and PW2, have right to secure protection of the suit land duly provided for under **section 40 (1) of the Constitution of Kenya, 2010** as the evidence reveals that the defendants are in unlawful occupation of the suit land.

43. On the third issue, I note the defendants’ claim and orders sought in the other file. The plaintiffs’ vehemently denied the said claim. It is notable that seller number 2, the deceased Dominic did not sign DExhibit 1, DExhibit 2 and DExhibit 3. Furthermore, the defendants’ list of documents dated 25th November 2013 shows copy of land sale agreement dated 17th November, 1998 (DExhibit 3). However, the agreement attached to the list is one dated 21st February 1998 allegedly made between the deceased Dominic and the deceased Michael for doubtful number of acres because (3) three and six (6) thereon are cancelled and not countersigned to fortify their authenticity.

44. It is further noted that DW4 who allegedly signed DExhibits 1,2 and 3 in favour of DW1 and DW2 confirmed that the deceased Dominic did not sign DExhibits 1 to 3. During cross examination DW4 stated, inter alia,

“ The sellers were Okuku Joseph Dulo and Dominic Dulo Owuor. They did not sign the agreements. The purchaser price and agreements done before me as I signed the same. The suit land is an agricultural land. I can not tell if consent to transfer the land was obtained the parties to the sale. I know the consent is mandatory.” (Emphasis laid)

45. In **Hiram Ngaithe Githire –vs- Wanjiku Munge (1979) KLR 50**, it was stated that under **section 6 of the Land Control Act (Cap 302)**, failure to obtain Land Control Board Consent makes the sale agreement void for all intents and purposes and the principles of equity can not soften or change this mandatory statutory provision; see also **Kahia –vs- Nganga (2004) 1 EA 75, Kilitit, Kuna and Murambu**

cases (*supra*).

46. **Article 10 (2) (b) of the Constitution (*supra*)** provides for equity as one of the National Values and principles of governance in Kenya. I subscribe to the recent Court of Appeal decision in **William Kipsoi Sigei -vs- Kipkoech Arusei and another (2019) eKLR** that the doctrines of constructive trust and equitable estoppel apply in favour of a purchaser who paid full purchase price and took 14 years possession of a parcel of agricultural land but failed to obtain **Land Control Board Consent under section 6 of the Land Control Act (*supra*)**.

47. Be that as it may, it is trite law that deliberate failure to enter into a written sale agreement with the respondent, failure to pay stamp duty for the transfer, if any, and failing to keep a copy of the transfer, portray the applicant (claimant) quite negligent in any transaction for the sale of land. That the applicant can not be a bona fide purchaser for value to enable the court to order rectification of land register in those circumstances; see the **case of Lawrence P. Mukiri Mungai, attorney of Francis Muroki Mwaura –v- the Attorney General and 4 others (2017) eKLR**.

48. At paragraph 10 of their plaint in the other file, the defendants claimed that they have established homes on the suit land. In cross-examination, both DW1 and DW2 told the court that they had no photographs to support their claim that they were in possession and occupation of the suit land which they have developed as alleged in this matter.

49. The defendants claim that they have acquired the suit land by adverse of possession. In the case of **Kasuve –vs- Mwaani Investments Limited and 4 others (2004) 1 KLR 184**, the Court of Appeal was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in possession of the suit land:-

(a) Openly and exclusively

(b) As or right

(c) Without interruption for a period of twelve years either after dispossession the owner or by discontinuance of possession of the owner of his own volition.

50. In **West Bank Estates Ltd –vs- Arthur (1966) 2 WLR 750**, it was held that the evidence of adverse possession should be definite as to the area and time; see also the decision of Madan J (as he then was) in **Gatimu Kinguru –vs- Muya Gathangi (2008) 1 KLR 1007** which I endorse without reservation.

51. In the second file, the defendants have failed to prove by DExhibits 1, 2, and 3 (not signed by the deceased Dominic). That they entered into a written sale agreement with the deceased Dominic or his authorized agent or at all. Quite plainly, DExhits 1,2, and 3 run against **section 3 (3) (a) and (b) of the Law of Contract Act Chapter 23 of the Laws of Kenya**, a mandatory legal provision hence the same are not enforceable against the plaintiffs in this matter.

52. Moreover, the doctrines of constructive trust and equitable estoppel can not apply as DExhibits 1,2 and 3 do not show full payment of the purported purchase price by the defendants who are not bona fide purchasers for value as held in **Lawrence Mungai and Kipsoi Sigei cases (*supra*)**. The defendant's case for adverse possession against the plaintiffs has not satisfied the triple requirements in **Kasuve case (*supra*)**. Thus, the defendants have failed to prove their claim against the defendants on the balance of probabilities in the other file.

53. On their part, the plaintiffs are entitled to the reliefs sought in their amended plaint in the lead file by virtue of the first and second issues for determination already resolved hereinabove. The plaintiffs have proved their claim against the defendants jointly and severally on the balance of probabilities.

54. Wherefore, the consolidated suits are determined as hereunder:-

(a) That Judgment be and is hereby entered for the plaintiffs against the defendants jointly and severally in terms of orders (i), (ii), (iii) and (iv) sought in their amended plaint dated 17th April, 2014 in the lead file. The defendants shall move out of the suit land within the next ninety (90) days from this date in default the plaintiffs to evict them accordingly.

(b) The defendants' claim against the plaintiffs originated by way of an amended plaint dated 14th April, 2014 (the other file) is hereby dismissed with costs to the plaintiffs.

DELIVERED, SIGNED and DATED in open court at **Migori** this 10th day of **December 2019**.

G.M A. ONG'ONDO

JUDGE

In presence of :-

Mr. Moriasi Osoro holding brief for O.M. Otieno learned counsel for the plaintiffs.

3rd defendant and 5th defendants- Present

