



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 238 OF 2017

(Formerly Kisii ELC Case No. 467 of 2013)

DAMON ABUDHO AGOLA.....APPLICANT

VERSUS

ANJILINA ATIENO OJWANG

HENOK ONYANGO OJUONG.....DEFENDANTS

JUDGMENT

1. By Originating summons dated 24/5/2015, the plaintiff claimed against the defendants jointly and severally for orders that:-

- a) **Declaration that defendants' rights to recover the whole of LR NO. KABONDO/KAKANGUTU EAST/1596 (hereinafter referred to as the suit property) is barred under the Limitation of Actions Act Chapter 22 of Law of Kenya, and their titles thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 40 years.**
- b) **There be an order that the plaintiff be registered as the proprietor of the whole of the suit property in place of the 2nd defendant herein who currently holds title to the suit property.**
- c) **There be an order restraining the defendants either by themselves, a gents servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit property, in any manner whatsoever and/or howsoever.**
- d) **The Deputy Registrar and/or the Executive officer of the Honourable High court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the whole of the suit property, in favour of the plaintiff, in the event of default by the 2nd defendant to execute the necessary transfer instruments.**
- e) **Costs of the originating summons be borne by the defendants.**
- f) **Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.**

2. The suit is anchored on the plaintiff's supporting affidavit sworn on 24/5/2016O and the grounds on the face of the Originating Summons. The grounds include :-

- a) **LR NO. KABONDO/KAKANGUTU EAST/444 (herein referred to as the original parcel of land) was hitherto registered in the names of the 1st defendant herein.**
- b) **However, on or about the 19th day of May 2015, the 1st defendant herein carried out and /or undertook sub- division of the original parcel of land.**
- c) **Pursuant to the sub-division, the original parcel of land was sub-divided into two (2) portions and thereby gave rise to two (2) parcels of land, namely LR. NO. KABONDO/KAKANGUTU EAST/1595 and the suit property, respectively.**
- d) **Besides, the portion hitherto under the occupation of the plaintiff, now fall within and/or comprises of the suit property.**

e) On the other hand, the 1st defendant herein also caused the suit property herein to be transferred and registered in the name of the 2nd defendant herein.

f) The plaintiff's occupation and possession of the portion of original parcel herein and now the suit property, has been continuous and without interruption for a duration of over 40 years.

g) In any event, at the time of sub-division of the original parcel of land and attendant transfer of the suit property, the defendants herein were aware, knowledgeable and cognizant of the plaintiff's occupation.

h) Pursuant to the foregoing, the defendants' right to recover the whole of the suit property, have been Extinguished by Effluxion of time.

i) Consequently, the plaintiff rights are sanctioned and/or vindicated vide Section 28 of the Land Registration Act No. 3 of 2012.

3. By an authority of co-defendant dated 24th June, 2016, the 1st defendant authorized 2nd defendant to plead, act and/or swear such affidavit and such pleading as the case may be on her behalf. In his replying affidavit filed in court on 29/6/2016, the 2nd defendant termed the plaintiff's claim suit misconceived, malicious, a waste of court's precious time and lacks in merit. He denied the plaintiff's claim and stated that his family has been in possession of the said land since time immemorial. He further, stated that the original suit land was adjudicated and subsequently registered in the name of the 1st defendant hence no dispute. The 1st defendant caused it to be subdivided into two titles namely the suit property and **LR NO. KABONDO/KAKANGUTU EAST/1595**, and later lawfully transferred and registered the suit property in the name of 2nd defendant.

4. The plaintiff's counsel filed a statement of agreed issues dated 1/7/2016, on his part under Order 15 Rules 1 & 2 Civil Procedure Rules, 2010. The issues are among others:-

1) Whether LR NO. KABONDO/KAKANGUTU EAST/444 (hereinafter referred to as the original parcel of land), was duly and lawfully registered in the name of the 1st defendant ?

2) Whether the activities of and occupation of a portion of the original parcel of land, has been free, open, continuous and uninterrupted ?

3) Whether the plaintiff's occupation over in respect of the suit property has been adverse to the interest of the defendant ?

4) Whether the plaintiff is entitled to the orders sought ?

5. By a Notice of change of advocate dated 10/10/2017, the plaintiff is represented by Oguttu, Ochwangi and Ochwal & Co. Advocates.

6. The 2nd defendant was duly served on 30/11/2017, for mention as proved by an affidavit of service sworn on 22/1/2018 by David Okumu Ojill, a duly licenced process server of this court. The 2nd defendant was served on 11/9/2017 by the same process server for hearing on 18/9/2017 when he failed to appear in court, and this court received the evidence of DAMON ABUDHO AGOLA (PW1).

7. Learned counsel for the plaintiff filed submissions dated 10/10/2017 which entails the background of the suit, an analysis of the evidence adduced during the hearing and concluded that the plaintiff is entitled to the Judgment as prayed in the originating summons together with costs.

8. Counsel, further, relied on authorities namely:-

a) Githu –v- Ndeete (1984) KLR 776 on change of ownership of land occupied by another person under possession.

b) Peter Thuo Kairu (1988) 2 KAR with regard to prescription under sections 5 to 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.

c) Njuguna Ndatho –v- Masai Itumo & 2 others Civil Appeal No. 231 of 1999 (unreported) Court of Appeal at Nakuru.

d) Section 28 of the Land Registration Act, 2012.

9. I have looked at the originating summons, the replying affidavit, and the evidence of PW1 as well as the submissions including authorities cited by learned counsel for the plaintiff. In Raila Odinga & another –vs- I.E.B.C. & 3 others Presidential Election Petition No. 1 of 2017 (2017) eKLR, the Supreme Court of Kenya cited with approval the supreme court of India in Arikala Narasa Reddy –v- Ventaka Ram Neddya Reddygari & another Civil Appeal Nos. 570 & 571 of 2012 (2014) 2 SCR in which the court held, inter alia:-

“The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings” (Emphasis provided).

10. Parties to this suit did not frame issues for determination by the court. It follows that the issues for determination flow from the pleadings namely the originating summons and the replying affidavit of the plaintiff and defendants respectively. In that regard, has the plaintiff been

in open, peaceful and continuous occupation of the suit property?

11. PW1 testified that he has occupied the suit property since 1966 and gained prescribed rights thereon. He told the court that the suit property and L.R No. 595 were created out of the original parcel of land which was adjudicated and a green card issued in the name of 1st defendant.

12. It was further testimony of PW1 that the 1st defendant used to take care of the entire block of the five parcels of land including the suit property which she registered in her name. He stated that ;-

“The 1st defendant and her sons-----They entered the suit land that I occupy since 1966”.

13. To fortify his testimony, PW1 produced the following documents as exhibits;

- a) Record or a green card in respect of the suit property (P Exhibit 1)
- b) Certificate of Official Search of 6/4/16 (P Exhibit 2)
- c) Certificate of Official Search issued to son to the 1st defendant (P. Exhibit 3).
- d) Certificate of Official Search issued on 11/7/2016 (P. Exhibit 4).
- e) Record/green card showing title deed issued to the 2nd defendant’s son to 1st defendant (P. Exhibit 5).
- f) Certificate of Official Search issued on 11/4/2016 (P. Exhibit 6).
- g) Photos of uprooted boundaries (P. Exhibit 7).

14. The Defendants denied the plaintiff’s claim in the replying affidavit of 2nd defendant. They otherwise admitted the issue of registration and subdivision of the original parcel of land which gave rise to **LR. NO. KABONDO/KAKANGUTU EAST/1595** and the suit property. The fact of subdivision and transfer of the land does not defeat the plaintiff’s claim for title under adverse possession in the circumstances. In **Githu case** (supra), it was held that it is trite law mere change of ownership of land which is the subject matter of a claim for title under adverse possession, cannot, perse, defeat the claim.

15. I take into account **Sections 7 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya** on actions to recover land and adverse possession respectively in this matter. The plaintiff’s claim for title to the suit property by virtue of adverse possession has been proved against the defendants on a balance of probability.

16. A fortiori, I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders or issues 1 to 5 sought in the Originating summons dated 24th May, 2016.

DELIVERED, SIGNED and DATED in open court at MIGORI this 15th day of February, 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mireri counsel for the plaintiff

Court Assistant – Tom Maurice

G. M. A. ONGONDO

JUDGE