



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 7 OF 2014

JOHNSON THIAKA NYAGA.....PLAINTIFF

VERSUS

JAMES KINYUA NYAGA.....1ST DEFENDANT

NJAGI NYAGA.....2ND DEFENDANT

WANJOHI MUTHONI NYAGA.....3RD DEFENDANT

JOSPHINE WAKERA NYAGA.....4TH DEFENDANT

KAMAU NYAGA.....5TH DEFENDANT

LAZARO MURIUKI NYAGA.....6TH DEFENDANT

JUDGMENT

This dispute has largely been prosecuted as if it is a boundary dispute. Indeed on 14th July 2014, the parties recorded the following consent order:

“That the District Land Surveyor and District Land Registrar do visit the disputed parcels of land L.R INOI/KAMONDO/75 and INOI/KAMONDO/79 to ascertain the boundaries on the ground and to confirm who is the owner of the disputed portion of 1.5 acres. A report be filed thereafter. Each party at liberty to have a private surveyor during the exercise. The OCS Kerugoya Police Station to provide security. Parties to share costs of the exercise. Mention on 23rd September 2014”.

Arising out of that consent order, the Land Registrar Kirinyaga Mr. **CYRUS KIRONJI** and the District Surveyor **Mr. M.K. KINUTHIA** were asked to prepare reports and ascertain the boundaries between the said two parcels of land. The parties were also at some stage given time to explore an out of Court settlement which however was not forthcoming. That is part of the reason why this case has been in this Court for the last four (4) years.

By a plaint filed herein on 21st January 2014, the plaintiff **JOHNSON THIAKA NYAGA** sought judgment against the defendants **JAMES NYAGA, NJAGI NYAGA, WANJOHI NYAGA, JOSEPHINE NYAGA, KAMAU NYAGA** and **LAZARO NYAGA** in the following terms:

- 1. A declaration that the plaintiff is the owner of land parcel number INOI/KAMONDO/79.**
- 2. An order that the defendants by themselves, servants, agents and properties (sic) do vacate from land parcel number INOI/KAMONDO/79 and in default they be forcefully evicted.**
- 3. Costs of the suit.**

The claim was premised on pleadings that whereas the plaintiff is the registered proprietor of land parcel No. INOI/KAMONDO/79 measuring 4.9 acres, the defendants who own land parcel No. INOI/KAMONDO/76 which is across the **KERUGOYA KABARE** road have forcefully encroached onto the plaintiff's land and occupied a portion thereof measuring 1.5 acres.

The defendants by their defence and counter claim pleaded that their land parcel No. INOI/KAMONDO/75 measures 5.24 acres and borders

the plaintiff's land parcel No. INOI/KAMONDO/79 which measures 4.9 acres. They added that they have been in continuous occupation of 1.5 acres of the plaintiff's land which is the disputed portion since 1959 having extensively developed the same and having therefore acquired it through adverse possession. They therefore sought the following orders against the plaintiff in their counter-claim:

- 1. A declaration that the defendants occupation over a portion of 0.562 Hectares on plaintiff's L.R INOI/KAMONDO/79 has been for a period over 12 years and have been open, exclusive, continuous, un-interrupted and that the plaintiff's title over the same has been extinguished and that the defendants have acquired a title for the portion through adverse possession.**
- 2. An order for curving out a portion of 0.562 Hectares as occupied by the defendants out of L.R INOI/KAMONDO/79 and the same be transferred in the joint names of the defendants.**
- 3. An order of permanent injunction do issue restraining the plaintiff, his servant, agents or anyone claiming under him from unlawfully interfering with the defendants quiet possession and enjoyment of their legal rights over the portion of 0.562 Hectares to be curved out of L.R INOI/KAMONDO/79.**
- 4. Costs of the suit and interest thereon.**

It is therefore clear from the above pleadings that the issues which this Court is called upon to determine are:

- 1. The ownership of land parcel No. INOI/KAMONDO/79.**
- 2. Whether the defendants should vacate the land parcel No. INOI/KAMONDO/79 or be evicted therefrom.**
- 3. Whether the defendants are entitled to an order that they are entitled to a portion of land measuring 0.562 Hectares out of land parcel No. INOI/KAMONDO/79 having acquired ownership thereof through adverse possession.**
- 4. Whether the defendants are entitled to an order of permanent injunction to restrain the plaintiff, his servants, agents or anyone claiming under him from unlawfully interfering with the defendants quiet enjoyment of the portion measuring 0.562 Hectares to be curved out of land parcel No. INOI/KAMONDO/79.**
- 5. Who is entitled to costs of this suit.**

In support of his case, the plaintiff asked the Court to adopt as his evidence two statements dated 21.1.14 and 8.5.14. He added that the land parcel No. INOI/KAMONDO/79 is registered in his names although it was previously registered in the names of his father **NYAGA KIBUGI** and that it measures 4.9 acres although one portion measuring 3.4 acres is on one side of a stream known as Karii while the other portion measuring 1.5 acres is beyond that stream. However, his father had allowed his friend **NYAGA MUTHENYA** (husband to the 4th defendant and father to the other defendants) to be cultivating part of land parcel No. INOI/KAMONDO/79 so as to keep away trespassers since he was then living in Mwea where he had gone to take care of his cattle. This arrangement was known to the plaintiff and his mother and that is how the **NYAGA MUTHENGA** started cultivating the portion measuring 1.5 acres. Meanwhile, the plaintiff was away in Mombasa where he was employed by Kenya Breweries. Upon the death of his parents, he returned home in 1983 and in 2011 when he filed for succession, he informed the defendants that the license to cultivate on the disputed portion had been terminated but they refused to vacate.

The 4th defendant **JOSEPHINE WAKERA NYAGA** testified on behalf of the defendants and called their neighbour **MUBIU MBOGO** as a witness. She too asked that her statement dated 20th February 2014 be adopted as her evidence. She said the 1st, 2nd, 5th and 6th defendants are her sons whereas the 3rd defendant is her grandson and that land parcel No. INOI/KAMONDO/75 was allocated to her husband **NYAGA MUTHENGA** while the plaintiff's father **NYAGA KIBUGI** was allocated parcel No. INOI/KAMONDO/79. It was her evidence that the two parcels of land are separated by the stream known as Karii and that the disputed portion measuring 1.5 acre has always been occupied by the defendants and the plaintiff has never utilized it. She added that she was present when the boundary to the two portions was being fixed. She denied that the plaintiff's father gave her husband the disputed portion to cultivate adding that both her co-wife and husband are buried on the disputed portion on which are homes and a crop of coffee and bananas. She stated that the disputed plot therefore belongs to them and they cannot be evicted therefrom.

The defendants witness **MUBIU MBOGO** (DW2) testified and also asked the Court to adopt his statement in which he stated that he is the registered proprietor of land parcel No. INOI/KAMONDO/72 which borders both the plaintiff's and defendants' land and that he was involved in the demarcation process. That the stream known as Karii is the natural boundary between the plaintiff's and defendants' land and that the plaintiff has never occupied the portion of land across the stream which has always been the property of the defendants where they have put up their homes. That the plaintiff's claim is an after thought since he knows that his late father's land never went beyond the stream and neither did he claim it during his life-time.

At the end of the trial, counsel agreed by consent that the following reports be admitted in evidence:

- 1. Report by Mr. M.K. KINUTHIA District Surveyor Kirinyaga dated 9.12.14.**
- 2. Report by Mr. PETER BUNDI a Registered Surveyor dated 16.12.14.**
- 3. Report by Mr. C.M. KIRONJI District Land Registrar Kirinyaga dated 20.11.14.**

Submissions were then filed both by **Mr. MAINA KAGIO** advocate for the plaintiff and **Mr. KIGURU KAHIGA** advocate for the

defendants.

I have considered the evidence by the parties and the submissions by counsel.

As indicated above, among the issues that this Court has to determine is whether the plaintiff is the owner of land parcel No. INOI/KAMONDO/79 and is therefore entitled to the declaration sought. It is clear beyond peradventure that the plaintiff's ownership of the land parcel No. INOI/KAMONDO/79 cannot be assailed. He has produced a title deed to the said land parcel and under the provisions of **Sections 24, 25 and 26 of the Land Registration Act**, such title is conclusive evidence that he is the absolute owner thereof subject only to those overriding interests recognized in law. There is no evidence led to suggest that the said title was obtained through fraud, misrepresentation or any illegal means. I therefore resolve the first issue in favour of the plaintiff.

I shall deal next with the third issue and which is whether the defendants have established their claim to a portion measuring 0.562 Hectares out of the land parcel No. INOI/KAMONDO/79 by way of adverse possession. Before I consider it, however, **Mr. MAINA KAGIO** has submitted that the defendants counter-claim in which they seek orders in adverse possession is incompetent for two reasons:

a. That under Section 38 of the Limitation of Actions Act, it should have been made by Originating Summons and not plaint; and

b. Such Originating Summons shall be supported by an affidavit to which a certified extract of the title to the land in dispute shall be annexed.

In that submission, counsel has cited the case of **WILSON KAZUNGU KATANA & 101 OTHERS VS SALIM ABDALLA BAKSHWEIN & ANOTHER C.A CIVIL APPEAL No.11 of 2014 (MALINDI) 2015 e K.L.R** where the Court of Appeal citing the then **Order XXXVI Rule 3 D (2) Civil Procedure Rules** stated that an Originating Summons must be accompanied by an affidavit to which is annexed a certified extract of the title. It said:

“That requirement no doubt was couched in mandatory terms failing which it would render the Originating Summons incompetent. We have perused the entire Originating Summons and nowhere have we come across a certified extract of the title of the suit premises. Thus the Originating Summons was incompetent and liable to be struck out. We are surprised that the trial Court and counsel involved did not notice this fatal omission”.

In my view, the purpose of annexing a copy of the extract of title to the land in dispute is to enable the Court confirm that the party against whom orders on adverse possession are being sought is indeed the registered owner of the property in dispute. In this case, the plaintiff has availed as part of his documentary evidence the title to land parcel No. INOI/KAMONDO/79. His registration as owner of that land is therefore not in dispute and both the Court and the parties are not in doubt as to what has to be determined. The **KATANA** case (supra) can therefore be distinguished on that account.

And with regard to the submission that the defendants claim in adverse possession could only be through an Originating Summons, it is true that previously, Superior Courts have held that failure to institute a claim for adverse possession by way of Originating Summons renders the suit incontestably bad in law – see for instance **KENYENGA VS OMBWORI 2001 K.L.R 103**. However, with the advent of the 2010 Constitution, the Courts have now held that a claim for adverse possession can be entertained even if brought by way of a plaint instead of an Originating Summons. A scenario similar to the one in this case where a party was seeking orders in adverse possession through a counter-claim was dealt with in the case of **SAMMY LUKUYI ADIEMA VS CHARLES SHAMWATI C.A CIVIL APPEAL No. 3 of 2014 (KISUMU)** where the Court held as follows:

“Given the provisions of Article 159 (2) (d) and (e) of the Constitution 2010, the Respondent need not have filed a separate suit (Originating Summons) claiming the subject piece of land by way of adverse possession”

And even before the advent of the 2010 Constitution, Superior Courts have held that it is not fatal to mount a claim for adverse possession through a plaint. That was the position taken in **NGATI FARMERS CO-OPERATIVE SOCIETY LTD VS COUNCILLOR JOHN LEDIDI & 15 OTHERS C.A CIVIL APPEAL No. 64 of 2004 (NAKURU) (2009 e K.L.R)** a decision that was decided a year before the promulgation of the 2010 Constitution. See also **MARIBA VS MARIBA 2007 1 E.A 175**.

Finally, in **BOYES VS GATHURE 1969 E.A 385**, it was held that the wrong procedure did not invalidate proceedings because it did not go to the jurisdiction of the Court and no prejudice was caused to the other party. It is therefore clear that the fact that no extract of the title to the land parcel No. INOI/KAMONDO/79 was annexed or that the claim by adverse possession was mounted through a plaint instead of an Originating Summons is not fatal to the defendant's counter-claim.

I shall now consider the merits of the defendant's counter-claim. In **KASUVE VS MWAANI INVESTMENT LTD & OTHERS 2004 1 K.L.R 184**, the Court of Appeal held that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

And in **WAMBUGU VS NJUGUNA 1983 K.L.R 172**, the Court of Appeal also stated that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed

or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”.

It is not in doubt that the defendants have been in occupation of the disputed 1.5 acres out of land parcel No. INOI/KAMONDO/79 since 1958. The issue that I have grappled with is whether or not the defendants have satisfied the other requirements that they have to meet in a claim for adverse possession. According to the plaintiff, the defendants have been occupying the portion in dispute with the consent of his late father who allowed the 4th defendant's husband NYAGA MUTHENGA to cultivate it while he was away in Mwea. That has been rebutted by the 4th defendant who testified as follows:

‘It is not true that in 1966 the plaintiff’s father told my husband to take care of his land for him. I am not aware of when he returned. I know that the plaintiff’s father used to cultivate upto the stream. When I was cultivating the land, I knew it was our land’.

The plaintiff on his part conceded that he was not privy to any conversation between his father and the 4th defendant's husband over the portion in dispute other than what he was informed by his mother. This is what he said in cross-examination:

“I was not there when my father told NYAGA MUTHENGA to take care of the land. However, I was given that information by my mother in 1975. I am the only one alive who can attest to that”.

The plaintiff's evidence in that regard is therefore hearsay and cannot really displace that of the 4th defendant. This Court finds therefore that the defendants' possession and occupation of the portion in dispute was not with the consent of the plaintiff's father.

In a claim of adverse possession however, it is my view, which I also took in the case of GICHIRA NGUNGI VS BETTY MITHAMO & OTHERS KERUGOYA ELC CASE No. 471'B' of 2013 cited by plaintiff's counsel, that the claimant must concede that indeed the registered proprietor of the land in dispute is the true owner. The claimant cannot be in adverse possession of what he considers to be his own land. It is important therefore that the party seeking another's land by way of adverse possession must recognize the other party as the registered and true owner thereof before laying a claim thereto by way of adverse possession. In this case, although the defendants are seeking a portion of the land parcel No. INOI/KAMONDO/79 by way of adverse possession, it is clear from the evidence of the 4th defendant that the defendants consider that portion to be their property. This is what the 4th defendant stated in paragraph six (6) of her statement dated 20th February 2014:

“That I remember very well being present when boundaries were being fixed by clan elders and I participated in planting boundary features between my late husband’s L.R No. INOI/KAMONDO/75 and INOI/KAMONDO/79 and that the family of the plaintiff have never cultivated or utilized the portion beyond or across the Karis Stream because that portion belongs to my family”.

And when she was cross-examined by counsel for the plaintiff, this is what she said:

“The plaintiff cannot now claim that the land is his yet we have always utilized it. The land we utilize is our land. The land is mine. It does not belong to the plaintiff. It is true that we started building on the land in 2011”.

The import of the above is that although disguised as a claim for adverse possession, the defendants claim to the portion in dispute is essentially a claim of what the defendants believe, wrongly, to be their own land. A party cannot claim by adverse possession what he considers to be his own property. Only a Court, upon hearing the parties, can rule whether or not a party has established a claim to land by way of adverse possession.

It is also important in a claim for adverse possession that the claimant is able to show that he has dispossessed the registered proprietor of the land in dispute. The registered proprietor must also have the knowledge about that dispossession. After all, adverse possession is all about an owner of land, with the knowledge that the claimant has occupied it without his consent continuously and un-interrupted for twelve (12) years, does nothing to assert his right nor make any entry thereto. From the evidence on record, the plaintiff only discovered in 2011 when he went to the Lands office, that in fact the portion in dispute measuring 0.56 Ha is part of his land. This is what he said in re-examination by his counsel:

“When I went to the Lands office, I did not know its boundary. It was not until 2011 that I discovered that the land extended beyond the Stream”.

He also said in his evidence in chief that the defendants only started building on the disputed portion in 2011 a fact that has been confirmed by the 4th defendant herself as cited above. It was after this discovery that the plaintiff moved to Court and filed this suit in 2014 and since time started running from 2011 for purpose of adverse possession, the twelve (12) year statutory period had not lapsed. That the defendants have utilized the portion in dispute since 1958 does not really count because all along the plaintiff had no knowledge that the disputed portion was part of his land while the defendants believed that it was in fact rightfully their land. As was held in JANDU VS KIRPAL 1975 E.A 225, the registered owner must know that he has been ousted. He must be aware that he has been dispossessed. Similarly, the adverse possessor cannot succeed if he did not know that he was in actual possession of another's land. Taking all that into account, it is clear to me that the defendants claim to the portion of the land parcel No. INOI/KAMONDO/79 measuring 0.56 Ha by way of adverse possession cannot be sustained and must be dismissed. By the same token therefore, the prayer that the plaintiff be permanently enjoined from interfering with the defendants quiet possession and enjoyment of their legal rights over the said portion cannot be granted as a party cannot be enjoined from possessing or enjoying his own property unless on justifiable grounds, which are missing in this case. On the other hand however, as the plaintiff has proved that he is the registered proprietor of land parcel No. INOI/KAMONDO/79 and holds the title thereto, he is entitled

to all the rights and privileges appurtenant to that registration which include the right to eject trespassers therefrom.

Ultimately therefore and upon considering all the evidence herein, I make the following orders:

1. The plaintiff's claim is allowed and a declaration be and is hereby issued that he is the owner of land parcel No. INOI/KAMONDO/79.

2. An order is issued that the defendants by themselves, their servants and agents do vacate from the land parcel No. INOI/KAMONDO/79 within six (6) months from the date of this judgment failure to which they be evicted therefrom in accordance with the law.

3. The defendants counter-claim is dismissed.

4. As the parties are related, each shall meet their own costs.

B.N. OLAO

JUDGE

20TH MARCH, 2018

Judgment dated, delivered and signed in open Court this 20th day of March 2018

Ms Nyangati for Mr. Kagio for Plaintiff present

Mr. Kahiga for Defendants absent

Plaintiff - present

1st Defendant – absent

2nd Defendant – present

3rd Defendant – absent

4th Defendant – present

6th Defendant – present

Right of appeal explained.

B.N. OLAO

JUDGE

20TH MARCH, 2018