



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELCC NO. 436 OF 2017

(Formerly Kisii ELCC No. 71 of 2010 (O.S.))

TOBIAS ODHIAMBO ABACH.....PLAINTIFF

VERSUS

ELIJAH O.L. OPAR.....DEFENDANT

JUDGMENT

1. The plaintiff filed an originating summons dated 17/3/2010 through Nyambati and Co. Advocates under **Order XXXVI Rule 3D of the Civil Procedure Rules, and Section 38 of the Limitation of Actions Act, Section 28 (b), 30(f), (g) and 98(1), (b) and (c) of the Registered Land Act, and Section 115(2)** of the Constitution and all other enabling provisions of the law against the respondent/defendant. He sought the following orders:-

a) THAT this honourable court be pleased to extinguish and/or modify the title or easement registered by the defendant burdening land reference Number WEST KASIPUL/KODERA KABARACH/255 (the suit land) without payment of compensation to the defendant.

b) THAT this honourable court be pleased to declare that the plaintiff has the rights of possession, prescription and occupation of the whole of that land measuring approximately 2.2ha within the suit land.

c) THAT this honorable court be pleased to declare that the plaintiff is entitled to an order under Section 38 of the

Limitation of Actions Act, and to be registered as the proprietor of that whole land measuring approximately 2.2ha within the suit land in place of the defendant free from all.

d) THAT the costs of this suit plus interest thereon at the court rates be granted to the plaintiff.

2. The originating summons is premised on grounds on the face of it, a supporting affidavit sworn on 17/3/2010 by the plaintiff and documents marked TOA-01 & 02. The grounds are :-

a) **THAT** the continued existence of the easement impedes the reasonable use of the land by the plaintiff without securing practical benefits to other persons.

b) **THAT** the plaintiff's rights over the suit land are overriding interests.

c) **THAT** the plaintiff has been in continuous and uninterrupted adverse possession of the whole of the suit land for over 12 years.

3. The defendant filed a replying affidavit sworn on 28/11/2011 through M/s Oguttu Mboya and Co. Advocates, now Ogutu, Ochwangi, Ochwal and Co. Advocates in opposition to the originating summons. He averred that the plaintiff has never been in possession and /or occupation of the suit land which is registered in his name following the completion of the adjudication and demarcation process at Kodera Karabach adjudication section. He further averred that in the year 2005, he took possession of the suit land and cultivated it until the year 2007 when the plaintiff trespassed onto it, but was stopped by the District Officer Kendu – Bay in the year 2009. He stated that he has freely, openly and uninterruptedly had occupation of and or possession of the suit land since then. He termed the plaintiff's claim untenable, premature, and incompetent and sought its dismissal.

4. In support of his replying affidavit, the defendant exhibited the following documents:-

a) Copy of record and certificate of Official Search dated 27/10/2011 in respect of the suit land marked E001 (a) and (b)

respectively.

b) Demand letter dated 8/2/2010 by the defendant's advocates marked E002.

5. The plaintiff's counsel filed submissions dated 23/7/2018. He identified the following issues for determination:-

i. Whether the plaintiff had acquired prescriptive rights of adverse possession over the suit land.

ii. Whether the plaintiff has been in peace possession of the suit land for a period of over 12 years.

iii. Whether the plaintiff is entitled to the reliefs sought in his claim.

iv. Who should bear the cost of the suit?

6. Learned counsel, analyzed each of the issues and concluded that the plaintiff has made out a case for adverse possession of the suit land against the defendant. He relied on the case of Titus Ong'ang'a Nyachieo - v- Martin Okioma Nyauma and 3 others (2015) e KLR as shown on the plaintiff's list of authorities dated 8th February 2018.

7. The defendant's counsel filed submissions dated 26/1/2018, on the background of the suit, evidence adduced at the hearing, analysed the same and relied on the case of Charles Otieno Seto -v- Didacus Ojwang Onyango & 2 others Kisii ELCC No. 244 of 2013 (O.S). Counsel urged the court to treat the suit as unproved and dismiss it with costs to the defendant.

8. Initially this suit was partly heard at Kisii Environment and Land Court (Mutungi J.) whereby the plaintiff (PW1) and Rosalina Awina Amaach (PW2) testified in support of the plaintiff's claim. On 21/2/2013, Okongo J directed

the originating summons to be treated as a plaint, the replying affidavit as defence and the matter be heard viva voce.

9. On 22/3/2017, the suit was transferred to this court for hearing and determination. I heard the evidence of the defendant (DW1) and Charles Ochoro Rabach (DW 2) in support of the defendant's case on 13/2/2018.

10. I have carefully considered the entire pleadings, the evidence of PW1, PW2, DW1, and DW2 and submissions by counsel for the respective parties. I bear in mind the decision in Great Lakes Transport Co. Ltd -v- KRA (2009) LKR 720 and Raila Odinga -v- IEBC (2017) e KLR in regard to issues for determination. I note the issues for determination as framed by the plaintiff's counsel in submissions. I extract the issues as follows :-

a) Has the plaintiff been in open continuous and erupted possession of the suit property for a period over 12 years?

b) Is the plaintiff entitled to the relief sought or appropriate orders to be made by court?

11. PW1 stated that he has been cultivating the suit land since 1990 without any interference. He stated that he does not reside on the land. He did not process title to the suit land and that somebody else was issued with its title. PW1 told the court that in the year 2010, he received a demand notice from DW1 to vacate the suit land. He produced PExh 1 to 3 in evidence.

12. PW1 further stated that he bought the suit land from his grand-father in 1980. He stated, inter alia:

“My grandfather died in 1980. My grandfather had sold me the parcel number 255 and indicated it was mine.”

13. PW2 confirmed that Pw1 was given the land by his (PW1) grandfather. He further stated that PW1 and DW1 do not reside on the suit land.

14. DW1 stated that he is the registered owner of the suit land since the year 2010 having bought it from one Ngodhe Odero. He produced DExhibit 1 to 6 in support of his testimony.

15. During cross examination, DW1, stated in part that:

“I have not built any structure on it. I stay far away from the land. PW1 has his own parcel of land I do not know its title number or reference number. I was in court when PW1 and his mother (PW2) testified in court. I am older than PW2. I found PW1 in the land in the year 2005. I was sick between year 2005 and year 2007 when PW1 entered my land. PW1 is not staying on the land. He was only tilling it.”

16. In the words of DW2, under the authority of DW1, he tilled the suit land. That PW1 does not stay on the land.

17. It was claimed by PW1 that he is in cultivation of the suit land since 1990. Notably possession can take different forms such as fencing and cultivation of the suit land as judicially recognized in Kimani Ruchine and Another -vs- Swift Rutherford Company Ltd and Another (1976- 1980) IKLR 1500; see in Titus O. Nyachieo case (supra) where the court noted, inter alia

“ that the appellant took possession of the land in 1975 and started cultivating it:”

18. In the present case, the occupation of the suit land by PW1 became adverse in the year 2002. DW1 obtained its title in the year 2010 in an effort to defeat the claim thereto by PW1. It is trite law that mere change of ownership of land which in the subject matter of a claim to title under adverse possession cannot, per se, defeat the claim; see **Githu –vs–Ndeete (1984)KLR 776.**

19. It is evident that PW1 acquired adverse possession rights over the suit land. Actions to recover land are anchored under Section 7 of the Law of Limitations Act (Cap 22) which provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.” (Emphasis added).

20. Do the rights acquired by adverse possession require consent of the Land Control Board? In **Mwangi and Another –vs–Mwangi (1986) KLR 328**, it was held that land control board consent is not required for rights acquired by adverse possession under **Section 7 of the Limitation of Actions Act (Cap 22)** In the instant matter, the consent of the land board is not a requirement.

21. In my considered view, PW1 has demonstrated that he has been in open, peaceful and uninterrupted possession of the suit land. He has acquired adverse possession rights thereon. He is entitled to registration of it's title under adverse possession pursuant to **Section 7 of the Limitation of Actions Act (CAP 22) as read with Section 38 of the Act.** I find that plaintiff (PW1) has proved his claim against the defendant (DW1) on a balance of probabilities.

22. Accordingly I enter judgment for the plaintiff against the defendant in terms of orders (1), (2) and (3) sought in his originating summons dated 17th March, 2010.

23. The costs of this suit shall be borne by the defendant.

24. **DELIVERED**, signed and **Dated at Migori this 12th day of APRIL, 2018**

G M A ONGONDO

JUDGE

In the presence of:

N. Nyarige learned counsel holding brief for G. M. Nyambati for the plaintiff

W. Ochwal learned counsel for the defendant

Tom Maurice, court assistant