



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 322 OF 2017 (O.S)

PENINAH ADHIAMBO OMITI (suing as the legal administrator of the

Estate of PHILEMON OMITI NYAANDE (Deceased).....PLAINTIFF

VERSUS

JAMES OORO ONGUS.....DEFENDANT

JUDGMENT

1. The plaintiff namely **PENINAH ADHIAMBO OMITI** sued the defendant, **JAMES OORO ONGUS** by an amended Originating Summons filed on 8th December, 2017, for adverse possession in regard to land **No. LR. NO. CENTRAL KASIPUL/SINO/786** (the suit property). A 13 paragraphed supporting affidavit sworn on 24/3/2017, by Philemon Omiti Nyaande (the original plaintiff and deceased herein) and documents marked PON 1 to 4, reinforce the originating summons.

2. Learned counsel, Mr. Ken Achieng Owuor represents the plaintiff in this suit. On 20th February 2018 the court directed that the Originating Summons as amended be treated as a plaint and the suit be heard through viva voce evidence.

3. The defendant was duly served with the Originating Summons dated 27th March, 2017 together with a notice of motion of even date on 5th April 2017 as proved by an affidavit of service sworn on 11th May, 2017 by James Njuguna Thuku, an authorized court process server. The defendant was further duly served on 20th December 2017 with an amended originating summons filed on 8th December, 2017 and a hearing notice dated 23rd March, 2018 on 26th March, 2018, as proved through affidavit of service sworn by the said process server on 19/2/2018 and 9th May, 2018 respectively.

4. Hearing of the suit proceeded exparte as the defendant neither entered appearance nor filed defence within the prescribed period of time or at all. The plaintiff (PW1) testified, inter alia; that she was the legal administrator of the estate of her deceased husband **PHILEMON OMITI NYAANDE**, who bought three (3) acres of the suit property from the defendant on 1st March, 1993, built thereon and has continuously and peacefully lived on the suit property to date. She produced Naivasha CMC Ad litem No. 587 of 2017 (PEXhibit 1), sale of land agreement in Dholuo language and certificate of translation dated 01/3/1993 (PEXhibit 2 (a) and 2b) another sale of land agreement in dholuo language and its certificate of translation dated 24/3/2017 (PEXhibit 3 (a) and (b) photo (PEXhibit 4 (a) to (f) 5 (a) to (e), certificate of official search dated 20/2/2017 (PEXhibit 6 (a) and a copy of record (PEXhibit 6 b) in respect of the suit property.

5. The plaintiff's claim is that her deceased husband bought three (3) acres of the suit property from the defendant on 1st March 1993. Upon purchase of the property, the plaintiff together with her deceased husband built and lived on the property continuously and peacefully. In the year 2017, the defendant claimed that the plaintiff and her deceased husband had bought the suit property at a low price hence provoking the instant suit.

6. The Plaintiff (PW1) called **MARGRET ALUOCH OUMA** (PW 2) in support of her claim. PW2 relied on her statement dated 3rd March 2013 which the court adopted as her evidence. She confirmed that the defendant who was her father in-law added a portion of the land to the family of the deceased in the year 2008.

7. I have considered the entire originating summons and the evidence of PW1 and PW2. The plaintiff's counsel did not submit in this matter. In the case of **Great Lakes Transport Co. (U) Ltd – v- Kenya Revenue Authority (2009) KLR 720**, it was held that issues for determination in a suit generally flow from the pleadings and unless they are amended, the trial court could only pronounce Judgment on the issues arising from the pleadings or such issues as the parties had framed for the court's determination. Therefore, the issues for this court's determination are entailed in the originating summons as follows:-

a) Whether the plaintiff is entitled under section 38 of the limitation of actions Act Cap 22 of the Laws of Kenya to be registered as the proprietor of 3 acres being part of parcel of land LR. No. Central Kasipul/Sino/786 measuring

approximately six decimal two (6.2) Hectares.

b) Whether the defendant is registered as proprietor of LR. No. Central Kasipul/Sino/786 measuring approximately six decimal two (6.2) hectares in trust for the plaintiff.

c) Whether the court should order for cancellation of title deed issued to the defendant for land parcel No. Central Kasipul/Sino/786 and the same to be subdivided and the plaintiff to be issued with his title deed for the portion occupied by plaintiff.

d) Whether the defendants should transfer the portion of land parcel no. Central Kasipul/Sino/786 to the plaintiff failing which the deputy registrar of the court be authorized to execute the transfer documents in favour of the plaintiff.

e) Who pays the costs of this suit.

8. The plaintiff (PW1) averred that title deed to the suit property was issued to the defendant on 12th January 2015 and that the defendant has refused to transfer the property to her. She testified, inter alia;

“The defendant lives on one part of the suit land but not the portion occupied by us. The suit land is registered in his name as per certificate of official search dated 20/2/2017 and copy of register/record (PEXhibit 6 (a) and (b) respectively).”

9. Documents including PEXhibits 2 (a), (b) and (3) and (b) available in evidence, reveal that the plaintiff’s deceased husband bought the suit property from the defendant in the year 1993. PW1 has been in continuous and peaceful possession of the property. She has built on the property, among others structures, a church building as shown on PEXhibit 5 (a) to (e).

10. The defendant permitted the plaintiff to occupy the property which is subject to consent from the area land control board. Clearly PEXhibit 2(a) and 3 (b) were rendered void. In Samwel Miki Waweru -v- Jane Njeri Richu (2004) eKLR . It was held that any continued occupation becomes adverse from the time the transaction becomes void.

11. The plaintiff and the defendant had a common intention between them in relation to the suit property as revealed in PEXhibit 2 (a) to 3 (b). It then follows that the parties created a constructive trust in favour of the plaintiff. In Macharia Mwangi Maina & 87 Others -v- Davidson Mwangi Kagiri (2014) eKLR , the court of Appeal held inter alia;

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the overriding objective of this court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madam, JA (as he then was) in Chase International Investment Corporation and another -vs. Laxman Keshra and Others [1978] KLR 143; [1976-80] 1 KLR 891.” (Emphasis added).

12. Under Section 28 (b) of the Land Registration Act, 2012 trust including customary trust are overriding interests which may for the time being subsist and affect all registered land. Indeed the suit property is registered land which is subject to constructive trust created by the deceased husband of PW1 and the defendant as shown in PEXhibits 2a, 2b, 3a & 3b. The absence of any reference to the existence of trust in the title documents including PEXhibit 6 b) does not affect the enforceability of the trust; see Macharia Mwangi Maina case (Ibid).

13. It was the evidence of PW1 and PW2 that PW1 has possessed and occupied the suit property for a period in excess of twelve years. Her possession and occupation of the property has open and notorious as judicially recognized in Kinguru – v- Gathangi (2008) 1 KLR (G & F) 1007 at 1015.

14. I find that PW1 is entitled to registration of title to the suit property as provided under Section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya). She (PW1) has proved her unchallenged claim against the defendant on a balance of probability.

15. In the upshot, I enter Judgment for the plaintiff (PW1) against the defendant as follows:-

a) A declaration that the defendant has acquired by adverse possession an absolute title to a portion measuring three (3) acres being part of the suit property LR No. Central Kasipul/Sino/786 which is in his possession and occupation.

b) A declaration that the defendant is entitled to an order under Section 38 of the Limitation of Actions Act (Cap 22) to be registered as a proprietor of that portion of the suit property in place of the defendant who shall execute a valid transfer in favour of the plaintiff free from encumbrances failing which the deputy registrar of the court shall execute the transfer documents in favour of the plaintiff.

c) A declaration that the defendant holds that portion of the suit property in trust for the plaintiff and the plaintiff’s name shall be entered in the register accordingly.

d) The costs of the suit shall be borne by the defendant.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of MAY 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Kiseru holding brief for Ken Achieng Awour learned counsel for the plaintiff.

Tom Maurice - Court Assistant