



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 349 OF 2017 (O.S)**

**(Formerly Kisii ELCC No. 327 of 2013)**

**DICKSON OGUNDE WERE.....PLAINTIFF**

**VERSUS**

**ESTHER NJERI GITAU**

**JESEE KARANJA MWANGI**

**PETER MACHAARIA MWANGI**

**JOSEPH KIMANI GITAU (Sued in their capacities as the legal**

**Representatives of the estate of**

**GEOFFREY MWANGI- Deceased).....DEFENDANTS**

**JUDGMENT**

1. On 14<sup>th</sup> August 2013, the plaintiff, Dickson Ogunde Were, filed an originating summons dated 19<sup>th</sup> July, 2013 under **Sections 7, 17 and 38 of the Limitation of Actions Act (Cap 22 of the Laws of Kenya) and Order 37 Rules 3D and 3F and Order 40 of the Civil Procedure Rules of the registration of the title Act (Cap 281 laws of Kenya)**. He sued the defendants jointly and severally for the following orders:-

(a) **THAT** pending the hearing and determination of this suit, the Defendants be restrained by an order of injunction from transferring, transmitting, alienating, wasting and/or dealing with the suit parcel of land **L.R NO. SOUTH SAKWA/KOGELO/326** in any other manner whatsoever and/or howsoever.

(b) **THAT** the Plaintiff has for a period in excess of twelve years been in adverse possession of all that parcel of land comprised in title No. SOUTH SAKWA/KOGELO/326, Migori County, comprising 6.2 ha and consequently the Defendants title thereto in respect of the said parcel of land has been extinguished by virtue of **Section 17 of the Limitations Actions Act (Cap 22 Laws of Kenya)**.

(c) **THAT** the Plaintiff be registered as the proprietor of the said Land Parcel No. SOUTH SAKWA/KOGELO/326 in place of the 2<sup>nd</sup> Defendant whose name the land is currently registered.

(d) **THAT** the 2<sup>nd</sup> Defendant do transfer Land Parcel No. SOUTH SAKWA/KOGELO/326 to the plaintiff forthwith and in default of the 2<sup>nd</sup> Defendant signing, executing or endorsing the necessary documents of transfer, the Deputy Registrar of this Honourable Court do sign execute and or endorse such papers/documents to effect the transfer.

(e) **THAT** the Defendants do pay the costs of this suit.

2. The originating summons was supported by the plaintiff's 17 paragraphed affidavit sworn on 19<sup>th</sup> July, 2013 and accompanying documents which include; a land certificate issued to Were Agunde on 14<sup>th</sup> March 1978 (PExhibit 1), four photographs showing homestead (PExhibit 2), a certificate of death of Ishmael Were Ogunde issued on 5<sup>th</sup> Feb,2013 (PExhibit 3), a certificate of official search dated 18<sup>th</sup> June, 2013(PExhibit 4) and a grant of letters of administration and affidavit of petition in respect of the estate of Godfrey Mwangi Gitau issued to the defendants on 5<sup>th</sup> Jan 2009 (PExhibit 5 (a) and (b) respectively).

3. The gist of the plaintiff's claim is that the suit parcel of land, L.R number south Sakwa/Kogelo/326 is his ancestral land which was originally registered in the names of his late grandfather Ishmael Were Agunde who died on 6<sup>th</sup> October, 2012 as shown on PExhibits 1 and 3. That his siblings including KENNETH OUMA WERE (PW2) live on and cultivate the suit parcel of land as per PExhibit 2. The plaintiff further claimed that he has lived openly and peacefully on the land since he was born in the year 1962. That the 2<sup>nd</sup> defendant was registered as the proprietor of the suit parcel of land on the 10<sup>th</sup> October, 2012 after purportedly being successor of Godfrey Mwangi (deceased) as revealed in PExhibits 5(a) and 5(b). That the plaintiff has neither seen the defendants nor received demand letter to vacate the suit parcel of land. That upon the discovery of PExhibits 4 and 5(a) and 5(b), the plaintiff filed the instant suit.

4. The defendants were duly served on 27<sup>th</sup> November, 2015 through an advertisement in the Standard newspapers as ordered by court on 4<sup>th</sup> December, 2014 further to the plaintiff's Notice of Motion application dated 16<sup>th</sup> July, 2014. The service of summons is demonstrated by affidavit of service sworn on 27<sup>th</sup> November, 2015 by the plaintiff's counsel. The defendants failed to either enter appearance or file statements of defence hence the suit proceeded to exparte hearing.

5. On 14<sup>th</sup> February, 2018, the court directed that the originating summons be treated as a plant and the suit be heard through viva voce evidence. On the same date, the plaintiff (PW1) and PW2 adduced evidence while HEZBON ODONDI OJWANG (PW3) and JUMA OBONYO (PW4) testified on 12<sup>th</sup> April 2018 in support of the plaintiff's claim.

6. Mr. Kwanga Mboya learned counsel for the plaintiff filed submissions dated 11th May, 2018 whereby he referred to the orders sought in the originating summons, identified five (5) issues for determination and analyzed them accordingly. The issues are whether the plaintiff has been in adverse possession of the suit property and if he is entitled to be registered as the proprietor of the property in place of the 2<sup>nd</sup> defendant who is the current registered proprietor, among others. Counsel cited authorities which include; **Wanje-vs-Saikwa (1984) KLR Sisto Wambugu-vs- Kamau Njuguna civil appeal number 10 of 1982 (CA) and Kanda Kimamet-vs-Chepkinyeng Kimamet Chebobei (2009) eKLR** in support his submissions and urged the court to grant the orders sought in the originating summons.

7. I have considered the originating summons and evidence adduced by PW1, PW2, PW3 and PW4. I also take into the account submissions by learned counsel for the plaintiff. I find it instructive the decision in **Galaxy Paints co. Ltd -vs- Falco Grounds Ltd (2000) 2EA 385** with regard to issues for determination in a suit. The plaintiff's counsel in his submission framed issues for determination which are relevant herein. Therefore, the issues for determination are whether:

**a) The plaintiff has been in adverse possession of the suit parcel of land thereby extinguished the 2<sup>nd</sup> defendant's title to the land.**

**b) The plaintiff is entitled to be registered as the proprietor of the suit parcel of land in place of the 2<sup>nd</sup> defendant.**

**c) The costs of the suit are available to the plaintiff.**

8. The plaintiff (PW1) averred in his supporting affidavit to the originating summons that the suit parcel of land is ancestral land upon which he has been living since his date of birth in the year 1962 and that he has built his homestead thereon. That in the year 1973, the land was registered in the names of his deceased father, Ishmael Were Ogunde who died on 6<sup>th</sup> October, 2012. He relied on PExhibits 4 to 5(b) which show that the proprietorship of the land changed to the name of the deceased father of the 2<sup>nd</sup> defendant on 10<sup>th</sup> October, 2012.

9. PW1 testified that the suit parcel of land is registered in the name of 2<sup>nd</sup> defendant on the basis that he was a successor of the estate of the late Godfrey Mwangi Gitau. He told the court, that he resided thereon for 50 years. He stated inter alia :

***“During my over 50 years on the suit property, I have never met either Jesse Karanja Mwangi (2<sup>nd</sup> defendant) or his late father as shown on title deed to the suit property...” (Emphasis added)***

10. PW2, a brother to PW1, stated that he has lived on the suit parcel of land for 33 years and that he found PW1 staying thereon. He testified in part thus:

***“I know PW1 who is my elder bro. We live on the same land...for now 33 years. I was born and found PW1 staying thereon. The suit property is currently registered in the name of PW1.”***

11. PW3, the area chief for 31 years, confirmed that PW1 has lived on the suit parcel of land openly, continuously and peacefully for 31 years. He also confirmed that the defendants have never raised any complaint thereof. That the current registered owners of the land are the 1<sup>st</sup> and 4<sup>th</sup> defendants.

12. Another witness (PW4) aged 82 years, stated that he is a step brother of PW1. According to him, PW1 has lived on the suit parcel of land for 60 years.

13. It was the evidence of PW1 as corroborated by PW2, PW3 and PW4 that he cultivates the suit parcel of land. He has built homes thereon as shown on PExhibit 2. In **Kimani Ruchine and another-v-Swift Rutherford company Ltd another (1976-80) 1KLR 1500 as quoted in Titus Ong'ang'a Nyachio-v-Martin Okioma Nyauma and 3 others (2017) eKLR**, the Court of Appeal restated that possession can take different forms such as fencing and cultivation of the land in dispute.

14. In **Kanda Kimamet's case** (supra), it was observed that the plaintiff was in occupation and possession of the suit parcel of land for a

period of about thirty two (32) years from 1968. He had planted maize crops on the land and continued being on the land openly, defiantly and without the consent or license of the defendant hence he has established title to the portion of the suit parcel of land.

15. In **volume 24 of the Halsbury's Laws of England 3<sup>rd</sup> Edition at page 252**, it was stated that:

**“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by person entitled for the purpose for which he had a right to use it.....**

**Fencing off is the best evidence of the possession of the surface land but cultivation of the surface without fencing off has been held sufficient to prove of possessions.”**

16. In the instant suit, it has been proved that the 2<sup>nd</sup> defendant is the registered owner of the suit parcel of land since 10<sup>th</sup> October, 2012. Both PW1 and PW2 have been in open and continuous possession and occupation of the land for over thirty three (33) years hence the 2<sup>nd</sup> defendant has been dispossessed of it; see **Wambugu case** (supra).

17. I find that the plaintiff has proved his case against the defendants jointly and severally on a balance of probability.

18. Consequently and for those reasons, I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders (b) (c) (d) and (e) sought in the plaintiffs originating summons dated 19<sup>th</sup> July 2013.

**DELIVERED, SIGNED and DATED** in Open Court at **MIGORI** this **16<sup>th</sup> day** of **JULY, 2018**.

**G. M. A. OGONDO**

**JUDGE**

**In the presence of :-**

Mr. Kwanga Mboya learned counsel for the plaintiff.

Tom Maurice – Court Assistant