



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 23 OF 2015 (O.S)

STEPHEN ONYANGO ODUOR.....1ST PLAINTIFF

KENNEDY ODHAIAMBO.....2ND PLAINTIFF

PETRONIAL AKOTH.....3RD PLAINTIFF

VERSUS

WILLIAM NDINYA OMOLLO.....DEFENDANT

JUDGMENT

1. Stephen Onyango Oduro, Kennedy Odhiambo and Petronilla Akoth, the Plaintiffs, filed this suit through the Originating Summons dated 15th June 2015 against William Ndinya Omollo, the Defendant, seeking to be declared the owners of 1.65 hectares of Land Parcel Siaya/Ligala/1589 under adverse possession. They also pray that the Defendant be ordered to transfer the 1.65 hectares to them and in default the Deputy Registrar be empowered to execute the necessary documents in their favour. They further pray that the Defendant be ordered to give vacant possession of any part of the land that he may be occupying and be permanently enjoined from interfering with their use of the 1.65 hectares they occupy.

2. The Defendant opposed the claim through the replying affidavit sworn on 21st July 2015.

3. The court gave directions on the 28th July 2016 converting the Originating summons and supporting affidavit as the plaint and the replying affidavit as the defence. The hearing commenced on the 16th March 2017 with the 1st Plaintiff testifying as PW1 on behalf of himself and the other two Plaintiffs. The Defendant then testified as DW1. The parties were then given time to file and exchange written submissions. The Plaintiffs filed their undated written submissions on the 16th November 2017.

4. The issues for determination are as follows;

a) Whether the Plaintiffs have been in a continuous and uninterrupted occupation of 1.65 hectares of land parcel Siaya/Ligala/1589 for over 12 years.

b) Whether the Plaintiffs occupation and possession of the said portion of the suit land entitles them to be declared and registered as the proprietors of the said land.

c) Who pays the costs.

5. The court has carefully considered the pleadings by parties, affidavit and oral evidence tendered, the submissions by the Plaintiffs and come to the following findings;

a) That from the copy of the title deed for land Parcel Siaya/Ligala/1589, the suit land got registered in the name of the Defendant under entry No. 5 on the 12th June 2006. That position is confirmed by the copies of the certificates of official search for the parcel provided by both parties.

b) That the said land was subject matter of Siaya Land Dispute Tribunal case no. 484 of 1998 between Silfanus Odero Ochieng and Patrick Juma Obiero as confirmed by the copy of the proceedings availed by the Plaintiffs. The tribunal's award was that the land be shared equally between the two parties. The award was read and adopted in Siaya S.R.M Court Misc. Appl. No. 37 of 2000 on the 23rd November 2000. That todate there is no evidence of any appeal having been preferred on the tribunal award or any judicial proceedings having been taken out on it by the parties.

c) That the Plaintiffs' evidence that they have been using the land for over 30 years with their late father Silvanus Oduor Ochieng, the claimant in the land dispute tribunal case referred to in (b) above, has not been disputed. That the Defendant in his oral evidence actually admitted the Plaintiffs' claim of 1.65 hectares of the suit land in the following words;

"...The Plaintiffs Originating summons seeks 1.65 hectares and I have no objection to them getting that land. That is why I have not interfered with the Plaintiffs' use of the land. The Plaintiffs are using a portion of the land and not the whole..."

That even though the Defendant later in his evidence asked the court to dismiss the Plaintiffs' case with costs, he did not dispute that the Plaintiffs have been in occupation of a portion of the suit land. The Defendant further admitted that he is not in occupation of the suit land and that he does not use it at all.

d) That though the Plaintiffs in the testimony tendered by PW1 were asking for the whole suit land, their prayer in the pleadings were for 1.65 hectares portion. That the court cannot award the Plaintiffs what they had not pleaded for.

6. That flowing from the foregoing, the court finds that the Plaintiffs have proved their case against the Defendant on a balance of probabilities and enters judgment for them in the following terms;

a) That the Plaintiffs are hereby declared as the adverse possessors of a portion of land measuring 1.65 hectares of Siaya/Ligala/1589, and that the Defendant's title to that portion is therefore extinguished.

b) That the Defendant do transfer the portion measuring 1.65 hectares from Siaya/Ligala/1589 to the Plaintiffs. That the portion be on the section of the land under their occupation and use.

c) That should the Defendant fail to execute any of the documents necessary to give effect to (b) above, the same be signed by the Deputy Registrar.

d) That the Defendants do meet the Plaintiffs' costs of this suit.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26th DAY OF September 2018

In the presence of:

Plaintiffs Present

Defendant Absent

Counsel Mr. Orengo for Athunga for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE