



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 408 OF 2017(OS)

(formerly Kisii Elcc 124 of 2010)

SAMSON OGWAGO NYANGILA.....PLAINTIFF

VERSUS

FRANCIS KESERA AMBIEMA (DECEASED).....1ST DEFENDANT

JOSEPH OYIER KASERA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff namely **SAMSON OGWAGO NYANGILA** has sued the defendants namely **FRANCIS KASERA AMBIEMA** (1st defendant) and **JOSEPH OYIER KASERE** (2nd defendant) by an Originating Summons (O.S) dated 26th April, 2010 pursuant to order XXXVI rules 3D and 7 of the Civil Procedure Rules, 2010. He claims to be in adverse possession of a portion of the suit land, L.R NO. GEM/KAMAGAWI/135 measuring 1.6 hectares for the determination of the following questions;-

- a. Whether there was contract of sale of land between the plaintiff and the 1st defendant concerning a portion of and PN.Gem/Kamagawi/135 (the suit land) and is so what was the consideration thereof and was the same paid in full.
- b. Whether the 1st defendant put the plaintiff in possession or occupation thereof; and if so when did the plaintiff start to occupy the same;
- c. Whether the said occupation and possession of the portion measuring 1.6 hectares can now amount to adverse possession, and if so what is the effect thereto?
- d. Whether the entry thereon and destruction of crops growing thereon by the 2nd defendant should be declared unlawful.
- e. Whether an injunction should issue against the defendants, their agents, servants or anybody deriving authority from them, restraining them from evicting, disposing or in any way interfering with the plaintiff's occupation, use and quiet enjoyment of the portion measuring 1.6 hectares.
- f. Whether the defendants should be ordered to pay compensation to the plaintiff for any losses incurred through the acts of the 2nd defendants in destroying the plaintiff's properties on the suit land.
- g. Whether the defendants should pay the costs of this suit.
- h. That such orders may be issued by the court as may attain the ends of justice.

2. The O.S is premised upon a 15 paragraphed affidavit sworn on 28/4/2010 by the plaintiff and documents marked SON-1 to 8 annexed to the affidavit. The documents include a certificate of official search, a letter of consent and a confirmation on sale of the portion of the suit land. He sought to be declared that he be registered the owner of the portion of the suit land by way of adverse possession, among other reliefs.

3. The defendants opposed the O.S by a 22 paragraphed affidavit sworn 30/6/2011 by the 1st defendant which find support in a land certificate issued on 21st April, 1978 to the 1st defendant (Dexht 1) and authority to plead, act and or swear affidavit on behalf of co-defendant dated 30th June, 2018. The defendant termed the originating summons premature, misconceived and legally untenable hence sought its dismissal.

4. The plaintiff is represented by learned counsel G.S Okoth and company advocates. The defendants are represented by Oguttu, Ochwangi, Ochwal and company advocates formerly Oguttu Mboya and company Advocates.

5. Initially, the instant suit was partly heard by Samson Okongo J at Kisii Environment and Land Court whereby the plaintiff (PW1) testified but was stood down as the 1st defendant had reportedly passed on. The suit was transferred to this court on 20/03/2017. Directions including consent for fresh hearing were taken on 25/07/2017. PW1 adduced evidence and produced PExhibits 1 and 2 (an application for consent from the area land control board and consent respectively) as well as made reference to a surveyor's sketch (PMFI3). He called two witnesses (PW2 and PW3).

6. DW1 testified on 26/4/18 and produced defence Exhibits 1 to 6. He stated that he is the registered proprietor of the suit land since 1st July, 2013.

7. Learned counsel for the Plaintiff filed submissions dated 04/05/18 while the defendants' learned counsel filed submissions dated 31/5/2018 further to directions given by the court on 26/4/2018. I have considered the submissions in this case accordingly.

8. I have carefully studied the entire Originating Summons, the 1st defendant's replying affidavit, the testimonies of PW1, PW2, PW3 and DW1. The issues for determination in a suit generally flow from the pleadings or as framed by the parties; see **Galaxy Paints Ltd –vs- Falcon Grounds Lt (2001) 2 EA 358**. The issues herein include whether the suit land is registered in the name of the 1st defendant, issues numbered 1 to 8 on the face of the Originating Summons, statement of agreed issues (defendants) dated 10/03/18 brought pursuant to Order 15 Rules 1 and 2 of the Civil Procedure Rules, 2010 and issues framed by the defendants counsel in his submissions.

9. I note that Sections 2, 24, 25, and 26 of the Land Registration Act, 2012(the LRA 2012) relate to proprietorship of registered land for instance, the suit land. Section 3 (2) of the Law of contract Act governs sale of land particularly contract(s) or agreements.

10. PW1 testified that the 1st defendant sold four (4) acres of land to him and he started using the land in year 1994. He cultivated the land by planting maize, beans and sugarcane on the same.

11. During cross-examination, PW1 stated that there were no minutes, documents or minutes to show that land was sold to him and that he is in possession or occupation of the land. He stated, inter alia;

“The area Chief Joel Oguta called a meeting and there were no minutes of the meeting. The chief is my witness. I have no photos of the damaged sugar cane. There is no document thereof.....” (Emphasis laid)

12. According to the area Chief (PW2), the suit land is an open field. In cross-examination, he told the court that he did not witness a land sale agreement between PW1 and 1st defendant. He stated that there were no minutes relating to the purported sale of land to which he was a stranger.

13. PW3, a wife of PW1, testified that she was not present when the sale of land agreement was made and executed. She was not able to tell the registration number of the land. That she simply cultivated sugarcane and maize on the land. That the 2nd defendant (DW1) chased away PW1 from the land.

14. DW1 testified that he was a son of the 1st defendants (deceased) who initially owned the suit land and that PW1 only leased three (3) acres of the land. That PW1 ceased cultivating the portion of the suit land in year 2007 due to arrears of lease of land.

15. In cross-examination, DW1, maintained that PW1 leased the portion of the suit land and did not purchase it. He testified in part that;-

“ It was a lease not a sale agreement---- PW1 used to cultivate the portion of land yearly until my late father stopped him. PW1 cultivated six (6) acres in lieu of three acres for 15 years”. (Emphasis added)

16. It follows therefore, that the 1st defendant is the 1st registered owner of the suit land as per Dexhibits 1 and 2. His registration thereof since 1978 was never challenged as envisaged under section 26 of the LRA 2012. Any adverse possession against the 1st defendant could only apply from the date of 1st registration in 1978 as observed by J. Mutungi J, **in Lepore Ole Maito –v- Letwat Kortom & 2 others (2016) e KLR.**

17. The defendant considered that the suit land was his since the year 2013. However, since the registration of a title to land is a creation of law and the 1st defendant has not been dispossessed of ownership of the suit land, PW1 cannot be considered to be an adverse possessor of the land see; **Wilson Kazungu Katana and 101 others –v- Salim Abdallah Bakshwein & Another (2015) eKLR.**

18. I have considered PExhibits 1 and 2 as well as DExhibits 1 to 6 in the matter. I am also conscious of the national values and principles of governance including human dignity, equity and social justice as enshrined at Article 10 of the Constitution of Kenya, 2010. There is no material placed before this court to show that the plaintiff's possession of the suit land or any portion thereof has been open and notorious as held by Madam J (as he then was) in **Gatimu Kunguru –v- Muya Gathangi (2008)1 KLR (G & F) 1007 at 1015.**

19. Considering all the facts and circumstances of the case set forth in evidence and also having considered the submission on record, I do find that the plaintiff's case has not been proved against the defendants on a balance of probability.

20. I thus dismiss the plaintiff's suit filed by way of an originating summons dated 26th April 2010 with costs to the defendants.

DELIVERED, Signed and **DATED** in open court at MIGORI this **18th** day of September 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Agure Odero learned counsel holding brief for Ms. Nyarige learned counsel for plaintiff.

Mr. Ochwangi learned counsel for the 2nd defendant

Tom – Court assistant