



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 758 OF 2017**

**(Formerly Kisii ELcc No. 5 of 2012)**

**PAMELA ATIENO OTIENO.....PLAINTIFF**

**VERSUS**

**ZABLON OWIGO OGECHA**

**SALMON ATEGO OGECHA.....DEFENDANTS**

**JUDGMENT**

1. By a plaint dated 3<sup>rd</sup> December, 2012 and filed in court on the even date, the plaintiff namely PAMELA ATIENO OTIENO has sued the defendants namely ZABLON OWIGO OGECHA and SALMON ATEGO OGECHA. She is seeking the following orders:

- a. Declaration that the plaintiff is registered and/or lawful owner of LR NO.KAMAGAMBO/KONGUDI/286 (the suit land).**
- b. An order of eviction against the defendants, their agents and/or servants from the suit land.**
- c. Permanent injunction restraining the defendant either by themselves, agents, servants and/or anyone claiming under the defendants, from entering upon, re-entering, trespassing onto, cultivating, building structures onto, interfering with and/or in any other manner, whatsoever, dealing with the suit land, and/or any portion thereof.**
- d. General Damages for Trespass.**
- e. Interest on [d] hereof at court rates.**
- f. Costs of this suit be borne by the Defendants.**
- g. Such further and/or other relief as the Honorable Court may deem fit and expedient so to grant.**

2. Briefly the plaintiff who is represented by M/S Ogotu Mboya & Co. Advocates claimed that she is the registered proprietor of the suit land LR NO. KAMAGAMBO/KONGUDI/286 with effect from 18th October 2012 following the determination of succession proceedings in respect of the estate of Ochango Oyola [her deceased husband] at Rongo PMC Succession Cause NO 167 OF 2012. Originally, the deceased was the registered proprietor of the suit land since 2<sup>nd</sup> January 1971. That the plaintiff has been in possession and or occupation of the suit land whereupon she cultivates for a livelihood. That on or about the year 2007, the defendants unlawfully entered upon the suit land, cultivated the land and established homesteads thereon which denied the plaintiff the usage and or development of the land thus provoking the instant suit.

3. The defendants who are represented by learned counsel, Mr. George Shane Okoth filed their statements of defence and counterclaim [originating summons] dated 12<sup>th</sup> Feb 2015. They denied the plaintiff's case and counterclaimed that they are entitled to be registered as proprietors of the suit land having acquired title thereto by virtue of adverse possession. The defendants stated that in the year 1979 their deceased father, Christopher Ogecha Adika, purchased a parcel of land which is now registered as LR. NO. KAMAGAMBO/KONGUDI/483 from the plaintiff's deceased husband, Opiyo Ochango, took possession of the suit land and erected homesteads thereon. That in the year 1981, their deceased father and their brother one Elisha Agoro Ogecha, physically merged the land with the suit land. That since 1981, the defendants have occupied and possessed the suit land continuously, peacefully and without any interference from the deceased who passed on in year 2002. That the plaintiff and her husband have never lived on the suit land since 1981.

4. The plaintiff denied the defendants' counterclaim by her replying affidavit sworn on 9<sup>th</sup> March 2013. She averred, inter alia, that the

deceased, Ochango Oyola never entered into any land sale agreement with Elisha Agoro Ogecha (Deceased) as alleged by the defendants or at all. That there is no scintilla of evidence such as payment of the purchase price and land control board consent to support the allegation by the defendants. The plaintiff further averred that the land sale agreement alluded to by the 2<sup>nd</sup> defendant related to Peter Otieno Oyola who was never the registered owner of the suit land as revealed in a copy of green card in respect of the suit land marked "PAO1". She termed the defendants' counterclaim misconceived, a thinly veiled attempt by the defendants to defraud the estate of the Ochango Oyola (Deceased), an abuse of the due process of the court, bad in law, legally untenable and sought its dismissal.

5. Initially this suit was partly heard at Environment and Land Court at Kisii by S.Okong'o, J, who received the testimony of the plaintiff (PW1) on 17<sup>th</sup> November 2014. PW1 stated that her deceased husband also known as Peter Otieno Oyola owned the suit land. She identified and produced as exhibits, a certificate of official search dated 13<sup>th</sup> November 2012 (PEXh1), another certificate of official search dated 4<sup>th</sup> November 2010 (PEXh2), Kenya Gazette of 13<sup>th</sup> July 2012 (PEXh3a), a notice dated 25<sup>th</sup> June 2012 (PEXh3b) and a title deed issued on 19<sup>th</sup> October 2012 (PEXh4) in respect of the suit land. On 13<sup>th</sup> July 2017, the instant suit was transferred to this court for further hearing and determination.

6. On 15<sup>th</sup> March 2018, I heard the testimonies of the 1<sup>st</sup> defendant (DW1) and the 2<sup>nd</sup> defendant (DW2), who relied on sale of land agreement dated 20<sup>th</sup> August 1981 (DEXhibit1) and suit land register/green card (DEXhibit2) in support of their statement of defence and counterclaim. They claimed that they have possessed the suit land since 1981 on which they cultivate and that PW1 do not occupy and or possess the land.

7. Pursuant to directions given by the court on 15<sup>th</sup> March 2018, learned counsel for the plaintiff and learned counsel for the defendants filed submission dated 14<sup>th</sup> May 2018 and 13<sup>th</sup> July 2018 respectively.

8. Submissions by the plaintiff's learned counsel were based on the background of the case and four (4) issues for determination, among them, whether there was a valid sale of land agreement between Elisha Agoro Ogecha and Ochango Oyola (Deceased) and whether the defendants have proved the claim of adverse possession. Counsel cited authorities which include **Dobie & Co. (K) Ltd -vs- Wanyonyi Wafula Chebukati (2014) eKLR Wanje - v- Sakwa (No. 2) (1984) KLR 284, Section 3 (2) of the Law of Contract Act and Sections 107 and 108 of the Evidence Act (Cap 80 Laws of Kenya)**, in submissions. Counsel further submitted that the plaintiff has proved her claim on a balance of probabilities hence she is entitled to the orders sought in the plaint and the defendant's counterclaim is bound to be dismissed with costs to the plaintiff.

9. In their submissions, the defendants' counsel made reference to the pleadings and cited **Section 19(1) of the Environment and Land Court Act, 2015 (2011) as read with Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010** as well as eight (8) questions for determination on the face of the originating summons. Counsel relied on, inter alia, Sections 6(1) and 8(1) of the Land Control Act (Cap 302 Laws of Kenya), **Waweru -v- Richu (2007) 1 EA 403 and Gatimu Kinguru -v- Muya Gathangi (1976-80) 1 KLR 317.**

10. I have carefully examined the entire pleadings, evidence and issues on the face of the originating summons, (counterclaim) statement of agreed issues (plaintiff) dated 8<sup>th</sup> March 2013, the statement of agreed issues (defendant) filed in court on 14<sup>th</sup> May 2014, and submissions herein. The points for determination in a suit generally flow from either pleadings or as framed by the parties; see **Galaxy Paints Ltd -v- Falcon Grounds Ltd (2000) 2 EA 385.** Therefore the issues for determination boil down to whether;-

**a. The plaintiff is the registered proprietor of the suit land.**

**b. The defendants have trespassed on the suit land.**

**c. The plaintiff is entitled to the reliefs sought in the plaint**

**d. In the alternative there was a valid sale of the suit land between plaintiff's deceased husband and the defendant's deceased father?**

**e. The defendants have acquired title to the suit land by way of adverse possession.**

**f. The defendants are entitled to be registered as the proprietors of the suit land in lieu of the plaintiff.**

11. The plaintiff (PW1) testified that the suit land was transferred to her by transmission as per exhibits 1 to 4. That the defendants moved from their own parcel of land to the suit land. She stated, inter alia;-

**"The deceased had another name Peter Otieno Oyola..... the deceased did not sell the suit property to Elisha Agoro Ogecha..... the defendants entered the suit property in the year 2007. It is my prayer that the defendants be evicted from the suit property".**

12. On his part, DW1 testified that he has lived on the suit land since the year 1980. That PW1 has never attempted to evict him from the land. He stated, among other things, that;-

**".....I did not see sale of land agreement.....I have no photos to show that I live on the suit land or cultivate it ....."**

13. DW2 stated that his late father Christopher Ogecha Adika, bought the suit land from the deceased husband of PW1. That they have lived on the land without interruption and referred to DEXhibits 1 and 2 thereof.

14. PW1 has demonstrated by way of PExhibit 4 that she is the registered proprietor of the suit land. Her rights and interests thereof are secured under Sections 24, 25, and 26 of the Land Registration Act (the LRA) 2012. Moreover, PW1 has secure protection of right to property under Article 40 of the Constitution of Kenya, 2010.

15. DW1 and DW2 claimed that their deceased father bought the suit land from the deceased husband of PW1 as per DExhibit 1. The suit land was merged with LR NO. Kamagambo/Kongudi/1483. They claimed that PW1 holds the suit land in trust for them since they have acquired adverse possession of the same. I bear in mind that trusts including customary trusts are overriding interests under Section 28 (b) of the LRA, 2012 and the decision in Mwangi & Another –v- Mwangi (1986) KLR 328 that trust over agricultural land and rights acquired by adverse possession are no subject to consent of land control board as required under Section 6 (1) of Land Control Act (Cap 302).

16. The defendants raised the doctrine of adverse possession in their counterclaim. It is trite law that the doctrine dictates that the land must be registered in the name other than that of the applicant who is in open and exclusive possession of the land in adverse manner to the title of the owner for a period in excess of twelve years having disposed of its owner, see Wilson Kazungu Katana & 101 Others –v- Salim Abdallah Bakshwein & another (2015) eKLR. However, the defendants have not proved any form of possession such as fencing or cultivation of the suit land; see Kimani Ruchine & Another –v- Swift Rutherford Co. Ltd & another (1976-80)1 KLR 1500.

17. Quite clearly, the defendants have mounted a counterclaim for adverse possession in respect of the suit land. In Githongo –v- Munya (2008) 1 KLR (G & F) 1079 at 1085, it was held that adverse possession claim cannot be properly brought as a counter claim in a suit. The counterclaim by way of an originating summons fails as the defendants/counter claimers have not established their claim in consonant with the decision in Waweru, Kinguru and Katana cases (Supra)

18. In the premises, the defendant's defence is mere denial and the counterclaim is mislaid against the plaintiff. The defendants are not entitled to the reliefs sought in the counterclaim.

19. The plaintiff has proved on a balance of probability that she is the registered proprietor of the suit land upon which the defendants have trespassed. She is entitled to the reliefs sought in the plaint considering the principles that guide the court in the award of damages and the nature of trespass by the defendants. I am of the considered view that the plaintiff is entitled to a minimum amount of **Kshs. 10,000/=** in general damages in the circumstances of the case see; Erick Adome and another –v- Pauline Kasumba Osebe & Another (2014) eKLR.

20. The plaintiff has established that the defendants are in unlawful occupation of the suit land. She is entitled to an eviction order against the defendants and shall be undertaken in accordance with Sections 152 B, 152 E, to 152 I of the Land Act 2016 (2012).

21. Consequently and for the stated reasons, I make the following orders:-

**a. I enter Judgment for plaintiff against the defendants in terms of orders (a) to (c) sought in her plaint dated 3<sup>rd</sup> December, 2012 as well as Kshs. 10,000/= general damages for trespass.**

**b. The defendants' counterclaim by way of an Originating Summons dated 12<sup>th</sup> February 2013, be and is hereby dismissed.**

**c. The costs of the entire suit and the counterclaim shall be borne by the defendants.**

**DELIVERED**, Signed and **DATED** in open court at MIGORI this **17<sup>th</sup>** day of **September** 2018.

**G.A.M. ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Mwitia Kerario learned counsel holding brief for Mr. G.S. Okoth learned counsel for the defendants.

Mr. Tom Maurice –Court Assistant