



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 460 OF 2015 (FORMERLY HCC 138 OF 2009 CONSOLIDATED WITH HCC 181 OF 2010 ON 4TH JULY 2013)

PEREZ OGOLA ORUOCH.....1ST PLAINTIFF

FLORENCE AUMA ORUOCH.....2ND PLAINTIFF

VERSUS

JAMES OWUOR ODUOR.....DEFENDANT

JUDGEMENT

1. Perez Ogola Oruoch and Florence Auma Oruoch, the Plaintiffs, suing as the legal administrators of the estate of Nashon Oruoch, deceased, filed Kisumu H.C.C.C. No. 138 of 2009 against James Owuor Oduor, the Defendant, through the plaint dated the 3rd September 2009 seeking for the following;

a. Eviction of the Defendant from Muhoroni Township L.R. 4476/93, suit land.

b. Permanent injunction restraining the Defendant and those claiming under him from developing, interfering, transferring, alienating, trespassing and or carrying out construction on Muhoroni Township L.R. 4476/93.

c. Costs of the suit.

d. Interest.

They aver that the suit land was allotted to Nashon Oruoch, the deceased, in 1975 and subsequently was registered as proprietor of the leasehold. That the Defendant trespassed onto a portion of the suit land in 2004 and erected a structure without permission and authority and has declined to vacate despite demand being issued. The Defendant opposed the Plaintiffs' claim through his statement of defence dated 29th October 2009. He avers that he is the administrator of the estate of his brother, the late Michael Owino Oduor, who had bought plot No. 12 Muhoroni Market, from Maina Jele, the administratrix of the estate of Hassan Caleb Magula, who was the holder of the temporary licence of occupation of the plot from the 1930. That he entered onto the plot in 1989 and thereafter erected a structure thereon and has been in continuous occupation since. That his plot is separate and distinct and does not know of Muhoroni Township L. R. No. 4476/93 claimed by the Plaintiffs, and that their suit should be dismissed with costs.

2. The Defendant in Kisumu HCCC No. 138 of 2009 commenced Kisumu HCC No. 181 of 2010 through originating summons dated the 25th November 2010 against Perez Ogola Oruoch and Florence Auma Oruocha, the Defendants, who are the Plaintiffs in Kisumu HCCC No. 138 of 2009, seeking to be declared the adverse possessor of the whole of Muhoroni Township L. R. No. 4476/93, also known as plot No. 12 Muhoroni. He also prays that should the Defendants fail to execute the documents of transfer in his favour, then the Deputy Registrar be empowered to sign the same. He also prays for costs. The Plaintiff avers among others that he has been in continuous occupation of the plot since 1989, initially as a tenant with his brother Michael Owino Oduor, who later bought it. The Plaintiff's claim is denied by the Defendants through the Affidavit in reply sworn by Perez Ogola Oruoch on the 14th December 2010. She depones that the Plaintiff entered onto the plot and erected a structure in 2004 and not 1989. That the grant in respect of the late Plaintiff's brother of 2004 indicates that the plot No. 12 was to be held for him in trust and therefore could not have erected a structure on the plot in 1989 as he claims. That the Plaintiff's claim based on adverse possession must fail. The Learned Counsel for the Plaintiff filed the notice of motion dated 28th November 2012 seeking for directions on the originating summons. The application came up for hearing on the 26th February 2013 and after hearing counsel for both parties, the court directed that the originating summons and replying affidavit be deemed as the plaint and defence respectively. The learned counsel for the Defendants then filed the notice of motion dated 11th March 2013 seeking for among others the following;

a. That Kisumu HCCC NO. 181 of 2010 be consolidated with Kisumu HCCC No. 138 of 2009.

b. That the claim and defence in Kisumu HCCC No. 138 of 2009 be treated as the plaint and defence in the consolidated suit.

c. That the claim by originating summons and replying affidavit thereof in Kisumu HCCC No. 181 of 2010 be treated as the counterclaim and defence to the counterclaim in the consolidated suit.

d. That the proceedings and evidence already taken be taken as proceedings and evidence in the consolidated suit.

e. That the parties be at liberty to adduce more evidence or call other witnesses in the consolidated suit.

The application came up for hearing on the 4th July 2013 when the learned counsel for the parties entered a consent allowing the application and that proceedings in Kisumu HCCC No. 138 of 2009 be typed. That by that date, the two Plaintiffs in Kisumu HCCC No. 138 of 2009 had testified on the 1st December 2010 as PW1 and PW2 while the Defendant partly testified on the 26th July 2012 as DW1.

3. The hearing resumed on the 1st February 2018 with counsel for the Plaintiffs indicating that they did not wish to reopen their case. The learned counsel for the defendant recalled the Defendant (DW1) to produce the documents in his list dated 23rd January 2012, except the one in number 3, as exhibits 1 (a) to (i) respectively, and additional testimony. The Defendant also called Ismael Murunga, Abdalla Odera Hamisi and Killion Nahasho Oloo and they testified as DW2 to DW4 respectively. The court then gave directions on filing and exchanging written submissions. The learned counsel for the Plaintiffs and Defendant filed their written submission dated 7th May 2018 and 30th May 2018 respectively.

4. The following are the issues for the court's determinations;

a. Whether the plot No. 12 Muhoroni Township and Muhoroni Township L. R. NO. 4476/93 are wholly or partly situated on the same position on the ground.

b. Whether the Plaintiffs are the legal and beneficial owners of Muhoroni Township L. R. No. 4476/93, the suit land.

c. Whether the Defendant entered onto the suit land in 1989 or 2004 or at all.

d. Whether the time started running in favour of the Defendant under adverse possession in respect of the suit land.

e. Whether the Defendant has been in adverse possession of the suit land for more than 12 years or he has been a trespasser.

f. Whether eviction and permanent injunction orders against the defendant should issue.

g. Who pays the costs in the two suits.

5. The court has carefully considered the pleadings in the two consolidated suits, oral and documentary evidence adduced by and for both parties, the written submissions by the parties counsel and come to the following determinations;

a. That Land Parcel L.R. 4476/93 Muhoroni Township, was allotted to Nahason Oruoch vide the letter of allotment dated the 24th October 1975. The letter of allotment indicates the plot size as 0.0462 hectares and the grant was for 99 years from 1st November 1975. That subsequent to the said letter of allotment, the said Nahason Oruoch was issued with the grant over the said plot, under **The Registration of Titles Act Chapter 281 of Laws of Kenya**, under Grant number I.R. 31317 dated 18th November 1977.

b. That the Grant of Letters of Administration issued in Kisumu H.C. Succession Cause No. 160 of 2009 in respect of the estate of Nashon Oruoch on the 17th June 2009 confirms that he deceased died on the 24th December 2003, which confirms the Plaintiffs testimony. That the grant further confirms that Perez Agola Oruoch and Florence Auma Oruoch had been appointed as the joint administrators of the said estate and therefore have capacity to file this suit for the benefit of the estate when they filed the plaint dated 3rd September 2009.

c. That grant in favour of the Plaintiffs was subsequently confirmed and the Certificates of Confirmation dated the 7th May 2010 issued. That the certificate indicates that the suit land was transmitted to the Plaintiffs jointly, confirming that they had both beneficial and legal interest over the suit land.

d. That James Owuor Oduor, the Defendant and one Gabriel Okello Oduor were appointed joint administrators of the estate of Michael Owino Oduor who died on the 4th November 2000, in Nairobi H.C. Succession Cause No. 3140 of 2002 on the 4th March 2003, as confirmed by the copy of the letters of administration. That the grant was on the 15th June 2004 confirmed and certificate of confirmation issued. That the schedule of the certificate has details of how the four properties listed are to be transmitted, that is plot No. 154 Muhoroni Township was to be registered with Anne Junior Owino while plot No. 224 and T.O.L No. 20 and 12 Muhoroni Township were to be **"held in trust by Gabriel Okello Oduor and James Owuor Oduor until eighteen."** That the copy of the certificate of death BNo. 859988 issued on the 22nd June 2005 shows that Gabriel Okello Owuor, who was the joint administrator with the Defendant to the estate of the late Michael Owino Oduor, died on the 20th April 2005.

e. That the Defendant's claim to plot No. 12 Muhoroni Township is based on the sale agreement dated 13th June 1997 between Mama Halima Itabo Jele and Michael Owino Owuor. That the Defendant's evidence is that the plot had been allotted to Caleb Hassan Magatu, the late husband to Mama Halima Itabo Jele, in 1930 under temporary occupation license. That however, no documentary evidence from the Lands office or the County Government (County or Town Council) has been availed to confirm that

the said Caleb Hassan Magatu was the allottee of plot No. 12 Muhoroni, apart from a copy of receipt number D737277 dated 9TH July 1997 for payment of Kshs. 2,252/=, being land rent for Kisumu/T.O.L 12 Muhoroni, in the name of Kalab H. Magatu.

f. That the Defendant appears to have had temporary occupation license No. 12 transferred to his name as the District Land Registrar's letter dated 16th March 2009 to the Commissioner of Lands seems to indicate. That the letter has listed Plot No. 036 against T.O.L No. 12 in the name of the Defendant. That whether that registration complies with the spirit of the certificate of confirmation issued on the 15th June 2004 referred to earlier in (d) above is doubtful, unless the trust was meant for his benefit which is unlikely as in his testimony he requested the court to have the ***"lease certificate be issued in my name as the administrator of my late brother's estate to hold for my niece to who I will later transfer it to."***

g. That though the Defendant has claimed the suit land under adverse possession on the basis that he has been occupying the whole parcel since 1989, the surveyor's report dated 1st March 2011, done pursuant to the court order of 1st December 2010, confirmed that the structure developed on the land only occupies about one third (1/3) of the plot. That position was confirmed by the Defendant when he stated that ***"I know that the court requested for a surveyor's report which was availed. It is dated 1st March 2011 and has been adopted as an exhibit. I agree the report shows the development does not cover half the plot. I agree that the report shows the area covered by the structure on the plot."*** That accordingly, even if the court was to find for the Defendant under adverse possession it would only be limited to the portion of the suit land occupied by the structure as per the surveyor's report findings.

h. That the pleadings in the statement of defence and originating summons filed by the Defendant in Kisumu HCCC No. 138 of 2009 and 181 of 2010 shows that the Defendant entry onto the suit land was initially as tenants with his late brother of Mama Halima Jele, widow of Caleb Hassan Magatu, in 1989. That the said Mama Halima late sold the plot described as Plot No. 12 to his late brother in 1997. That from the Defendant's own testimony in Court, he has ***"lived on the suit land from 1997 to date and I did not know of the Plaintiffs claim over the land before this suit."*** That the foregoing leaves no doubt that the Defendant has until the filing of the suit by the Plaintiff in 2009 taken the suit land as initially, that of their then landlady, Mama Halima, and Later that of his late brother. That the Defendant's occupation and possession of the suit land or the portion thereof, was on the basis of license or permission of the landlady and that of his brother who purchased it in 1997, and thereafter as the legal representative of his late brother's estate. That the Defendant's claim that he had been in adverse possession of the suit land from 1989 therefore has no basis.

i. That the Defendant conceded in his evidence that he came to know that the Plaintiffs had title to the suit land in 2007 when they issued him with eviction notice. That before that date the Defendant's occupation and possession of the suit land or part thereof was by license and or beneficial entitlement. That time for purposes of adverse possession started running in favour of the Defendant and against the Plaintiffs title in 2007 when he got to know the plot he had believed he had beneficial rights over was registered with the Plaintiffs. That Kisumu HCCC No. 138 of 2009 was filed within the following two (2) years and hence the requisite period of twelve (12) years had not lapsed by the time the defendant filed Kisumu HCCC NO. 181 of 2010 based on adverse possession.

j. That from the testimony adduced by the Plaintiffs and Defendant in court, which is confirmed by the surveyor's report dated 1st March 2011, the Defendant's structure occupies a part of the suit land which the court estimates to be a 1/3, from the sketch diagram attached to the said report. That the Defendant has declined to give vacant possession even after being asked to vacate. That as the Defendant did not have the consent or authority of the Plaintiffs to occupy or continue occupying that portion of the suit land, the Plaintiffs are entitled to the prayers of eviction, permanent injunction and costs as per their plaint.

6. That flowing from the foregoing, the court finds and orders as follows;

i. That the Defendant has failed to prove his claim based on adverse possession against both Plaintiffs and his claim in Kisumu HCCC No. 181 of 2010 is dismissed with costs.

ii. That the Plaintiffs have proved their case against the Defendant in Kisumu HCCC No. 138 of 2009 and judgment is hereby entered in their favour in terms of prayers (a), (b), (c) and (d) of the plaint dated 3rd September 2009.

iii. That in respect of prayer (a), the Defendant is directed to vacate from the suit land and give vacant possession to the Plaintiffs in ninety (90) days, and in default eviction order to issue to be executed in accordance with the law.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2018

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE