



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 294 OF 2017**

**(Formerly Kisii ELC No. 164 of 2012)**

**CLEMENT OURE OPON.....PLAINTIFF**

VERSUS..

**MICHAEL MUNEKANE NDORI**

**MUSA NGUSARE NDORI.....DEFENDANTS**

**JUDGMENT**

1. By a plaint dated 14<sup>th</sup> May, 2012, the plaintiff, **CLEMENT OURE OPON** sued the defendants, **MICHAEL MUNEKANE NDORI** (1<sup>st</sup> defendants) and **MUSA NGUSARE NDORI** (2<sup>ND</sup> defendant) seeking declaration that he is the registered and or lawful owner of the suit property, LR NO. SUNA EAST/KAKRAO/1312, an order of eviction, permanent injunction, general damages for trespass on the property and costs of the suit. He is represented by M/s Oguttu, Ochwangi, Ochwal & Co. Advocates formerly M/s Oguttu Mboya and Co. Advocates.
2. The plaintiff's case in brief is that he is the registered proprietor and or owner of the suit property since 10<sup>th</sup> February 2012. That on or about February /March 2012, the defendants trespassed into the property, erected temporary structures thereon and commenced cultivation of a substantial portion of the suit property hence provoked the instant suit.
3. The defendants through J.O. Soire and Co. Advocates denied the plaintiffs claim and sought its dismissal with costs. They stated that the plaintiff who is also the owner of the adjacent land parcel LR NO. SUNA EAST/KAKRAO/1311 was well aware of their long time occupation and or user and or claim over the suit property. That since the year 1974, they have carried out activities on the suit property which their late father bought from the plaintiffs father Masilus Omolo Opon (Deceased).
4. In their statement of defence and counterclaim dated 21<sup>st</sup> June 2012, the defendants claimed that they have acquired the suit property by adverse possession. They sought a declaration to that effect and an order compelling the plaintiff to transfer the property to them with costs.
5. The plaintiff (PW1) testified that he bought the suit property which is approximately 2.57 hectares from Deusededit Otieno Ojala as per sale agreement dated 23<sup>rd</sup> February 2012 (PExhibit 1.). That he obtained title deed issued on 19<sup>th</sup> March 2012 (PExhibit 2) and as revealed in certificate of official search dated 3<sup>rd</sup> April, 2013 (PExhibit 3). That Dr. Peter Hawkings Ojwang Ojang Rakwach had sold the suit property to the seller Deusededit Ojala. That he is the registered proprietor of the suit property as well as the adjacent land parcel **LR NO. SUNA EAST/KAKRAO/1311.**
6. PW 2, MARIKO MUDENYA NDOR,I told the court that he was a younger brother of the 1<sup>st</sup> defendant. That the suit property previously belonged to the late Masilus Omolo Opon who was a brother of PW1 and he purported to sell the suit property belonging to PW1 to him (PW2). That the defendants were then away in Tanzania. That he (PW2) moved out of the property after he did discover that the suit property belonged to PW1.
7. PW3, Tokiko Awach Owiti stated that in the year 1984, he witnessed sale of the suit property by PW2, who paid Kshs.200/= as purchased price to the late Masilus Omolo Opon. That the suit property was then vacant and the defendants were then away in Tanzania.
8. According to 2<sup>nd</sup> defendant (DW1), the 1<sup>st</sup> defendant and himself live and have built on the suit property since the year 1974. That their late father Ndori Munekene bought it from the late Masilus Omolo Opon, who was father of PW1 as per copy of the suit property's register (Dexhibit 1). That the late father of PW1 sold the suit property to Peter Rakwach who then sold it to Deusededit Otieno Ojala, who complained that DW1 had trespassed thereon. That DW1 was charged in Migori SPM's court Criminal case no. 680 of 2010 but he was acquitted of the trespass charge as shown on the proceedings and ruling (Dexhibit 2).

9. DW 1 stated that PW1 was registered as proprietor of the suit property in the year 2012 while they were still living on the property. That PW1 and his late father as well as Peter Rakwach never raised any complaint regarding their occupation and possession of the suit property.

10. Learned counsel for the plaintiff filed submissions dated 7<sup>th</sup> September 2018 and urged the court to grant the reliefs sought in the plaint. Counsel submitted that PW1 is the absolute owner of the suit property and that the actions of the defendants are in violation of the concept of sanctity of private property. He relied on authorities, inter alia, **Esther Gachambi Mwangi –v- Samwel Mwangi Mbiri (2012) eKLR** and **Samson ole Tian –v- The Clerk Transmara County Council and Trasmara County Council Kisii**. HCCC no. 4 of 2007. He also cited **Section 91 of the Penal Code (Cap 63 Laws of Kenya)**. Section **133 (a) of the Registered Land Act (Cap 300 repealed) and Sections 24, 25, and 26 of the Land Registration Act, 2012**.

11. Learned counsel for the defendants filed submission dated 11<sup>th</sup> October 2018 whereby he identified issues for determination including whether the PW1 is the legal owner of the suit property and whether the parties are entitled to the orders sought in their respective pleadings herein. Counsel submitted that the defendants are not trespassers on the suit property as they have acquired title to property by adverse possession. He relied on the case of **Martha Njeri Wanyoike & 2 others –v- Peter Macharia Mwangi and 4 others (2016) eKLR** and **Gulam Miriam Noordin –v- Julius Charo Karisa (2015) eKLR** in the submissions.

12. I have carefully considered the pleadings, evidence of all the witnesses and submissions presented in this matter. I am guided by the decision in **Galaxy Paints Ltd –v- Falcon Grounds Ltd (2000) 2 EA 285** where the court of Appeal stated ;-

**“It is trite law and .....that issues for determination in suit generally flow from the pleadings and unless the pleadings are amended.....or such issues as the parties have framed for the court’s determination.”**

13. By a statement of agreed issues (plaintiff) filed pursuant to **Order 15 Rule 1 and 2 of the Civil Procedure Rules, 2010** and dated 18<sup>th</sup> April 2014, learned counsel for the plaintiff enumerated eleven (11) issues for determination. As already noted, learned counsel for the defendants identified six (6) issues for the court’s determination. In sum, the issues for determination boil down to ;-

- a) Whether the plaintiff (PW1) is the lawful and registered proprietor of the suit property.
- b) The defendants have trespassed upon the suit property.
- c) The defendants have acquired adverse possession over the suit property.
- d) The plaintiff and the defendants are entitled to the reliefs sought in the plaint and counterclaim respectively.

14. On the issue of the proprietorship of the suit property, I bear in mind the meaning of the term **“Proprietor”** under Section 2 of the Land Registration Act, 2012. I also take into account the interest conferred by registration and proprietorship of land provided for under Sections 24, 25 and 26 of the same Act. A certificate of title (PExhibit 2) reveals that PW1 is the proprietor of the suit property. Nonetheless it is not contested that PW1 is the proprietor of the suit property.

15. As regards trespass upon the suit property, PW1 stated that the defendants entered the property, baked bricks and erected temporary structures thereon. He told the court that the defendants live on the suit property. He also stated that DW 1 was charged of trespass on the property in Migori PMs court Criminal case no. 680 of 2010.

16. The testimony of PW1 that the defendants live on the suit property was confirmed by PW2 and PW3. Furthermore, DW1 produced DExhibit 2 where the court held in part that;-

**“In the circumstance to put the accused in his defence will not serve any purpose and there is an obvious explanation to why he was working that part of the land.**

**The evidence from the prosecution is insufficient to sustain this charge. I acquit the accused under Section 210 of the Criminal Procedure Code.”**

17. DExhibit 2 shows that DW1 was charged of trespass upon the suit property and he was acquitted of the charge on 30<sup>th</sup> March 2011. **Concise Oxford English Dictionary** defines the term **“trespass”** as follows;-

**“Enter someone’s land or property without permission.”**

18. It was submitted by learned counsel for the plaintiff that PW1 holds the title to the suit property which has not been impeached and that court is enjoined to protect the rights of PW1 under **Article 40 of the Constitution of Kenya, 2010 (the Constitution)**. The defendants have firmly denied the claim and mounted a counterclaim for adverse possession over the suit property.

19. It was asserted by defendant’s learned counsel that from the evidence on record, the defendants are not trespassers on the suit property. That the plaintiff acquired ownership of the property on which the defendants were in occupation. That the plaintiff was their neighbor and was aware of their occupation thus the defendants have acquired overriding interest thereon as set out at Section 28 (h) of the Land Registration Act, 2012

20. To that extent, the defendants’ occupation of the suit property can hardly be considered as trespass. In **Alice Mweru Ngai –v – Kenya**

**Power and Lighting Co. Ltd (2015) eKLR**, B. Olao J, rendered himself, inter alia;-

**“The defendants conduct in this matter with regard to the suit land can hardly be regarded as an unjustified intrusion into the plaintiff’s land.”**

21. On the issue of reliefs sought including adverse possession, Sections 7 and 17 of the Limitation of Actions Act (Cap 22) govern actions to recover land and title extinguished at the end of the limitation period respectively. The defendants claim to be in occupation of the suit property without interruption since the year 1974, hence commenced their counterclaim for adverse possession herein. Their learned counsel submitted that the claim was properly raised as a counterclaim. In **Gulam Noordin case** (supra), the Court of Appeal held that a counterclaim for adverse possession ought not to be brought by originating summons.

22. The court of Appeal noted that a claim for adverse possession in form of a defence is tenable. The court further held that irrespective of the procedure adopted, the onus is the claimant to prove adverse possession claim in a suit and it was dictated by the need to do substantive justice.

23. It is trite law that even where the plaintiff has made no specific plea of adverse possession, the plea can nonetheless be granted; see **Bayete Co. Ltd –vs- Kosgey (1998) LLR 813**.

24. In the case of **Wilson Kazungu Katana and 101 others –v- Salim Abdallah Bakshwein & another (2015), eKLR**, it was held that the doctrine of adverse possession dictates that;-

- a) The land in dispute is registered in the name of a person other than the applicant.
- b) The applicant is in open and exclusive possession in adverse manner to the title to the owner.
- c) The applicant is in occupation of the suit land for a period in excess of twelve years (12) having dispossessed the owner or discontinued the possession of the owner.

25. It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute; see **Titus Ong’anga Nyachio –v- Martin Okioma Nyauma & 3 others (2017) eKLR**. There is no dispute that the defendants erected temporary structures on the suit property and that they live thereon. Clearly, the defendants have acquired overriding interests on the suit property as envisaged under **Section 28 (h) of the Land Registration Act, 2012**.

26. In the circumstances, I find that the plaintiff has not proved his claim against the defendants on a balance of probability. I also find that the defendants’ counterclaim mounted against the plaintiff has been proved on a balance of probability.

27. In the result there shall be judgment for the defendants against the plaintiff in the following terms;

**i. A declaration that the defendants have acquired by adverse possession an absolute title to the suit property, LR NO. SUNA EAST/KAKRAO/1312.**

**ii. A declaration that the defendants are entitled to be registered as proprietors of the suit property in place of the plaintiff who shall execute transfer in favour of the defendants free from all encumbrances and in default the Deputy Registrar of this court be and is hereby authorized to do so.**

**iii. The plaintiff’s suit is dismissed with costs.**

**iv. The defendants’ counterclaim is allowed with costs.**

**Orders accordingly.**

**DELIVERED, DATED and SIGNED at MIGORI this 17<sup>th</sup> day of October 2018.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Oguttu Mboya learned counsel for the plaintiff.

Tom Maurice – Court assistant