



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 514 OF 2017 (O.S)

(Formerly Kisii ELC Case No. 486 of 2013 (O.S))

KENNEDY OMONDI ALANDO.....PLAINTIFF

VERSUS

ENOCK OGWENO OCHOLA.....DEFENDANT

JUDGMENT

1. The suit property is LR NO. East Kasipul / Kojwach Kamoro / 433 approximately 2.2 hectares to which the plaintiff claims to have acquired title by adverse possession or prescription. By his Originating Summons dated 6th December 2013, the Plaintiff through M/s Oguttu, Ochwangi, Ochwal & Co Advocates has sued the defendant for the following reliefs:-

(1) A declaration that the Defendant's right to recover the whole of the suit property is barred under the Limitations of Actions Act Chapter 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 20 years.

(2) That there be an Order that the Plaintiff be registered as the proprietor of the whole of the suit property in place of the Defendant.

(3) That there be an Order restraining the Defendant by himself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said parcel of land, that is, suit property land, in any manner whatsoever and/or howsoever.

(4) The Deputy Registrar and/or the Executive Officer of the Honourable High Court be directed and/or ordered to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of the suit property, in favour of the Plaintiff, in the event of default by the Defendant to execute the necessary Transfer Instruments.

(5) Costs of this Originating Summons be borne by the Defendant.

(6) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

2. The Originating Summon is expressed under Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 and Section 38 of the Limitation of Actions Act (Cap 22). It is anchored on the plaintiff's supporting affidavit sworn on the even date, grounds (a) to (f) on the face of the application and documents marked KOA 1 to KOA 5 which include a green card / register (PExhibit 1) and photos of the suit property (PExhibit 7 a to 7e).

3. The gist of the Plaintiff's case is that the suit property was initially registered in the name of Obudho Gambe (Deceased 1) following land adjudication in the area. The late Leonara Oigo Ojango (Deceased 2), who was paternal grandmother of the plaintiff (PW1) and mother of Peter Alando Ojango (Deceased 3) occupied the entire suit property. Deceased 3, who was the father of PW1 lived on the property. Whereas Deceased 2 was buried on the suit property, Deceased 1 was not buried on the suit property.

4. PW1 stated that the defendant obtained a grant of Letters of Administration and a Certificate of Confirmation of grant in respect of the estate of deceased 1 in Oyugis PMCC Succession Cause No. 125 of 2012 (PExhibits 4(a) and 4 (b) respectively). That the defendant who has never occupied the suit property caused it to be transferred and registered in his own name on 23rd July 2013 through transmission as shown on a copy of register of suit property (PExhibit 1) and copy of Certificate of Official Search dated 23rd November, 2013 (PExhibit 2).

5. PW1 further stated that he was born and brought up on the suit property. That he has occupied the property openly, peacefully and continuously for a period over 30 years. PW1 lodged a caution (PEXhibit 3) following the acts of the defendant in relation to the property.

6. In his Replied Affidavit sworn on 16th March, 2015 the defendant through Bana and Co Advocates, termed the plaintiff's claim frivolous, misconceived and unmerited. He averred, inter alia, that he acquired title to the suit property by way of transmission from deceased 1, who was his grandmother whose remains were buried on the suit property. That after the attempted coup d'état of 1982, deceased 3 who was father of PW1 was arrested and detained in jail where he died and was buried in 1987.

7. That PW1 and his mother settled on **LR NO. East Kasipul / Kojwach Kanioro / 434** which they purportedly sold to **Bethwel Waweru Ogwayo** in the mistaken belief that it was the suit property before they shifted to Oyugis Town where they live today. That Bethwel Waweru Ogwayo constructed several structures on the suit property which he has since abandoned and PW1 has no interest whatsoever, overriding and otherwise in the suit property.

8. PW1 testified and relied on PEXhibits 1 to 7. He called PAUL OTIENO DAAWO (PW2) who relied on his Statement dated 18th June 2016 and CAROLINE LINET JUMA ONYANGO (PW3) Chief Kojwach location, Rachuonyo East Homabay County who relied on her letter dated 17/6/2016 (PEXhibit 11).

9. The defendant (DW1) testified, inter alia, that PEXhibits 7(a) to (e) were erected by Bethwel Waweru Ogwayo who left the property after he claimed that PW1 had sold it to him. DW1 asked him to vacate the property. DW1 called his three (3) witnesses namely Joseph Okeyo Omboto Assistant Chief Kanioro Sub Location (DW2), KEPHA ONYANGO OCHOLA (DW3) and WILLIAM OTIENO OIGO (DW4) who relied on their respective statements dated 13th March, 2015.

10. By submissions dated 28th September, 2018 learned Counsel for the plaintiff referred to Orders sought in the Originating Summons, interim Order of Injunction granted pursuant to Notice of Motion dated 5th October 2015, analysis of evidence adduced in Court and urged the court to grant the plaintiff (PW1) the orders sought in the Originating Summons. Counsel submitted that the plaintiff has been in continuous and uninterrupted occupation of the suit property for a duration of over 30 years hence he has acquired prescriptive rights over the suit property.

11. Counsel cited authorities including the following Court of Appeal decisions: **(a) Githu vs Ndeete 1984 KLR 778** that the respondents' possession of the suit land was uninterrupted hence established their respective titles by adverse possession. **(b) Harrison Ngige Kaara vs Shadrack Njanja Kaara Nairobi Civil Appeal No. 79 of 1996** that adverse possession to the land in dispute could not arise as the appellant was the registered proprietor's dependant.

12. In his submissions dated 19th October, 2018, Mr. J. O. Bana learned Counsel for the defendant gave a summary of evidence before the Court. He analysed the entire evidence and urged the Court to dismiss the plaintiff's Originating Summons with costs.

13. In support of his submissions, the defendant's Counsel cited the case of **Virginia Wanjiku Mwangi vs David Mwangi, Johnthan Kamus (2013) eKLR** where Ombwayo J held that possession requires at least five (5) minimum conditions namely:-

(a) Open and notorious use of the property

(b) Continuous use of the property

(c) Exclusive use of the property

(d) Actual possession of the property

(e) Non-permissive, hostile or adverse use of the property

14. Counsel further relied on the following case law;

a) Peter Gichuki Wanjohi vs Julia Mumbi Mutari (2017) eKLR by Waithak J that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent.

b) Karuntimi Raiji vs M'Makinya M'itunga (2013) eKLR where the Court of Appeal referred to, among others, Section 30 of the Registered Land Act with regard to a claim for adverse possession against the estate of a deceased person.

15. I have carefully reviewed the entire pleadings, evidence of PW1, PW2, PW3, DW1, DW2, DW3 and DW4 as well as submissions in this matter. I note, the plaintiff's statement of agreed issue dated 15th September, 2014. In the spirit of the decision in **Galaxy paints Ltd vs Falcon Grounds Ltd (2000) 2EA 385**, I find that the issues for determination boil down to whether the plaintiff has acquired title to the suit property by adverse possession and whether he is entitled to the orders sought on the face of the Originating Summons.

16. It is common ground that the suit Land was initially registered in the name of deceased 1. That subsequently DW1 became registered as its proprietor through transmission. That fact is revealed in the Originating Summons with the plaintiff's supporting affidavit at paragraphs 4, 5, & 6 and evidence in this matter.

17. The plaintiff (PW1) stated that he was born on 15/11/1979. That he was born and bred on the suit land and that he is a grandson of

deceased 2 who occupied the land and was buried thereon. He also stated that he has stayed on the suit land since the time of his birth.

18. PW1 further stated that he has established his homestead on the suit land. He stated in part that:-

“I am staying on the suit property. I have photographs taken on the suit property. The first photograph shows my house. The second photographs is of myself. The third photograph is of my pit latrine. The 4th and 5th photographs shows my farm. The original photographs are produced as PExh7 (a), (b), (c), (d) and (e). I am praying that the court grants the reliefs that I have sought in the originating summons. The suit property is the only home that I know. The defendant was registered as owner of the suit property irregularly”. (Emphasis added).

19. The testimony of PW1 was fortified by his neighbour (PW2) and the area Chief (PW3) that PW1 has houses on the land. PW2 told the Court that PW1 built the houses and that he has lived thereon for over 12 years.

20. DW1 testified that PW1 does not live on the land. DW2 confirmed the evidence of DW1. However, the testimonies of DW1, DW2 and DW3 disclose that DW1 does not live on the land and that there are structures or development done by PW1 on the land courtesy of Bethwel Waweru Ogwayo.

21. It emerges from the of evidence that DW1 is the registered owner of the suit land through transmission in respect of the estate of deceased 1. However, he does not occupy the land and PExhibits 7 (a) to (e) and the evidence of PW 2 and PW3 reveal that PW1 has established a house on the suit land on which he cultivates.

22. It is also evident that PW1 is in possession of the suit land. In the case of Titus **Ong’anga Nyachieo =vs= Martin Okioma Nyauma & 3 Others (2017) eKLR**, the Court of Appeal held that it is trite law that possession can take different forms such as fencing or cultivating of the land in dispute (See **Kimani Ruchine & Another =vs= Swift Rutherford Company Ltd & Another (1976 - 1980) 1KLR 1500**).

23. PW1 has raised a claim of adverse possession over the defendant’s title to the suit land. In **Wilson Kazungu Katana & 101 Others =vs=salim Abdallah Bakshwein & Another (2015) EKLR**, it was held that the doctrine of adverse possession dictates that:-

(a) The land in dispute must be registered in the name other than the applicant

(b) The applicant must be in open and exclusive possession of the land in adverse manner to the title of the owner.

(c) The applicants’ occupation of the land must be in excess of twelve years having dispossessed the owner or discontinued the possession of the owner.

24. It is common ground that the suit land in registered in the name of DW1. It has been asserted by PW1 and his witnesses (PW2 & PW3) that he has a homestead on the suit land. His possession of the land has not been interrupted or broken since 1979. Moreover, DW1 does not occupy or possess the land hence he has been dispossessed of the land.

25. In **Gatimu Kinguru =vs= Muya Gathangi (1976) KLR 253, Madan J** (as he then was) held, inter alia;

“The defendant’s possession was open and notorious There has been no discontinuation of possession by the defendant since 1959..... There was ouster of the plaintiff from the Land followed by adverse possession, occupation, development, and cultivation of the land by the defendant”. (Emphasis laid)

26. The defendant (DW1) contended that PW1 does not live on the suit land. That there has been interruption of occupation of PW1 on the land. It is not disputed that there are developments on the suit land as shown on PExhibits 7 (a) to (e). There was no suit filed to stop time from running under Section 38 of the Limitation Actions Act (Cap 22) - **See Ndatho =vs= Itumo & 2 Others (2002) 2 KLR 637**. In the instant suit, on 28/10/2015 the Court only issued orders for maintenance of status Quo on the suit land in order to preserve it thus it did not stop time from running as already noted.

27. In a nutshell, the suit land is registered in the name of DW1 under the Registered Land Act (Cap 300 repealed Act), an Act cited under Section 37 of the Limitations of act (Cap 22). It is proved that PW1 has been in adverse possession of the land for more than 12 years. Therefore he is entitled to be registered as the sole proprietor of the suit land as the defendants title has been extinguished thereby. The plaintiff has proved his claim against the defendant on a balance of probability.

28. The upshot is that judgment is hereby entered for the plaintiff against the defendant in terms of issues for determination numbered 1, 2, 3, 4, and 5 on the face of Originating summons dated 6th March, 2013.

DELIVERED, SIGNED and DATED in open court at MIGORI this **19th** day of **December, 2018**

G. M. A. ONGONDO

JUDGE

In the presence of;

MS Okota holding brief for Mr. Oguttu Mboya learned counsel for the plaintiff.

Mr. Odhiambo Kanyangi holding brief for Mr. Bana learned counsel for the defendant.

Tom, Court Assistant.