



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 779 OF 2017

(FORMELY KISII ELC CASE NO. 490 OF 2013 CONSOLIDATED WITH KISII ELCC NO. 71 OF 2014 (O.S))

RISPER ATIENO OJWANG.....PLAINTIFF

VERSUS

MARGARET OCHOLA OTIENO.....DEFENDANT

JUDGMENT

1. This judgment is in respect of two (2) consolidated suits; formerly Kisii ELC case No. 490 of 2013 and Kisii ELC case No. 71 of 2014. On 23rd July 2014, the court (Okongo J) directed and ordered herein thus:-

“This suit be and is hereby consolidated with Kisii HCCC No. 71 of 2014 (O.S.), Margret Achola Otieno =vs= Rispa Atieno Ojwang. This suit shall be the lead file on which all further proceedings shall be taken.”

2. By a Pliant dated 16th December 2013 and filed on 17th December 2013, the plaintiff namely Rispa Atieno Ojwang has sued the defendant, Margaret Achola Otieno for the following reliefs:-

(i) Declaration that the Plaintiff is the registered and/or lawful owner of LR NO. KAMAGAMBO / KABUORO/843

(ii) An Order of Eviction directed against the Defendant, her agents and/or servants, from LR NO. KAMAGAMBO / KABUORO / 843

(iii) Permanent Injunction restraining the Defendant either by herself, agents, servants and/or anyone claiming under the Defendant from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land, that is LR NO. KAMAGAMBO / KABUORO / 843 and/or any portion thereof.

(iv) An Order directing and/or compelling the District Land Register, Migori to remove and/or vacate the Caution and Restriction, respectively entered and/or endorsed in the Register of LR no. Kamagambo / Kabuoro/843, on the 20th September 2001 and 26th August 2003.

(v) General Damages for trespass.

(vi) Interest on (v) hereof at Court rates.

(vii) Costs of this suit, together with interests thereon be borne by the Defendant.

3. On the other hand, by an Originating Summons dated 20th February 2014 and filed on the even date, the defendant has sought orders :-

(1) That this Honourable Court do declare that the Applicant has acquired by ADVERSE POSSESSION of the whole of land parcel No. KAMAGAMBO /KABUORO / 843 having been in uninterrupted occupation and / or possession of the said parcel for over 12 years that is since the year 1958.

(2) That this Honourable Court be further pleased to order that the whole of land parcel No. KAMAGAMBO / KABUORO / 843 measuring 12.6 ha be registered in the name of the Applicant .

(3) That the Court do issue an injunction restraining the Respondent from interfering with the Applicant’s quite, enjoyment and

possession of land parcel No. KAMAGAMBO / KABUORO / 843 measuring 12.6 hectares..

(4) Any other relief this Honourable Court may deem fit to grant in the circumstances.”

4. The gist of the plaintiff's case is that the suit land was initially registered in the name of her son, Godfrey Omondi Otieno who transferred the same to her (Plaintiff), who then obtained its registration on 5th November, 1997. That the defendant lodged a caution to be restricted on the title to the suit land on 20th September, 2001 and also caused a rectification to be registered over the same title on 26th August 2003. That subsequently, that the defendant trespassed onto a substantial portion of the suit land by entry, cultivation and erection of temporary structures thereon rendering the present suit necessary.

5. The defendant claims that she has been in uninterrupted occupation of the whole of the suit land, LR NO. Kamagambo/Kabuoro/843 since 1958. That the plaintiff unlawfully and fraudulently got registered as proprietor of the suit land when there was a pending suit. She has sought dismissal of the plaintiff's suit with Costs. That the plaintiff is guilty of non-disclosure as there existed similar suit namely Kisii HCCC No. 2313 of 1995.

6. On 23rd June 2015, the plaintiff (PW1) testified inter alia, that the suit land was initially registered in the name of her elder son, Godfrey Omondi Otieno and that the defendant uses the land. That she had purchased the suit land from the late Lucas Otieno Odero, who was the defendant's husband in the absence of the defendant. She produced PE exhibits 1 to 12 which include a copy of the register for the suit land and a copy of the defendant's statement of defence and a draft copy of Counterclaim and judgment in Kisii HCC No. 2313 of 1995.

7. The suit was transferred to this Court on 19th July 2017. Directions were given on 15th March 2018, that the matter proceeds to further hearing on 18th July 2018. The defendant (DW1) testified in part that her late husband Lucas Otieno Odero left the suit land to her and that she has lived on the land since 1958 when she got married to her deceased husband. She produced DE exhibits 1 to 3 which include Judgment in Kisii HCC No. 2313 of 1995 (DEXH 2) and documents in Homabay SRM Succession Cause No. 40 of 1994 (DEXH 3).

8. Learned counsel for the plaintiff file submissions dated 11/10/2018 and urged the court to enter judgment in the plaintiff's favour and dismiss the defendant's statement of defence and the originating summons with costs. Counsel framed and analysed six (6) issues for determination among them, whether the plaintiff is the registered proprietor of the suit land and whether the defendant has among legitimate rights and interests over the suit land.

9. Counsel further relied on authorities which include **Sections 24, 25 and 26 of the Land Registration Act 2012, Order 2 Rule 10 (2) of the Civil Procedure Rules, 2010, Ocean View Plaza Ltd vs= Attorney General (KLR (E & L) 1 at pages 475 - 478 and Abiero vs= Thabiti Finance Company (2001) KLR 496.** Counsel submitted for an award of Kshs. 200,000/= on account of general damages for trespass in favour of the plaintiff.

10. Learned Counsel for the defendant filed submissions on 14th November 2018 and cited Sections 7, 17 and 38 of the Law of Limitations Act (Cap 22) in support of the defendant's claim. Counsel submitted, inter alia, that the plaintiff and her son have never occupied the suit land hence they owned the suit land by title only. That the defendant's evidence on the originating summons is unchallenged, eloquent and consistent thus the defendant's claim should be allowed as sought in the Counterclaim.

11. I have reviewed with care the entire pleadings, evidence of PW1 and DW1 as well as submissions of counsel for the respective parties. In the case of **Great Lakes Company (U) Ltd vs= Kenya Revenue Authority (2009)KLR 720**, the Court of Appeal held that issues for determination in a suit generally flow from pleadings oral framed by the parties for the court's determination. I consider the plaintiff's statement of agreed issues dated 15th February 2014, the defendants agreed issues dated 10th March 2014 and issues in the plaintiff submissions. Therefore, the issues for determination in that instant suit, boil down to whether:-

(a) The plaintiff is the registered proprietor of the suit land.

(b) The defendant has legitimate rights over the suit land.

(c) The parties herein are entitled to reliefs sought in their respective pleadings.

12. On the first issue, the plaintiff stated in her Complaint, and Replying Affidavit sworn on 28th March, 2014 and Statement dated 16th February 2014 that she is the registered proprietor of the suit land since 5th November, 1997. In her testimony, PW1 stated, inter alia:-

“I am the owner of the parcel of land in dispute namely LR NO. Kamagambo /Kabuoro/843 (“the suit property”). The suit property is registered in my name. The suit property was initially registered in the name of my elder son Godfrey Omondi Otieno”

13. By her originating summons and Statement of defence dated 13th February 2014, the defendant admitted that the plaintiff is the registered proprietor of the suit land. She stated that PW1 holds title to the land although she termed the title false and urged the court to reverse it.

14. This court is mindful of the definition the term of “proprietor” under Section 2 of Land Registration Act, 2012. The suit land was registered under the Registered Land Act Cap 300 (repealed Act) and I am mindful of the rights of proprietor as provided at Sections 27 and 28 of the repealed Act. I also take into account the rights and interest of proprietor under Sections 24 and 25 of the Land Registration Act, 2012. From the pleadings and evidence herein, it is common ground that PW1 is the registered proprietor of the suit land.

15. As pertains the defendants' rights over the suit land, PW1 testified that she purchased the land from Lucas Otieno Odero (Deceased) who was the defendant's husband. That the defendant is in cultivation of the Land without her permission. During cross - examination, PW1 maintained that the defendant (DW1) is in occupation of the land.

16. DW1, stated that she lives on the suit land since 1958 when her deceased husband married her. That her son lives on the land. PW1 also confirmed that position when she stated that:-

“The defendant is cultivating the land. Her son is also living on the land.”

17. It is common baseline that DW1 is in sole possession of the land. PW1 ceased possession of it in 1985. In the case of **Titus Ong'ang'a Nyachio =vs= Nyauma (2017) eKLR**, the Court of Appeal held that possession of land indispute can take different forms including fencing and cultivation.

18. It was the testimony of PW1 that the suit land belongs to her. That she bought the land from the deceased husband of DW1 in 1960s. She stated that the land was initially registered in the name of her elder son, Godfrey Omondi Otieno.

19. During cross - examination, PW1W stated in a contradictory manner as she testified that:-

“my son bought the land in 1991 because the defendant and her husband were occupying the suit property.... I have not done anything on the suit property since 1985.... The suit property was purchased by my husband Isaiah Otieno Ojwang. It is Isaiah Ojwang who purchased land from Lucas Odero... “ (Emphasis added)”.

20. During further cross examination, PW1 stated that neither her husband who died in 1989 nor her son ever occupied the suit land. That her deceased husband never left her with the agreement of Sale regarding the suit land. She could not recall the purchase price of the land and that DW1 was and is still in occupation of the suit land.

21. It is evident that neither PW1 nor her son Godfrey Omondi Otieno has ever occupied the suit land. There is no evidence that they bought the land from the deceased husband of DW1. There is no dispute that the said son of PW1 sued DW1 and enjoined PW1 as a party in Kisii High Court Civil Case No. 2313 of 1985 (O.S) which was dismissed for want of prosecution on 29/11/2013 as per Judgment (DExhibit 2).

22. It is further evident that neither PW1 nor her son purchased the suit land as there was no agreement of Sale of the land from the deceased husband of the defendant (DW1). Therefore there is no iota of evidence to prove even any constructive trust as the alleged transaction is foundation less in the circumstances herein; see also **Mwangi and another =vs= Mwangi (1986) KLR 328**.

23. Moreover, the purported Sale is void for all purposes for want of consent as envisaged under Section 6(1) of the Land Control Act (Cap 302); see **Kariuki =vs= Kariuki (1983) KLR 227**. The plaintiff's title deed (PEXH2) is suspect as due process was not followed in obtaining it.

24. It follows that DW1 has been in open and notorious occupation and possession of the suit land for a period in excess of twelve (12) years. She cultivates the land and her son lives thereon hence dispossessed the plaintiff from the land.

24. In **Gatimu Kinguru =vs= Muya Gathangi (1976 -80)KLR 317**, Madan J (as he the was) held inter alia:-

“The defendant's possession was open and notorious....There has been discontinuation of he 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. In view of the foregoing analysis, I find that the plaintiff has not proved his claim against the defendant on a balance of probability. On the other hand, the defendant has proved her counter claim against the plaintiff on a balance of probability.

27. Afortion, the consolidated suits are determined as follows:-

a) The plaintiff's suit by way of a Plaint dated 16th December, 2013 be and is hereby dismissed with costs.

b) Judgment be and is hereby entered for the defendant, Margret Achola Otieno against the plaintiff, Rispa Atieno Ojwang in terms of Orders 1, 2, and 3 as sought in her Originating Summons dated 20th February 2014 with costs.

DELIVERED, SIGNED and DATED in open court at MIGORI this 11th day of **December, 2018**

G. M. A. ONGONDO

JUDGE

In the presence of;

MS W. Ochwal learned counsel for the plaintiff.

Mr. G. S. Okoth holding brief for G. J. M Masese learned counsel for the defendant.

Tom, Court Assistant.