



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 1063 OF 2016 (OS)

(FORMERLY HCC NO. 518 OF 2012)

SIMON RUNDU YOSE.....1ST PLAINTIFF

EPHRAHIM ANANDA OMBEWA.....2ND PLAINTIFF

VERSUS

SOSPETER ONYANGO BELE.....1ST DEFENDANT

JEREMIAH ONYANGO MASENO.....2ND DEFENDANT

JAMES AYIECHA MASENO.....3RD DEFENDANT

J U D G M E N T

1. The applicants commenced the instant suit by way of an originating summons dated 14th November 2012 brought under Order 37 rule 7 of the Civil Procedure Rules, 2010 and Sections 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The applicants claim to have acquired title to land parcels **LR Nos. Kanyamkago/Kawere II/4240 and 4241** and land parcels **LR Nos. Kanyamkago/Kawere II/4248 and 4249** registered in the respondents names by virtue of having been in adverse possession of the said parcels (hereinafter referred to as **“the suit properties”**) for a period in excess of 12 years. The applicants seek orders to be declared as entitled to be registered as the owners of the suit properties and to be duly registered as the owners thereof.

2. The originating summons is supported on the annexed affidavit sworn by Simon Rundu Yose, the 1st applicant herein on 14th November 2012 and the annexures thereof. The respondents upon being served with the originating summons entered appearance and the 1st respondent Sospeter Onyango Bele filed a replying affidavit sworn on 29th November 2012 in opposition to the originating summons. The respondents denied the applicants had acquired title to the suit properties by adverse possession stating that the parcels of land claimed by the applicants formed part of land parcel **Kanyamkago/Kawere II/951** owned by the late Ezekiel Abongo Ochieng. The respondents aver that land parcel **Kanyamkago/Kawere II/951** was subdivided and distributed to the beneficiaries of the estate of the late Ezekiel Abongo Ochieng and that the applicants are not beneficiaries of the estate of the late Ezekiel Abongo Ochieng to be entitled to any land from the estate.

3. Honourable Justice Okong’o on 22nd July 2013 gave directions that the originating summons be treated

as a plaintiff and the replying affidavit in response thereto as a defence and further that the same be heard by way of viva voce evidence. The matter was part heard by Okong'o, J. on 7th July 2015 when both plaintiffs testified and closed their case. The defence case was heard before me on 2nd June 2016 when the 1st and 3rd defendants testified on behalf of the defence and closed the defence case.

4. The Evidence by the Parties;

The 1st plaintiff (PW1) testified that his father and the father of the 2nd plaintiff purchased portions of land from one Ezekiel Abongo alias Abongo Ochieng in 1973 and 1974 respectively. The parcel of land the subject of the sale was **LR No. Kanyamkago/Kawere II/951**. The 1st plaintiff testified that he and the 2nd plaintiff have been in occupation of the land purchased by their fathers' from 1973 and 1974 respectively. The witness stated he knows the 1st defendant who is a neighbour while the 2nd and 3rd defendants are brothers. The 1st plaintiff testified that sometime in August 2012 the 2nd plaintiff informed him he had received summons from the land registrar respecting a dispute touching on a boundary which the summons indicated the land registrar would visit the site to determine. Alarmed, the plaintiffs decided to check with the lands office as to what was happening.

5. The witness stated that at the lands office they discovered that land parcel 951 had been transferred directly from Ezekiel Abongo to the 1st defendant. A search on parcel 951 revealed that the same was transferred to the 1st defendant on 6th May 2011 who proceeded and subdivided the same into 12 portions namely **Kanyamkago/Kawere II/4240 to 4251**. A copy of the summons from the land registrar dated 5th July 2012 and certificate of official search for parcel **951** dated 20th March 2012 were produced as "**PEx1**" and "**PEx2**" respectively. The plaintiffs explained that they obtained the mutation form used to subdivide parcel **951** produced as "**PEx3**" and further obtained searches for parcels **4241** and **4248** produced as "**PEx4**" and "**PEx5**".

6. The 1st plaintiff further testified that the land registrar's summons related to fixing of boundaries in respect of **LR Nos. 4248** and **4249** registered in the 2nd defendant's name and parcel **LR No. 952**. The 1st plaintiff stated that he is occupying land parcels **4240** and **4241** which presently are registered in the 1st and 3rd defendants' names respectively. The 2nd plaintiff for his part has been in occupation of land parcels **4248** and **4249** since 1974.

7. The plaintiffs stated that the 1st defendant was not a close relative of the late Ezekiel Abongo (deceased) who died on 12th October 1995. Further the 1st plaintiff stated that the 1st defendant's father one, Liasare Bele Amolo (now deceased) obtained a grant dated 15th February 1999 vide Kisii HC Succ. Cause No. 241 of 1996 to administer the estate of the late Ezekiel Abongo "**PEx6**" but he died on 1st February 2010 before the grant was confirmed. That before the death of Liasare Belle, the 1st plaintiff stated that his father Yose Amusabi and the 2nd plaintiff lodged objection in the succession cause but the said Liasare Bele died before the objection was determined. The plaintiffs contend that the 1st defendant was not substituted in place of Liasare Bele in the succession cause and it was therefore not clear how the 1st defendant got to be registered as owner of land parcel **No. 951** which he subsequently subdivided.

8. The plaintiffs averred that they have continuously occupied land parcels **4240** and **4241** since 1973 and that the 2nd plaintiff has been in occupation of land parcels **4248** and **4249** since 1974. The plaintiffs aver that the defendants do not occupy any of the disputed parcels of land and contend that the defendants were not beneficiaries of Abongo (deceased) who was not survived by any children. The plaintiffs aver that they have occupied the disputed parcels of land for over 40 years and are consequently entitled to be registered as the owners of the said parcels of land.

9. Under cross examination the 1st plaintiff maintained that his late father had purchased a portion of land parcel **No. 951** in 1973 and it is that land they have occupied since. The 1st plaintiff affirmed that their father instituted HCCC No. 30 of 1988 (Kisii) against Abongo Ochieng and James Maseno as

defendants. The plaintiffs' case against the 2nd defendant was dismissed by the elders. The 1st plaintiff stated they were seeking to be registered as owners of the parcels of land on account of their occupation and stay on the land over a long period of time. The 1st plaintiff testified the delineation of plot Nos. **4240** and **4241** which his father occupied and owned were well defined on the ground as established by the late Abongo. The 1st plaintiff further stated that land parcels **951** was not subdivided on the ground as per the mutation forms and emphasized he was presently occupying the parcels currently registered as parcels **4240** and **4241**.

10. The 2nd plaintiff testified as PW2 and entirely adopted the evidence given by PW1. In cross examination, PW2 stated that he was occupying land that his father had purchased from the late Abongo. He stated that the 2nd defendant entered his land in 2008 and planted maize and sugarcane and that the 3rd defendant also wanted to enter his land. He further stated the defendants have severally wanted them to leave and vacate the land they occupy knowing fully well that the portions they occupy belong to them.

11. The three defendants testified in support of their defence, the 1st defendant as DW1, the 3rd defendant as DW2 and the 2nd defendant as DW3 respectively. DW1 testified that Abongo Ochieng was his grandfather and that he knew the 2nd and 3rd defendants who had purchased portions of land from his grandfather. The 2nd and 3rd defendants had showed him copies of land purchase agreements entered into on 4th June 1983 and 5th November 1984 ("**DEx2(a) and (b)**") in regard to the 2nd defendant while in regard to the 3rd defendant/respondent there was an agreement made in June 1989 ("**DEx3**"). DW1 acknowledged that his grandfather died before he had transferred the land to the defendants and he stated that he later pursued the matter and had the land transferred to the defendants. The 1st defendant stated the 2nd defendant was registered as owner of land parcel **Kanyamkago/Kawere II/4248** and the 3rd defendant as owner of land parcel **Kanyamkago/Kawere II/4241** after land parcel **Kanyamkago/Kawere II/951** was subdivided. The 1st defendant further stated that after the 2nd and 3rd defendants got their parcels, the portion of land parcel **951** that remained was subdivided into 10 portions which were all in his name. He testified that the plaintiffs were occupying a portion of his grandfather's land and had constructed houses thereon and that even at the time his grandfather died the plaintiffs were in occupation and had built houses thereon. The witness stated the 2nd and 3rd defendants are occupying their own parcels of land which were transferred to them. The witness however stated he could not state the specific parcels of land that the plaintiffs were in possession of after the subdivision of land parcel **951**.

12. Under cross examination, DW1 stated that the plaintiffs are still in occupation of the portion they were occupying before his grandfather died. He conceded that at the time Abongo died he had not transferred land parcel **951** to anybody and that in 2012 when he subdivided and transferred the land parcels to the 2nd and 3rd defendants out of land parcel **951**, he had not taken out letters of administration for the estate of his late grandfather. He further stated his father had petitioned for grant of letters of administration for the estate of his late grandfather the late Ezekiel Abongo Ochieng but he died before the succession cause was concluded. The witness could not tell how he became the administrator of his late grandfather's estate so as to be able to distribute the estate and merely stated it is the lawyer who caused the letters of administration to be issued (even though none were exhibited). The 1st defendant stated his grandfather had initiated the process of subdivision of parcel **951** even though he did not know whom the grandfather intended to give the 12 plots which the mutation forms ("**DEx4**") shows. The witness affirmed parcels **4240** and **4249** were still in his name and that 2nd plaintiff's occupation borders the 2nd defendant while the 1st plaintiff's borders that of the 3rd defendant.

13. The 1st defendant in reexamination by Mr. Nyasimi advocate stated thus:-

"My father had subdivided the land into 12 portions and that is what I observed. The lawyer is the one who assisted me to process the succession and obtain titles. The letter of succession was taken out in the name of my father. My father died before the succession process was completed."

DW2 and DW3 testified to the effect that they each purchased land from Abongo Ochieng who died before he transferred the land to them. DW2, the 3rd defendant stated that none of the plaintiffs have occupied his land parcel **4241** in respect of which he holds title “**DEX7**” transferred to him by the 1st defendant. DW3, the 2nd defendant affirmed that he is the registered owner of land parcel **4248** as per the copy of title “**DEX9**” and stated that owing to interference by the 2nd plaintiff he caused a demand letter to be sent to him on 19th March 2012 “**DEX8**” and he reported to the D.O and the chief respecting the interference. The witness affirmed that the title was transferred to him by the 1st defendant through the assistance of Mr. Sam Onyango Advocate. The witness further in cross examination agreed that the 2nd plaintiff has been farming on parcel **4248** since the year 2000 and that it was only after he got title to the land that he began asserting his claim to the whole of his land.

14. Analysis and determinations;

Following the close of the hearing the parties filed written submissions, the plaintiffs on 27th September 2016 and the defendants on 11th October 2016. After reviewing the pleadings, the evidence and the submissions by the parties the issues for determination are:-

- i. **Whether the 1st defendant got himself unlawfully and illegally registered as the owner of land parcel Kanyamkago/Kawere II/951 as purported administrator of the estate of the late Ezekiel Abongo Ochieng (deceased).**
- ii. **Whether the 1st defendant caused land parcel Kanyamkago/Kawere II/951 to be fraudulently and illegally subdivided into 12 parcels whereupon land parcels Kanyamkago/Kawere II/4241 and 4248 were transferred to the 3rd and 2nd defendants respectively,**
- iii. **Whether the plaintiffs have acquired title to portions of land parcel Kanyamkago/Kawere II/951 by way of adverse possession for a period exceeding 12 years.**
- iv. **What orders should the court make.**

15. The plaintiffs’ case is set out in the affidavit in support of the originating summons (OS) and in the oral evidence adduced by the plaintiff. There is no dispute that the late Ezekiel Abongo Ochieng was the registered owner of land parcel No. **Kanyamkago/Kawere II/951** said to have been 11.15hectares. Both plaintiffs fathers (now deceased) claim to have purchased portions of the land in 1973 and 1974 respectively whereupon they entered into possession. Likewise the 2nd and 3rd defendants state they purchased portions of land from the said Abongo Ochieng in 1983/84 and 1989 respectively. The said Abongo Ochieng died on 12th October 1995 as per the copy of death certificate produced as “**DEX1**” and as at the time of his death he had not formalized either the alleged sales to the plaintiffs and/or the 2nd and 3rd defendants. The evidence on record is that the said Abongo Ochieng died without leaving any children and that the 1st defendant’s father who was a step son to the deceased, petitioned for grant of letters of administration to the estate of the late Abongo Ochieng vide Kisii HC Succession Cause No. 241 of 1996 and was issued temporary grant of letters of administration on 15th February 1999. The 1st plaintiff’s father and the 2nd plaintiff herein filed an objection to the grant of letters issued to the 1st defendant’s father and sought the revocation of the grant. Both the plaintiffs and the defendants agree the 1st defendant’s father died before the objection to the grant was determined. **If the 1st defendant’s father died before the succession cause in respect of the late Abong’o was concluded, how was the estate of the late Abongo administered? How did the 1st defendant become entitled to administer the estate?**

16. As I could not find any answers to these questions from the evidence, I *suo moto* caused the court registry to avail to me Kisii HC Succession Cause No. 241 of 1996 for my perusal to satisfy myself what the position was in regard to the succession proceedings. The file was availed to me and upon perusal my

findings were briefly as follows:-

- i. **The temporary letters of administration were issued to Liasare Bele Amolo by HPG Waweru, J on 15th February 1999. Liasare Bele Amolo on 9th September 1999 applied for confirmation of the letters of administration issued to him on 15th February 1999 to be confirmed.**
- ii. **On 14th February 2000 the firm of Soire & Co. Advocates filed a chamber summons for revocation and annulment of grant on behalf of Yose Amusabi and Ephraim Ananda on grounds of failure to disclose the interest of the objectors and concealment.**
- iii. **The objection despite being fixed severally for hearing was never heard and on 8th July 2015, Hon. Justice Chacha Mwita pursuant to a notice having been issued under Section 73 of the Law of Succession Act, revoked the grant issued on 15th February 1999 under Section 76(d)(i) of the Act and the matter was marked closed.**

17. The 1st defendant has not demonstrated he had any authority to administer the estate of the late Abongo Ochieng (deceased). **Under what authority did he get land parcel 951 transferred to him?** He could only have achieved that feat if he had been appointed administrator of the late Abongo Ochieng's estate. My view is he had no authority or capacity to act as administrator without being appointed by the court as administrator pursuant to the provisions of the Law of Succession Act.

18. The copy of the mutation forms dated 8th September 2011 (“PEX3”) are indicated to have been signed by the 1st defendant. He had no capacity to do so as he was not the administrator of the late Abongo's estate. It is a matter of concern that a person can wake up one day, complete a mutation form and cause somebody else's land to be subdivided. It is intriguing how the surveyor and the land registrar accepted to deal with the matter. In my view, the act of the 1st defendant borders on criminality. He definitely knew his father who had initiated the succession process had not completed the same. He does not say he petitioned for fresh letters of administration and got them, yet he had the courage to present himself as the owner and execute documents. Whatever he did was a nullity ab initio and I declare it so.

19. I must answer the 1st and 2nd issues in the affirmative. I am satisfied and persuaded that the 1st defendant acted unlawfully and illegally in getting himself registered as the owner of land parcel **Kanyamkago/Kawere II/951** and causing the subdivision of the same. The transfers effected to the 2nd and 3rd defendants were a nullity. The 1st defendant had no capacity to deal with the estate of Abongo Ochieng and the titles ought to be annulled and cancelled. It is so ordered.

20. On the 3rd issue as to whether the plaintiffs have acquired title of the portions they occupy by adverse possession. I am on the evidence satisfied that indeed the plaintiffs are adverse possessors and are entitled to be registered as owners of the portions they have adversely possessed. The plaintiffs' evidence is that they have occupied and have built residences on the portions that they have occupied. The 1st defendant admitted that even at the time his grandfather died in 1995 the plaintiffs were in occupation and had built their houses on the portions they occupy. I have on perusal of the succession file come across a copy of the land board consent issued to Abongo Ochieng on 30th May 1986 annexed to the objection application which shows the said Abongo had sought consent to subdivide parcels **951** into 4 portions and transfer to Yose Amusabi, Mbewa Anunda and James Ayiecha Maseno. The subdivision portions were to be 3.15Ha, 2.0Ha, 3.2Ha and 2.8Ha. This is consistent with the plaintiffs' claims that their late fathers had purchased portions of land from Abongo Ochieng (deceased). The 1st defendant stated in his evidence that the plaintiffs still occupy the portions that they were occupying before his grandfather died. The fact that the plaintiffs have occupied, used and built houses on the portions they occupy demonstrates that they have openly possessed the land they have occupied adversely for a period of 12 years and have accordingly acquired ownership thereto. The plaintiffs therefore will become entitled to be registered as owners of the portions they occupy as delineated on the ground by the late Abongo Ochieng once the estate is administered in accordance with the law.

21. Accordingly therefore, it is my finding and holding that the plaintiffs have become entitled to be registered as owners of the portions that they occupy (to be surveyed having regard to the physical boundaries on the ground) by virtue of adverse possession and I declare them to be deemed as beneficiaries of the estate of Abongo Ochieng (deceased). The 2nd and 3rd defendants equally will be entitled as beneficiaries of the late Abongo Ochieng's estate to portions measuring 1.18ha and 1.14ha respectively as depicted in the "unlawful titles" that they presently hold.

22. The net effect of my judgment is that:-

i. I declare the registration of land parcel Kanyamkago/Kawere II/951 in the name of the 1st defendant and the consequent subdivisions thereof null and void.

ii. The subdivisions of the land Kanyamkago/Kawere II/951 into land parcels Kanyamkago/Kawere II/4240 to 4251 is declared null and void and the consequent titles thereto are ordered to be cancelled and the land restored to the original parcel number Kanyamkago/Kawere II/951 in the name of Abongo Ochieng (deceased).

iii. That formal succession proceedings to the estate of the late Abongo Ochieng (deceased) to be undertaken with a view of distributing his estate.

iv. That in such succession proceedings as in (iii) above the plaintiffs, Simon Rundu Yose and Ephraim Amanda Ombewa to be deemed as beneficiaries to the estate of the late Abongo Ochieng (deceased) to the extent of the portions of land parcel 951 which they have adversely possessed as declared in this judgment (to be surveyed and ascertained having regard to the physical boundaries on the ground).

v. That the 1st and 2nd defendants to be equally deemed as beneficiaries to the estate of the late Abongo Ochieng (deceased) in respect of portions measuring 1.18Ha and 1.14Ha respectively.

vi. Each party to bear their own costs of the suit.

Judgment dated, signed and delivered at Kisii this 12th day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st and 2nd plaintiffs/applicants

..... for the 1st, 2nd and 3rd defendants/respondents

..... court assistant

J. M. MUTUNGI

JUDGE