



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE NO. 41 OF 2016

KIBUTUK ARAP TOO.....PLAINTIFF

VERSUS

PERIS SHANYASI ALLULYA.....1ST DEFENDANT

JOYCE KABURANI.....2ND DEFENDANT

JAPHET LUGAFA SHIKONYERE.....3RD DFENDANT

LEAH MUSIMBI.....4TH DEFENDANT

LENA SOKONI.....5TH DEFENDANT

JUDGMENT

INTRODUCTION:

By a plaint dated 23rd February 2016 the Plaintiff herein sued the defendants seeking for:

1. A declaration that land comprised in land parcels No. NANDI/KAPKANGANI/1439 and 2211 solely belong to the plaintiff and the defendants have no proprietary interest in the said Parcels.
2. An eviction order do issue against the defendants herein, their agents, servants and/or anybody acting on their behalf from land parcels No. NANDI/KAPKANGANI/1439 and 2211.
3. Costs and interest.
4. Any other relief that this Honorable court may deem fit and just to grant

The defendants filed their joint statement of defence and counter claim together with their witness statements. The parties gave their evidence and both counsel filed their written submissions.

Plaintiff's Case.

It was the plaintiff's evidence that he is the registered owner of land parcel No.NANDI/KAPKANGANI/1439 and 2211 which parcels were subdivided from parcel No. NANDI/KAPKANGANI/1391 vide a decree in KAPSABET PM Land case No. 34 of 2005. The plaintiff urged the court to adopt his witness statement dated 23/2/15 and the list of documents dated the same date. The court adopted the same as his evidence. The plaintiff produced the original title for plot No.

NANDI/KAPKANGANI/1439 issued on 9/3/06 as P-exhibit No. 1. The plaintiff also stated that he owns 5 parcels of land of which two are registered in his name as **NANDI/KAPKANGANI/2211**. He also produced copies of the green card for parcels No.s 1239, 1439, 2211, 1391, and 697 as exhibits before the court

The plaintiff further testified that he went before a panel of elders and later to Kapsabet Magistrates' Court where the court adopted the award of the land Disputes Tribunal as the judgement of the court. He produced the decree of the Kapsabet LDT case No 34/05 as an exhibit before the court. The plaintiff also testified that he accepted the award of the tribunal which gave him the two parcels of land.

The plaintiff stated in his evidence that the defendants have trespassed on his parcel of land who have been demolishing the structures that he has been putting up. He urged the court to grant him orders to evict the defendants from his parcel of land. He has tried to take possession of the suit land but the defendants have made it difficult.

The plaintiff called one witness one Peter Butuk who confirmed the plaintiff's assertions and further clarified that the Land Case No. 34 of 2006 was in relation to land parcel No. NANDI/KAPKANGANI/1391 which title had been closed and therefore nonexistent and that is why the court found that it could not issue an eviction order on a closed title and thus the instant suit. It was his evidence that parcels NANDI/KAPKANGANI/2211 and 1439 have never been subject to any litigation and therefore the instant suit is in respect of a different subject matter.

DEFENDANT'S CASE

The 1st defendant gave evidence on behalf of all the defendants and called one witness who is the Executive officer Kapsabet law courts who produced Land Disputes Tribunal file No. 34/05 and Civil Case No. 34/06. It was the defendant's evidence as per witness statement adopted by the court that the plaintiff is the registered owner of parcels of land known as NANDI/KAPKANGANI/ 1439 and 2211 measuring 0.4 and 1.5Ha respectively. She also stated that the said parcels of land were as a result of a sub division NANDI/KAPKANGANI/697 It was their evidence that the defendants had purchased the land from the 1st defendant Peris Alulu and have been in occupation. The defendant further stated that the plaintiff has in the past attempted to evict them from the suit land. The defendants prayed for the dismissal of the plaintiff's suit and counter claimed for an order for transfer of the whole suit land in their favour in the respective portions that they are claiming.

PLAINTIFF'S COUNSEL'S SUBMISSIONS

Plaintiff's Counsel filed submissions in support of the plaintiff's case. He reiterated the plaintiff's evidence who stated that the occupation by the defendants has not been lawful, peaceful, uninterrupted and continuous for over 12 years as alleged by the defendants. Counsel also submitted that there have been confrontations and eviction which are admitted by the defendants in their evidence and pleadings.

Counsel submitted that from the defendant's defence it is clear that they have admitted that the plaintiff is the registered owner of land parcel No..NANDI/KAPKANGANI/1439 and 2211. It was Counsel's submission that the defendants' witness who is the Executive officer, Kapsabet Law Courts who produced Exhibit being file No. LDT 34 of 2005 and file No. Civil 34 of 2006 admitted on cross examination that the plaint filed on 27th January 2006 in case file No. Civil 34 of 2006 was in respect of parcel No. NANDI/KAPKANGANI/1391 and no amendments were ever made.

Mr. Bungei urged the Court to note that even though the plaintiff is the same as in the instant case (the other parties are different) and therefore the issue of *res Judicata* cannot arise. Counsel stated that the 1st defendant who testified on behalf of the other defendants failed to show the Court which parcels are allegedly under their occupation and when she entered the parcel, but only alleged occupation. The other defendants neither testified nor recorded a statement and therefore the evidence of the plaintiff virtually remained unchallenged. Counsel submitted that the defendants did not take their case seriously.

It was further submitted by Counsel for the plaintiff that the defendants did not comply with Order 1 rule 13 of the Civil Procedure Rules when the 1st defendant purportedly signed joint statement and gave evidence on behalf of the other 5 defendants namely JOYCE, JAPHET, LEAH and LENA without a written authority from the said defendants. There was no written authority from the 2nd to 5th defendants authorizing the 1st defendant to act and/or plead on their behalf. It follows therefore that no evidence whatsoever was tendered by the 2nd to 5th defendant. He submitted that it is trite law that written authority must be given and filed and failure to do so is fatal to the defendants' defence and counterclaim.

Counsel framed issues for determination for the court as follows:

1. Whether the plaintiff is the registered owner of parcels no.NANDI/KAPKANGANI/1439 and 2211.
2. Whether the suit herein is *res judicata*.
3. Whether the defendants were ever evicted.
4. Whether the defendants counter claim which is in essence a claim for adverse possession can stand.

On issue No. 1, Counsel submitted that it is not in dispute that the plaintiff is the registered owner of parcel No.NANDI/KAPKANGANI/1439 and 2211. This was admitted by the defendants in their statement.

As regards issue No. 2 it was Counsel's submission that this suit has not been heard and determined on merit by a court of competent jurisdiction with similar parties and same subject matter. The LDT case 34 of 2005 was in respect of Land Parcel No. NANDI/KAPKANGANI/1391 and not 2211 or 1439. Parcel No. NANDI/KAPKANGANI/2211 and 1439 was as a result of a decree in LDT case No. 34 of 2005. Secondly, Counsel submitted that from the defendants' Exb. 2 Civil case 34/2006 it is also clear that the parties are not the same except for the 1st defendant herein who was one of the defendants. From the pleadings, the prayers of eviction sought in the plaint were in relation of NANDI/KAPKANGANI/ 1391 and not 2211 or 1439. Counsel submitted that the Court therefore rightly found that parcel No. NANDI/KAPKANGANI/ 1391 did not exist and the plaintiff's case was dismissed on that point, the plaintiff had no other option but to file the instant suit in respect of the new developments thus the orders being sought in respect of NANDI/KAPKANGANI/ 2211 and 1439.

He therefore submitted that the plaintiff's case in the instant suit is proper before this Court.

On issue No. 3 Counsel submitted that it is trite law that a claim of adverse possession can only be sought by way of originating summons supported by an affidavit. Order 37 rule 7 is mandatory. He stated that a party cannot therefore counterclaim for adverse possession. Counsel cited the case of **KENYANGA — VS- OMBWORI 200 KLR page 107-108** where it was held by the Court of Appeal that a claim for adverse possession can only be brought by way of originating summons supported by affidavit. He urged the court to strike out/ dismiss the defendants' instant counterclaim with costs. Furthermore, the defendants cannot claim to have been in peaceful, uninterrupted occupation as their occupation was interrupted by the eviction carried out by the plaintiff in Civil case No.34/2006 which the defendant confirmed on cross examination and in her evidence in case No. 36/2006 page 48 paragraph 1 of the proceedings. It was evident from the proceedings that there was an eviction Order dated 16/8/2007 which was executed in 2008.

Counsel also referred the court to page 54 paragraph 2 of the said proceedings in Civil 34/2006 (Exb2) where one MOBO MBONE confirmed that eviction was done in 2008 and houses including that of the 1st defendant were demolished. The 1st defendant also confirmed interruption in her statement whereby the filing of LDT 34 of 2005 and Civil No. 34/2006 also interrupted the claim herein including the filing of the instant suit which interrupted the purported continuity of occupation and times stopped running.

Counsel for the plaintiff therefore prayed that judgement be entered for the plaintiff as prayed in the plaint as he had proved his case on a balance of probabilities as required by law and urged the court to dismiss the defendants' counterclaim with costs to the plaintiff.

DEFENDANTS' COUNSEL'S SUBMISSIONS

Counsel for the defendants submitted that the defendants are legally entitled to the portions they have been in occupation of for a long time as Purchasers. He submitted that the Plaintiff had evaded concluding the transaction that he initially began with the 1st Defendant, who subsequently sold the same to the other Defendants and, including those not before Court.

Mr. Choge Counsel for the defendants reiterated the statement of the defendants stated that the defendants had averred that they have been in occupation and possession of various portions of the suit properties as particularized in paragraph 12 of the Defence and Counterclaim. He submitted that the Plaintiff has never enjoyed any occupation or possession after he ceded the same in 1972.

Counsel enumerated issues for the courts determination as follows:

1. Whether the Plaintiff is the absolute legal owner of the suit properties.
2. Whether the Plaintiff has user, occupation and possession of the suit properties.
3. Whether the Defendants are in occupation and possession of the properties and have any rights and or interests over the suit properties
4. Whether the Plaintiff's titles to the properties are liable to be impeached on account of the Defendants alleged interests therein.
5. Is the suit res judicata?

Counsel relied on Section 28 of the Land Registration Act 2012 which provides for overriding interests as follows:

“unless the contrary is expressed in the Register all registered land shall be subject to the overriding interest without being noted in the register which include rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or prescription”.

Mr. Choge stated that the Defendants have all along sought to have their various portions transferred to them to no avail which he stated that was demonstrated in the proceedings before the Magistrates' Court Kapsabet Civil Suit no 34 of 2010 an exhibit before the Court.

Counsel also relied on the various Court of Appeal decisions that stated that possession and occupation of land can create an Overriding Interest to which the proprietors rights and Interests were subject. He cited the case of Obiero vs Opiyo (1972) EA 227 where it was stated that:

"The Respondent has rights against the Appellant stemming from possession and occupation of part of the land which amounted to an Overriding Interest not required to be noted on the register and the Appellants proprietorship was subject to it, *Section 30g*

Mr. Choge further submitted that the Defendants case was that they had purchased their respective portions over a long period of time, beginning in 1972 and they had taken possession and had been living there to date and that the plaintiff does not live on the suit land. Counsel submitted further that the Plaintiff allegedly sub-divided the parcels and failed to take cognizance of the Defendants occupations as a consequence the Plaintiff's titles became subject to the Defendants Overriding Interest in respect of the portions they occupied notwithstanding that they were not noted in the Register.

Counsel also raised the issue of *res judicata* and stated that it was apparent that the rules of *res judicata* applies to this case. He therefore urged the court to find that the suit is *res-judicata* since Kapsabet LDT no. 34 of 2005 and Civil Suit 34 of 2006 both lower matters were determined on merit and were accordingly dismissed with Costs.

Counsel submitted that under section 26 of the Registration of Land Act 2012, a title can be challenged on the ground of misrepresentation and fraud. He stated that the plaintiff's titles were unprocedurally acquired. He therefore urged the court to find that the Plaintiff has not proved his case on a balance of probabilities and the same should be dismissed with Costs and Judgment entered as prayed in the counter claim for the defendants.

Analysis and determination

This is a case that has been protracted over a long period of time. This matter was at one time at the Kapsabet Land Disputes Tribunal. It was later filed at the Kapsabet law Courts but the same was not determined.

The plaintiff stated his case through his evidence and produced exhibits in support of his case. The 1st defendant also gave evidence on behalf of all the defendants. Counsel's crafted the issues for determination and amongst them was whether this suit is *res judicata*, whether the plaintiff is the registered owner of the suit properties, whether the defendants have acquired the suit land by way of adverse possession and whether a claim for adverse possession can stand by way of counter claim.

I will start with the issue as to whether the plaintiff is the registered owner of the suit parcel of land. It is not disputed that the plaintiff is the registered owner of land parcel Nos. NANDI/KAPKANGANI/2211 and 1439 as was evident from the plaintiff and defendants' testimony together with the titles in respect of the same by the plaintiff. The defendant also admitted that the plaintiff is the registered owner of the suit land save for that the defendants are in occupation by virtue of having purchased the land from the 1st defendant one Peris Shanyasi.

The plaintiff testified that they had gone to the Land Disputes Tribunal which award was adopted by the court. A surveyor subdivided the suit land and the 1st defendant was given plot No. 2209 and the plaintiff given plot Nos. 2211 and 1439 respectively. It was the plaintiff's evidence that one Peter Ateya who was given plot No. 2210 took his portion but the 1st defendant Peris was removed from the plaintiff's land but came back instead of occupying the portion that was given to her. The plaintiff further stated that the persons mentioned in the counter claim are supposed to be on plot No. 2209 belonging to the 1st defendant.

From the pleadings and the evidence before the court, it is evident that the 1st defendant is the link between the other defendants as they say that she is the one who sold to them their portions. They allowed the 1st defendant to give evidence on their behalf but did not adduce any evidence to plead a proper case for them. There was also no authority to plead and give evidence on behalf of the defendants. There was no proof that the defendants had bought the land either from the plaintiff or the 1st defendant. I find that the defendants claim lies with the 1st defendant one Peris who sold to them the portions that they are claiming. The 1st defendant owns plot No. 2209 which was awarded to her and the plaintiff does not claim the same. This is evident from their pleadings and the exhibits that they produced in court in respect of the Land Disputes Tribunal and the Civil Case No.34/06. The defendants therefore have no claim against the plaintiff but should direct their claim against the 1st defendant if they so wish.

On the issue as to whether this matter is *res judicata*, I find that the ingredients of *res judicata* have not been met in this particular case. The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It provides :-

“7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

From the above, the ingredients of *res judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see **Karia & Another v the Attorney General and Others [2005] 1 EA 83**).

The previous suit was not in respect of the same subject matter and the parties that were sued were not similar as evident from the proceedings produced by the defendants. It is also noteworthy that the judgement in Civil case No. 34/06 was dismissed on the ground that the court did not have jurisdiction to deal with land of a deceased person and that it could not issue eviction orders in respect of a non-existent parcel of land being No. 1391. It also stated that the Tribunal had no jurisdiction to handle land belonging to a deceased person. The court stated that the plaintiff could sue the right person in respect of the land parcel. I therefore find that the suit was not conclusively determined by a court or Tribunal of competent jurisdiction. The claim that the suit herein is *res judicata* therefore fails.

On the issue whether the defendants' claim for adverse possession can be sustained by way of a counter claim, I will rely on the case **Gulam Mariam Noordin v Julius Charo Karisa**, Civil Appeal No 26 of 2015, where the claim was raised in the defence, the Court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

The plaintiff's Counsel had faulted the defendants' claim of adverse possession by way of defence and counter claim on the basis that it offends the requirement of filing the claim vide originating Summons. In the above case the Court of Appeal said that the procedure can be allowed but a party can only apply to be registered as proprietor of land by adverse possession under order 37 through originating Summons.

The defendants did not lead sufficient evidence to prove that they have adversely acquire the plaintiff's suit land. They have not been in quiet, uninterrupted occupation as claimed by the 1st defendant. There have been interruptions including evictions and the current suit which shows that their occupation has not been peaceful. I find that they have not met the threshold for grant of the orders for adverse possession. Even if they had met the threshold, the procedure they chose to follow to assert their rights would not have made them to be registered as owners. The law is very clear on this.

The defendants also did not prove that there was any misrepresentation or fraud on the part of the plaintiff in the acquisition of the titles to the suit land. It is therefore clear that section 26 of the Land Registration Act 2012 does not apply in this case. The defendants did not plead any particulars of fraud or misrepresentation in their defence and counter claim. The overriding interest which in effect is adverse possession does not arise in this case as it was not proved.

I have considered the pleadings, the evidence adduced and Counsel's rival submissions in support of their clients' cases and find that the plaintiff has proved his case on a balance of probabilities and therefore enter judgement in his favour as prayed. The defendants have failed to prove their counter claim and the same is dismissed with costs.

I therefore make the following orders.

1. That a declaration is hereby made that land comprised in land parcels No. NANDI/KAPKANGANI/1439 and 2211 solely belongs to the plaintiff and the defendants have no proprietary interest in the said Parcels.
2. That the defendants herein, their agents, servants and/or anybody acting on their behalf do vacate land parcels No. NANDI/KAPKANGANI/1439 and 2211 within the next 60 days for the date of this judgement or decree failure of which an eviction order to issue.
3. The defendants to pay the costs of this suit.

Dated and delivered at Eldoret on this 31st day of October, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Mitei holding brief for Mr. Bungei for the Plaintiff

Mr. Koech: Court Assistant

In the absence of the defendants.