



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC NO.303 OF 2012(O.S)

JOHN ODONGO OWITI.....PLAINTIFF

VERSUS

PHOEBE ALUOCH OGOLLA.....DEFENDANT

JUDGMENT

The plaintiff brought this suit on 8th August, 2012 through Originating Summons of the same date seeking the following orders:-

1. A declaration that the defendant's right to recover a portion measuring 1.2 hectares of land parcel No. Suna East/Wasweta I/8239(herein after referred to as Plot No. 8239) and her title thereto have been extinguished on grounds that the plaintiff had openly, peacefully and continuously been in occupation and possession of the aforesaid portion of Plot No. 8239 for a period exceeding 12 years.
2. That the plaintiff be registered as the proprietor of the said portion measuring 1.2 hectares of land parcel No. Suna East/ Wasweta I/8239 in place of the defendant.
3. An order restraining the defendant by herself, her agents, servants or employees from interfering with the plaintiff's peaceful possession of the said portion of land in any manner whatsoever and /or howsoever.
4. The costs of originating summons to be borne by the defendant.
5. Such further or other orders that the court may deem fit and expedient to grant.

The Originating Summons was supported by the affidavit sworn by the plaintiff on 8th August 2012 wherein he deposed that the defendant was the registered owner of a parcel of land which resulted from the subdivision of Plot No. 8239. The plaintiff deposed that a portion of his father's ancestral land measuring 1.2 hectares was part of the said parcel of land that was registered in the name of the defendant after the sub-division of Plot No. 8239. The plaintiff contended that the defendant caused the said portion of his father's ancestral land to be registered as part of her land fraudulently. The plaintiff contended that since he was born, he had been in continuous, open and peaceful possession of the said parcel of land measuring 1.2 hectares without interruption from the defendant. The plaintiff deposed further that he had developed the disputed parcel of land extensively over the years in addition to the farming activities that he was carrying out thereon. The plaintiff deposed that the defendant and members of her family have

never occupied the disputed parcel of land. He deposed further that there was a clearly marked boundary between the disputed parcel of land and the defendant's land. He contended that the defendant's interest over the said parcel of land measuring 1.2 hectares had been determined by effluxion of time and as such she had no right to evict him from the property.

The Originating Summons was opposed by the defendant through a replying affidavit sworn on 28th September 2012. In her affidavit, the defendant contended that the plaintiff's Originating Summons is incompetent, frivolous, bad in law and fatally defective. The defendant stated that she has never owned Plot No. 8239 and as such the plaintiff's claim against her is misconceived. The defendant contended that the Originating Summons ought to have been supported by an affidavit to which the plaintiff should have annexed a certified copy of the register for the parcel of land claimed. She contended that the absence of a certified copy of the register of the disputed parcel of land renders the Originating Summons defective and incompetent. The defendant contended that from the material on record, it is clear that the plaintiff's adverse possession claim has no basis. She termed the claim a belated attempt to enforce a purported agreement for sale that was purportedly entered into between the plaintiff's deceased father and the defendant's deceased husband. The defendant denied that the plaintiff has enjoyed continuous, open and peaceful possession of the disputed parcel of land. The defendant also denied that Plot No. 8239 or any portion thereof was the plaintiff's ancestral land.

When the Originating Summons came up for hearing on 17th September, 2013, the plaintiff sought leave to amend the Originating Summons which request, was granted. On 7th November, 2014, the plaintiff who is acting in person filed an "amended" Originating Summons. In the new Originating Summons, the plaintiff sought a declaration that the defendant's right to recover a portion measuring 1.2 hectares of the land parcel No. Suna East/Wasweta 1/15215 and her title thereto is extinguished on the ground that the plaintiff had openly, peacefully and continuously been in occupation and possession of the said portion of land for a period exceeding 12 years. The plaintiff also sought an order that he be registered as the owner of the said portion of land in place of the defendant and an injunction to restrain the defendant from interfering with his peaceful possession of the same in any manner whatsoever and howsoever. The only change that was brought by the new originating summons was in the parcel number for the land being claimed by the plaintiff which changed from Suna East/Wasweta 1/8239 to Suna East/Wasweta 1/15215. Everything else remained the same. The plaintiff did not file a fresh affidavit in support of the new originating summons. The defendant did not also file a further affidavit in response to the same.

When the suit came up for hearing, the plaintiff (PW1) testified that; the defendant is the widow of Mathayo Ogola Chacha (deceased) who sold the land in dispute to his deceased father, Julius Bondo in 1967. Ogola died in the 1980s while his father, Bondo died in the year 1993. The disputed land was registered in the name of Ogola. After Ogola's death, his eldest son, Wilson Obungu Ogola was nominated to take out a grant of letters of administration. Obungu obtained a grant of letters of administration in respect of Ogola's estate and divided the land into 3 portions amongst Ogola's 3 widows. PW1 told the court that when his father, Bondo, purchased the disputed land, he took possession and set up his homestead thereon. Upon his death, he was buried on that disputed land. Bondo died before he was given a title for the disputed land by Ogola (deceased).

PW1 stated further that; upon subdivision of Ogola's land by Obungu, the portion of the initial larger parcel of land that had been purchased by his father and in which they were in occupation ("**the disputed land**") fell on the portion of land that was given to the defendant herein which was Plot No. 8239. He stated that the defendant was supposed to subdivide the said Plot No. 8239 further so that he could obtain a separate title for the disputed land that was under his occupation.

PW1 stated that he engaged a surveyor to demarcate the portion of plot 8239 that was under his occupation for the purposes of the subdivision referred above. The said surveyor found that portion to be measuring 1.2 hectares. After the survey, he applied to the Land Control Board for consent for the subdivision of Plot No. 8239. He appeared before the Land Control Board together with the defendant and consent to subdivide Plot No. 8239 was given. He produced in evidence as exhibit; the application for consent of the land control board dated 23rd January 1994 and the letter of consent dated 14th December 1994 as plaintiff's exhibits 1 and 2 respectively.

PW1 stated that, Plot No. 8239 was supposed to be subdivided into 3 portions of 2.4, 1.2 and 0.4 hectares each and the defendant was supposed to transfer to him the portion measuring 1.2 hectares. He stated that the defendant did not carry out the subdivision of Plot No. 8239 in accordance with the consent aforesaid. He stated that in the year 2001, the defendant subdivided Plot No. 8239 into two portions namely, Suna East/Wasweta 1/15215 (Plot No.15215) and Suna East/Wasweta 1/15216 (Plot No.15216). The disputed land that was under his occupation fell on Plot No. 15215 which is registered in the name of the defendant. He produced in evidence a copy of a certificate of official search for Plot No. 15215 dated 7th October 2013 as plaintiff's exhibit 3.

PW1 stated that he is claiming the disputed land which was a portion of the original Plot No. 8239 from Plot No. 15215. He stated that on 11th December 2008 and 11th February 2009, the defendant and his sons invaded the disputed land and destroyed the crops that were growing thereon. The damage that was caused on the two occasions, was assessed at Kshs 32,812/- and Kshs 10,000/- respectively. He produced crop damage assessment reports dated 11th December 2008 and 11th February 2009 as plaintiff's exhibit 4 and 5 respectively. He told the court that after the said invasion, the defendant dispossessed him of about $\frac{3}{4}$ of the disputed land which the defendant was still cultivating as at the date of hearing.

During cross-examination by the advocate for the defendant, PW1 stated that he is the son of Owiti Dudi and not Julius Bondo Ochola whom he contended was his uncle. He stated that Ochola did not have children. Ochola's wife, Mary Anyango died in the year 2012. PW1 stated that although his father used to stay at Oruba in Migori, he did not have land at Oruba. He stated that the land at Oruba was small and that his brothers moved from Oruba to Witharaga where one of his brothers purchased land. He contended that he left Oruba when he was still young.

PW1 denied that he or Ochola had any relations with the defendant. He also denied that Ochola had been welcomed by the defendant to stay with her as a brother and that the land that was occupied by Ochola was to revert to the defendant upon the death of Ochola because Ochola had no children. He contended that he had an agreement which showed that Ogola sold the disputed land to Ochola. PW1 stated that he was staying in the home of Ochola and insisted that he started staying there when he was young after Ochola who had no children took him as his child. He stated further that he had not taken grant of letters of administration in respect of Ochola's estate because the disputed land was not in Ochola's name.

He stated that, the defendant and her 4 sons are occupying Plot No. 15215 and they have put up their homesteads thereon. He contended that he is occupying about 0.040 hectares of Plot No. 15215. He told the court that his occupation was not peaceful since the defendant was still intent on taking the remaining portion of the disputed land that was in his occupation. In his further evidence under examination by the court, PW1 stated that the defendant started demanding that he vacates the disputed land in 1994 after the death of his uncle, Ochola in 1993. PW1 stated that has nowhere to go if evicted. The plaintiff did not call any witness.

The defendant (DW1) testified that the plaintiff is known to her and that they hailed from the same village. He told the court that; she was married to Ogola Chacha alias Mathayo Ogola Chacha (deceased) who passed on in the year 1997. She had a co-wife. Her husband owned the parcel of land which is the subject of the plaintiff's claim herein. She stated that, Julius Bondo was her distant cousin. He was married but had no children. Her deceased husband took him and gave him a portion of his land to stay on after he had been chased from Kehancha. She could not remember the year when they allowed Julius Bondo to stay with them.

She denied that Julius Bondo bought the land from her deceased husband. She stated that he was given the land to occupy temporarily. She stated that Julius Bondo occupied land measuring about a $\frac{1}{4}$ of an acre which was enough for his homestead and cultivation. She stated that her husband died and was followed by Julius Bondo. Julius Bondo left a wife who also passed on. After the death of Julius Bondo's wife, she took over the portion of land that the Bondo's had occupied. DW1 told the court that she was occupying land parcel No. Suna East/Wasweta 1/15215 with her 5 sons who are all adults.

DW1 stated that the plaintiff is her distant nephew and not the son of Julius Bondo. DW1 contended that

the plaintiff started laying a claim to the disputed land after the death of Julius Bondo and his wife. She stated that she reported the matter to the chief and the plaintiff who had a small house on the disputed land refused to vacate despite the chief's order requiring him to do so. She denied going to the Land Control Board with the plaintiff. She also denied having agreed to give the plaintiff a portion of Plot No. 15215 measuring 1.2 hectares. She contended that the plaintiff had never occupied the suit property peacefully. DW1 stated that the plaintiff is not occupying 1.2 hectares of land as he has claimed but only Julius Bondo's homestead which measures about a ¼ of an acre. She stated that the plaintiff's family is living at Witharaga and urged the court to dismiss the plaintiff's claim with costs.

In cross examination, DW1 stated that her husband had two wives and not three. She reiterated that the plaintiff was not staying with Julius Bondo as his son and that the plaintiff came to the disputed land after the death of Julius Bondo.

The defendant called two witnesses. The first witness was Wilson Obungu Ogola (DW2). DW2 testified that; the defendant is his step mother. His father was Mathayo Ogola Chacha (deceased). He is the eldest son of Ogola. He stated that the plaintiff was known to him because he was occupying the defendant's parcel of land. He stated that after the death of Ogola, he was appointed as the administrator of his estate. Ogola had three wives. In his capacity as the administrator of the estate of Ogola, he subdivided Ogola's land and transferred portions thereof to each of his three houses represented by the three widows. The defendant who is one of his father's widows got a portion of land known Plot No. 8239 out of Ogola's land. DW2 stated that Julius Bondo who was known to him was a distant relative of the defendant. He stated that during the land clashes that involved the Kuria and Luo communities at Kwa, Julius Bondo who was displaced sought refuge at the defendant's home.

He stated that Julius Bondo initially lived in the defendant's house, but later, his father, Ogola gave him a piece of land to put up his own house. The portion of land that was given to Julius Bondo to put up his homestead measured about a ¼ of an acre. He corroborated DW1's testimony that Julius Bondo had a wife with whom he had no children and that his death was followed by the death of his wife. DW2 stated that he went to work in Uganda for some time and when he came back in 1998, he found the plaintiff living in the homestead where Julius Bondo used to live.

DW2 stated that the defendant and the plaintiff were not living in peace since the defendant wanted the plaintiff to vacate the homestead of Julius Bondo. He stated that the dispute was referred to the area chief who asked the plaintiff to vacate the defendant's parcel of land. DW2 stated that, Julius Bondo was only given a temporary shelter by Ogola and was to vacate after things had settled where he had been evicted.

DW2 denied that the plaintiff lived with Julius Bondo during his lifetime. He stated that he found the plaintiff in Julius Bondo's homestead when he returned from Uganda. DW2 stated that he was not aware that Julius Bondo had purchased the disputed land from his father. He stated that while he was carrying out succession proceedings in respect of his father's estate, no claim was raised by the plaintiff concerning the disputed land that was allegedly purchased by Julius Bondo from his father. In cross examination, DW2 stated that he went to Uganda in 1996 by which time Julius Bondo had died and the plaintiff was not in occupation of his homestead.

The defendant's second witness was Samuel Opiyo Chacha (DW3). DW3 is a step brother to Mathayo Ogola Chacha, the defendant's deceased husband. He told the court that the defendant was one of Ogola's three wives and that Julius Bondo was a brother to the defendant. He stated that Julius Bondo went to the defendant's home to seek refuge following his eviction during land clashes where he used to stay. He stated that he was present when the defendant's husband, Ogola, gave Julius Bondo a portion of land for free to occupy temporarily. The portion of land measured about a ¼ of an acre. He corroborated the evidence of DW1 and DW2 that the plaintiff is not Julius Bondo's son.

In examination by the court, DW3 stated that Julius Bondo had put up houses on the portion of land that was given to him by Mathayo Ogola which houses collapsed after the death of Julius Bondo and his wife. He stated further that the plaintiff entered the disputed land after the death of Julius Bondo as an adult and he never put up any house on the said parcel of land.

After the close of evidence, parties were directed to make closing submissions in writing. The plaintiff filed his submissions dated 22nd May, 2015 on 2nd June, 2015 in which he reiterated the evidence that he had given at the trial. He submitted that he had been in occupation of the disputed land with his family for 23 years. He submitted that his home on the suit property is comprised of two semi-permanent houses. He submitted that he has also planted a variety of trees on the disputed land over the years that he has been in occupation thereof. He submitted that the evidence of DW2 and DW3 was contradictory.

The defendant in submissions filed on 28th July 2015 submitted that the plaintiff's affidavit in support of the Originating Summons did not comply with the mandatory requirements of Order 37 Rule 7(2) of the Civil Procedure Rules since no certified copy of the extract of title was annexed thereto. The defendant submitted that the Originating Summons is defective in form and substance and ought to be dismissed. The defendant submitted further that the plaintiff has not proved the ingredients of adverse possession in that he has failed to prove that he had been in open, uninterrupted and peaceful possession of the disputed parcel of land for more than 12 years prior to the filing of this suit. The defendant submitted that the plaintiff has also failed to prove that his alleged possession of the suit property was without the consent and/or authority of the defendant and that he was in actual occupation and possession of a well defined and demarcated parcel of land.

The defendant submitted that the plaintiff has not defined the time of his entry onto the disputed land which is a mandatory requirement to enable the court compute time. The defendant submitted that the duration of the plaintiff's alleged possession had therefore not been proved to have been 12 years. The defendant submitted that Julius Bondo (deceased) entered the disputed land with the consent and authority of the defendant and that his possession was therefore not adverse to the rights of the defendant. The defendant submitted further that the plaintiff in his evidence had stated that the defendant's family had entered the disputed land and destroyed his crops and that before the institution of this suit, the defendants were in possession of a large portion of the disputed land. The defendant submitted that the plaintiff had also claimed that he had been chased away from the disputed land and that his occupation had never been peaceful. The defendant submitted that the foregoing is evidence that the plaintiff's possession of the disputed land had been interrupted by the defendant before the institution of these proceedings and further, that the plaintiff is not clear on the size of the disputed land which he claims to have been in possession of. The defendant submitted that the plaintiff has failed to prove his case of a balance of probabilities.

The issues that arise for determination in this suit are, first, whether the plaintiff's suit is defective for non compliance with the provisions of Order 37 Rule 7 of the Civil Procedure Rules and secondly, whether the plaintiff has become entitled by adverse possession to a portion of the defendant's parcel of land known as Plot No. 15215(disputed land). On the first issue, the defendant has contended that the Originating Summons herein is incompetent and fatally defective since it is not supported by an affidavit to which a certified copy of the extract of the title of the land claimed has been annexed as required by Order 37 Rule 7(2) of the Civil Procedure Rules. Order 37 Rule 7 (1) and (2) states as follows:-

"7. (1) an application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed."

In my view, failure to comply with the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules which is couched in mandatory terms would render an Originating Summons defective. Whether such defect is fatal to the Originating Summons is another matter. In the case **Titus Mutuku Kasuve vs. Mwaani Investment Ltd & others, Civil Appeal No. 35 of 2002**, the Court of Appeal stated as follows with respect to the repealed Order XXXIX Rule 3D(2) which was in the same terms as Order 37 Rule 7(2) of the current Civil Procedure Rules;

"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, Rule 3 D (2) of Order XXXVI Civil

Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the Originating Summons. In this case, the appellant did not annex the certified extracts of land title L.R. Nos 1756 and 1757 before the sub-division or even after the sub-division."

In the case of **Johson Kinyua vs. Simon Gututa Rumuri, Nyeri CA No. 265 of 2005**, the Court of Appeal stated that where the disputed land is registered under the Registered Land Act, a search certificate under the Registered Land Act duly signed by the registrar would constitute evidence of the entries set out in the certificate and that failure to annex an extract of title in such a case was a non issue. In this case, I have noted that the plaintiff exhibited a certificate of official search in respect of Plot No. 15215(Plaintiff's Exhibit 3) a portion of which the plaintiff is claiming by adverse possession in his amended Originating Summons. I am of the view therefore that the plaintiff's Originating Summons is not fatally defective.

In order for the plaintiff to succeed in his claim for adverse possession, he had a duty to establish that he had been in open, continuous and uninterrupted possession of the disputed land for a period of at least twelve years prior to the filing of the present application. In **Ndatho vs. Itumo & 2 others (2002) 2 KLR 637**, the Court of Appeal stated that in order to succeed in a summons for adverse possession:-

"The possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor."

In **Wambugu vs. Njuguna (1983) KLR 173**, the Court of Appeal stated as follows:

"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."

Save for stating that he had been in occupation for a period exceeding 12 years, the plaintiff did not specifically plead when he entered the suit property. During his evidence in chief, the plaintiff contended that his father by the name Julius Bondo Ochola bought the suit property from the defendant's husband in 1967 and took possession thereof thereafter. The plaintiff contended further that he started staying with Ochola on the suit property in the year 1984 and that the defendants started harassing him after the death of Ochola. In his submissions, the plaintiff stated that he had been in possession of the property for 23 years. In my view, there is no cogent evidence from the plaintiff as to when time began to run for purposes of adverse possession and against whom.

The plaintiff's evidence on possession was highly contested by the defendant. The defendant's evidence was that she was never dispossessed of the suit property, but rather, that she permitted Julius Bondo Ochola who was a distant relative to temporarily stay on the disputed land following his eviction from a place known as Kwa during the tribal land clashes between the Luo and Kuria communities. The defendant's witnesses stated that Julius Bondo Ochola died while he was in occupation of the suit property and that the plaintiff entered the suit property after his death. The plaintiff on the other hand contended that the defendants started harassing him and demanding that he vacates the disputed land after the death of Ochola in 1993.

What comes out from the foregoing is that between 1984 up to 1993, the plaintiff was occupying the disputed land with the permission of Ochola whom he claimed to have purchased the same from Ogola. The plaintiff's occupation of the disputed land during this period when Ochola was a live could not therefore be adverse either to Ochola or to the defendant who was not even the registered owner of the disputed land then. After the death of Ochola, in 1993, the plaintiff in his own words has not occupied the

disputed land peacefully. The defendant has asserted her right to the disputed land and taken possession of a substantial portion thereof. In any event, between 1993 when Ochola died and 2012 when this suit was filed, 12 years had not lapsed.

The plaintiff has therefore not proved on a balance of probabilities that he was in open, continuous and uninterrupted possession of the disputed land for a period of 12 years prior to the filing of this suit and that his occupation was adverse to the defendant. The upshot of the foregoing is that the plaintiff's suit against the defendant has no merit. The same is accordingly dismissed with costs to the defendant.

Signed at Nairobi this.....Day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendant**