



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 198 OF 2009**

**LEPORE OLE MAITO .....PLAINTIFF**

**VERSUS**

**LETWAT KORTOM ..... 1<sup>ST</sup> DEFENDANT**

**TALALA KORTOM ..... 2<sup>ND</sup> DEFENDANT**

**NTOME KORTOM .....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff vide the plaint dated 1<sup>st</sup> October 2009 filed in court on the same date instituted the instant suit against the defendants claiming that the defendants who are brothers have trespassed and continues in trespass of his land parcels **Transmara/Mapashi/318** and **48** (hereinafter referred to as “the suit properties”). The plaintiff avers that he is the registered owner of the suit properties and that the defendants have without any colour of right and/or justification trespassed thereunto. The plaintiff prays for judgment against the defendants jointly and severally for:-

**(a) An order of eviction against the defendants and/or any other person using, cultivating or occupying the suit properties under the authority of the defendants together with further permanent injunction restraining the defendants from interfering with the plaintiff’s use possession and occupation of the said land.**

**(b) General damages.**

**(c) Costs of the suit together with interest.**

2. The record shows that two law firms, C. O Nyamwange & Co. Advocates and Sonye J. Ondari & Company Advocates filed two separate memorandums of appearance and joint statements of defences at different times. On 27<sup>th</sup> October 2014 when the matter came up for pretrial directions the firm of Sonye Ondari & Company Advocates confirmed they were not the ones on record for the defendants and consequently the documents filed by his firm on behalf of the defendants stands expunged from the record such that the statement of defence filed by the firm of C. O Nyamwange & Co. Advocates on 16<sup>th</sup> October 2009 is deemed to be the appropriate defence filed on behalf of the defendants.

3. By the defence the defendants deny the plaintiff is the registered owner of land parcel **Transmara/Mapashi/48** and further aver that even if the plaintiff was the registered owner the defendants state they have lived on the said land for over thirty (30) years and that their relatives have been buried thereon and thus the plaintiff could only have been unlawfully registered as owner. The

defendants consequently deny that they are in trespass and put the plaintiff to proof.

4. The defendants further unusually filed an originating summons dated 2<sup>nd</sup> December 2009 within the instant suit apparently without any leave following the closure of the pleadings. It is unclear whether the defendants intended the originating summons to be a separate action and/or a counter claim to the plaintiff's suit. By the originating summons the defendants claimed to have continuously occupied and possessed the suit properties for a period of over 36 years and averred the plaintiff's title had been extinguished and they were therefore entitled to be registered as the owners under the provisions of the **Limitation of Actions Act**, Cap 22 Laws of Kenya. The defendants claim in the originating summons was that their possession of the suit properties was adverse to the rights and interests of the plaintiff and that they had therefore acquired title to the land by adverse possession. The plaintiff filed a replying affidavit in response to the originating summons sworn on 8<sup>th</sup> December 2009. The plaintiff denies the defendants have been in adverse possession of the suit properties and avers that he was awarded the suit properties following an adjudication process and thus states the defendants could not have been in adverse possession before the adjudication process was finalized.

5. The suit was listed before me for hearing on 24<sup>th</sup> September 2015 when the plaintiff testified in support of his case. The plaintiff did not call any other witness. In his evidence the plaintiff testified that he is the registered absolute owner of LR Number **Transmara/Mapashi/48** and **Transmara/ Mapashi/318** and tendered in evidence copies of the title deeds produced as "**PEx1 and 2**" respectively. The plaintiff further produced search certificates from the lands office marked as **PEx 3 'a'** and **'b'** which confirm the plaintiff is the registered owner of the suit properties. As per the official searches the plaintiff was registered as owner of title number **Transmara/Mapashi/48** on 24<sup>th</sup> June 1996 and issued with the title deed on 15<sup>th</sup> August 2009 while he was registered owner of title number **Transmara/Mapashi/318** on 18<sup>th</sup> August 2009 and issued with a title deed on the same date. The plaintiff explained that he was using land parcel **Transmara/Mapashi/48** while the defendants were in occupation and making use of land parcel **Transmara/ Mapashi/318**. The plaintiff further stated that he had acquired the suit properties through the adjudication process and that the defendants attempt to have the award of land parcel **Transmara/Mapashi/318** to the plaintiff quashed vide Kisii HC Misc. App. No. 2 of 2008 (JR) was unsuccessful and the award of **land parcel 318** Mapashi Adjudication Section to the plaintiff vide appeal No. 146 of 1998 was upheld.

6. In cross examination by counsel for the defendants the plaintiff stated that the defendants are his neighbours and that their step mother is the registered owner of land parcel **Transmara/Mapashi/49** and that the defendants own land parcel **Transmara/Mapashi/53**. The plaintiff further stated land parcel 318 had been hived out of his land parcel 48 during the land adjudication and was awarded to the defendants but following an appeal to the Minister the parcel of land was reverted to the plaintiff. The defendants' challenge of the award by the Minister in Kisii J/R No. 2 of 2008 was dismissed resulting in the plaintiff being issued with title to **land parcel 318** which the defendants are now unlawfully and illegally in occupation of. The plaintiff denied that any of the defendants' relatives had been buried on **land parcel 318** and/or that the defendants had lived on the land parcel all their lives.

7. The 1<sup>st</sup> defendant, Letwat Kortom testified on behalf of himself and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant stated in his evidence that **parcel No. 318** used to belong to his deceased father and that they all reside on the said land parcel where they have established their homesteads. The defendants state they are not aware how the plaintiff got title to **land parcel 318** since the same has always been their land where they have always lived. The defendants deny having encroached onto the plaintiffs land and seek dismissal of the plaintiff's case against them.

8. The 1<sup>st</sup> defendant in cross examination admitted the defendants have had a long running dispute with the plaintiff culminating in the Kisii HC Misc. Application No. 2 of 2008 (J/R) whose ruling went against the defendants. The 1<sup>st</sup> defendant stated that their father (deceased) used to own about 10 acres but the portion of land they now occupy comprised in land parcel 318 is about 2 acres.

9. The parties filed final closing written submissions following the close of the oral testimonies by the

plaintiff and the defendants. The defendants filed their submissions on 4<sup>th</sup> May 2016 while the plaintiff filed his submissions on 20<sup>th</sup> June 2016. The parties in their written submissions reiterated the facts of the case which largely are not in dispute. Having considered the pleadings, the evidence and the submissions by the parties the issues for determination are:-

**(i) Whether the plaintiff is the registered owner of the suit properties and if so whether his rights of ownership are absolute and indefeasible?**

**(ii) Whether the defendants have encroached and/or in trespass of the plaintiff's parcel of land?**

**(iii) Whether the defendants are adverse possessors of the plaintiff's parcels of land?**

**(iv) What reliefs should the court grant and to whom?**

10. On the 1<sup>st</sup> issue there is clear evidence that the plaintiff was registered as the owner of land parcel **Transmara/Mapashi/48** on 24<sup>th</sup> June 1996 and issued with a title on 18<sup>th</sup> August 2009 as per the copy of title deed produced as PEx.1. The plaintiff was registered as owner of land parcel **Transmara/Mapashi/318** on 18<sup>th</sup> August 2009 and issued with a title on the same day as per copy of title deed produced as PEx.2. The register in respect of **land parcel 318** like in respect of **land parcel 48** was opened on 24<sup>th</sup> June 1996 but nobody was registered as owner because the land parcel was subject of a dispute arising from the adjudication process and until the adjudication process was finalized under the Land Adjudication Act, Cap 284 Laws of Kenya title to the disputed parcel could not be registered in the name of any party. That there was a dispute in regard to the allocation of **land parcel 318** during the adjudication process is evident by the fact that there was an appeal made to the Minister by the plaintiff in regard to parcel No. 318. The proceedings in respect of Appeal No. 146 of 1998 concerning Plot No. 318 where the plaintiff was the appellant and the 1<sup>st</sup> defendant was the respondent was annexed in the defendants' bundle of documents. By the ruling dated 28<sup>th</sup> April 2006 the disputed plot 318 was awarded to the plaintiff and this constituted the finalization of the adjudication process. Under section 29 (1) of the Land Adjudication Act the determination of the Minister is final.

11. Section 29 (1) provides thus:

**“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by –**

**(a) Delivering to the minister an appeal in writing specifying the grounds of appeal; and**

**(b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.**

**(2) The minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.**

**(3) When the appeals have been determined, the Director of Land Adjudication shall –**

**(a) After the duplicate adjudication register to conform with the determination; and**

**(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the chief land registrar, who shall after the adjudication register accordingly.**

The Minister determined the appeal in favour of the plaintiff and following the determination of the

appeal the plaintiff was in terms of Section 29 of the Land Adjudication Act (reproduced above) registered as the owner of land parcel. As earlier observed in this judgment, the defendants challenge of the determination by the Minister through a judicial review application was dismissed by the court meaning the determination by the Minister of the appeal took effect.

12. The registration of the plaintiff as owner of the suit properties was after due process under the provisions of the Land Adjudication Act and following such registration the plaintiff was vested with rights of ownership and such rights are absolute and indefeasible under the provisions of Sections 24, 25 and 26 of the Land Registration Act, 2012. The title held by the plaintiff indefeasible and can only be challenged as provided under section 26 1(a) and (b) of the Land Registration Act, 2012 on account of fraud to which he is shown to be a party or if it is shown the title was unlawfully or unprocedurally acquired.

Section 24 (a) of the Land Registration Act provides:-

24. Subject to this Act –

**(a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.**

Section 25 (1) of the Act provides:-

**The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) To such liabilities, rights and interests as affected the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

Section 26 (1) further provides;

**26(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima face evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –**

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party;**

**or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

13. In the present case the plaintiff has established that he is the registered owner of land parcels **Transmara/Mapashi/48** and **318** and that such registration was obtained following the adjudication of rights and interests under the provisions of the Land Adjudication Act, Cap 284 Laws of Kenya. The

broad objective of the Land Adjudication Act is set out in the preamble thus:-

**“An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust Land and for purposes connected therewith and purposes incidental thereto.”**

14. The Land Adjudication Act, sets an elaborate procedure through which the rights and interests of all persons is to be established and once that process and procedure is followed and completed the determination of such rights and interests is final. The Act provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister's decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction. Evidence in this suit shows both the plaintiff and the defendants participated in the adjudication process and that an appeal to the Minister was lodged in respect to the award of **land parcel 318** to the defendants. The appeal was determined in favour of the plaintiff and he was consequently registered as owner of land parcel 318 and issued with a title thereof.

15. The plaintiff in my view was validly registered as owner of land parcel 318 following a lawful process of adjudication. The defendants judicial review application was unsuccessful and thus the Minister's determination of the appeal was validated. My view therefore is that the plaintiff is validly the registered owner of land parcels **Transmara/Mapashi/48** and **318** and as such registered owner his ownership rights are absolute and indefeasible. The defendants' rights were finally determined during the adjudication process and the Minister having determined the appeal in favour of the plaintiff, the defendants ceased to have any interest in the suit properties. In the premises, I answer the first issue in the affirmative that the plaintiff is the validly registered owner of the suit properties and his rights of ownership are absolute and indefeasible.

16. On the second issue whether or not the defendants have encroached onto or are in unlawful occupation of the plaintiff's parcel of land, the answer would have to be in the affirmative having found and determined that the plaintiff is validly the registered owner of the suit properties and that his title is indefeasible. While the defendants may have been in occupation of a portion of the plaintiff's land during the process of land adjudication, the plaintiff was adjudged to be entitled to be registered owner of the land. The process of land adjudication entails collating of all available information and it is not unusual for persons to be relocated and/or various parcels of land belonging to a person to be consolidated which effectively leads to displacement of persons from parcels they may have occupied. Be it as it may be, once the plaintiff was awarded the subject **land parcel 318** and issued with a title deed the defendants continued occupation of the parcel of land became unlawful as the plaintiff became entitled to occupation and use of the land. The defendants were obliged to vacate the plaintiffs' parcel of land once he was awarded the land.

17. On the third issue whether or not the defendants are adverse possessors of the suit land and therefore entitled to be registered as owners thereof, my position is that they are not. Before **Transmara/Mapashi** area was declared an adjudication section and/or area the land was trust land and as such no person could possess the land adversely against the community. Adverse possession has to relate to a known person who is the registered owner. As evidence has established in the present case the area where the suit properties are situate was declared an adjudication section/area in 1985/86 and when the adjudication was completed those persons who were awarded land through the process were issued with titles in 1996 save for those parcels in respect of which objections had been raised such as parcel 318 which had to await the determination of the objections and any appeals arising therefrom. The plaintiff was adjudicated as the owner of land parcel 318 when the Minister rendered his decision on 28<sup>th</sup> April 2006 pursuant to which the plaintiff was registered as owner on 18<sup>th</sup> August 2009. The registration of the plaintiff constituted a first registration and any adverse possession against the plaintiff could only run from the date he was registered as the owner of the land.

18. Time could not run against the plaintiff during the period when the suit property was under the

process of adjudication under the provisions of the Land Adjudication Act. It is therefore my determination that the defendants have not acquired title to the plaintiff's land by adverse possession. The defendants in their evidence admit they are only in occupation of land parcel **Transmara/Mapashi/318** which was adjudicated in favour of the plaintiff following the appeal to the Minister. The plaintiff was registered owner of the land on 18<sup>th</sup> August 2009 and he soon thereafter sought to recover the land from the defendants by filing this suit. The claim of adverse possession by the defendants against the plaintiff has no basis and is for dismissal. The net result is that I find the plaintiff's case proved on a balance of probabilities against the defendants. However, the plaintiff's claim for general damages is unsubstantiated and no basis has been laid for it and accordingly I will decline to make any award for general damages. I accordingly enter judgment in favour of the plaintiff against the defendants jointly and severally on the following terms:-

**(i) That the defendants their agents, servants and/or any persons claiming through them be and are hereby ordered to vacate and deliver vacant possession of land parcel Transmara/Mapashi/318 to the plaintiff within 90 days from the date of being served with a copy of the judgment and decree herein.**

**(ii) That in the event the defendants do not vacate as under (i) above an eviction order shall issue on application by the plaintiff for their forcible removal from the suit land.**

**(iii) Costs of the suit are awarded to the plaintiff.**

**Judgment dated, signed and delivered at Kisii this 7<sup>th</sup> day of October, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

..... Court Assistant

**J. M. MUTUNGI**

**JUDGE**