



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 292 OF 2012

MONYENYE AGAO (Suing as the administrator of the estate of the late

AGAO MONYENYE) PLAINTIFF

VERSUS

ORINA MURWA (Suing as the administrator of the estate of

MURWA AYIEMI) DEFENDANT

JUDGMENT

1. The plaintiff/applicant commenced the instant suit by way of an originating summons dated 25th July 2012 filed in court on the same date. The plaintiff claim is that he has acquired title to land parcel **LR No. Wanjare/ Bogitaa/1060** (hereinafter referred to as “the suit property”) by way of adverse possession and prays for determination by the court of the following issues:-

1. Declaration that the defendant’s rights to recover a portion measuring 1.1Ha of LR No. Wanjare/Bogitaa/1060 is barred under the Limitation of Actions Act, Cap 22 of Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 35 years.

2. There be an order that the plaintiff be registered as the proprietor of the portion measuring 1.1Ha of LR No. Wanjare/Bogitaa/1060 in place of the defendant.

3. There be an order restraining the defendant either by himself, agents, servants and/or employs from interfering with the plaintiff’s peaceful possession and occupation of the said portion of land that is, LR No. Wanjare/Bogitaa/1060 in any manner whatsoever and/or howsoever.

4. Costs of the originating summons be borne by the defendant.

2. The originating summons was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by Monyenye Agao the plaintiff herein. Simultaneously with the originating summons the plaintiff filed a Notice of Motion application for an order of temporary injunction restraining the defendant from in any manner dealing with the suit property or interfering with the plaintiff’s use of the suit property pending the hearing and determination of the suit.

3. Upon being served the defendant filed a replying affidavit to the originating summons and a response to the application for injunction by the plaintiff. The notice of motion application for injunction was argued before **Okong'o, J.** and he on 21st June 2014 made a ruling where he granted the temporary injunction in favour of the plaintiff. On 8th October 2013 the court gave directions by consent of the parties that the originating summons and the supporting affidavit be converted to a plaint and the defendant/ respondent's replying affidavit to the (OS) be constituted as the defence and the hearing of the (OS) proceed by way of viva voce evidence.

4. The hearing of the suit opened before Okong'o, J. on 27th November 2014 when the plaintiff testified as PW1. The plaintiff's two witnesses, Mdogo Osire (PW2) and John Ochako Motio (PW3) testified before me on 11th February 2016. The defendant, Orina Omurwa (DW1) was the sole witness who testified before me on 31st March 2016 on the part of the defence whereupon the trial closed and the parties thereafter filed their respective final written submissions. The plaintiff's submissions were filed on 30th May 2016 and the defendant's submissions were filed on 2nd June 2016.

5. The plaintiff's case

The plaintiff's case is that his late father Agao Monyenye in the year 1977 purchased the suit property from the father of the defendant one Murwa Ayiemi now deceased. The plaintiff avers that his late father fully paid for the land and was permitted to take possession which he did and remained in possession up to 2007 when he died. After his father's death the plaintiff states that he continued using and cultivating the suit property upto the time he instituted the present suit. The plaintiff states that his late father and subsequently himself peacefully and openly occupied and possessed the suit property without any interruption from the defendant or anybody else and that they were cultivating the land as the owners thereof. The plaintiff in the circumstances avers that their occupation and possession of the suit land was adverse to the interests and rights of the defendant and the title of the defendant had become extinguished with the result that the plaintiff had become entitled to be registered as the owner of the suit property in place of the defendant. The plaintiff by the originating summons states that he had purchased and occupied and possessed a portion of 1.1Ha and that is the portion he sought to be declared as having acquired title to by way of adverse possession.

6. The plaintiff gave evidence as PW1 and basically reiterated the contents of the affidavit sworn in support of the originating summons. The plaintiff testified that his late father, Agao Monyenye and Murwa Ayiemi (also now deceased) in 1977 entered into a sale transaction relating to **LR Wanjare/Bogitaa/1060** then registered and owned by the said Murwa Ayiemi. The plaintiff tendered in evidence a copy of the abstract of title (green card) and a copy of the official search in respect of land parcel **LR No. Wanjare/Bogitaa/1060** as PEx.2 and 3 respectively. The abstract of title shows that Murwa Ayiemi (deceased) was registered as owner on 4th August 1976 while the certificate of official search issued on 6th October 2011 shows the said Murwa Ayiemi was still the registered owner as at that date. The abstract of title and the certificate of official search confirm that the suit property is 2.2Ha. The plaintiff stated that the defendant, Orina Omurwa, was present when his father and the plaintiff's father were transacting and the defendant was therefore aware of the transaction.

7. The plaintiff further stated that his father occupied the suit property until 2007 when he died and thereafter the plaintiff continued the occupation and use of the suit property. The plaintiff testified that his late father utilized the land to farm maize and bananas and he as well planted trees. After taking over the plaintiff stated that he continued with cultivating maize and bananas on the suit property. The plaintiff explained that after Murwa Ayiemi sold the suit land he and his family moved to Ramasha in Nyaribari and that is where he got buried when he died. No member of the defendant's family was left on the suit property. The plaintiff asserted that his father was freely and openly using the suit property since 1977 until 2007 when he died and that his use of the land was not disturbed and/or interrupted and that the defendant had knowledge that the plaintiff was using the land as the owner thereof.

8. The plaintiff further stated in evidence that the dispute was arbitrated by the Land Disputes Tribunal who determined that the suit land belonged to Agao Monyenye and the decision of the Tribunal was

adopted by the Magistrate's court and a decree issued. The Tribunal proceedings were produced as PEx.6 and the court's decree as PEx.7. The plaintiff stated that after the Tribunal awarded the suit land to the plaintiff the defendant invaded the land and ploughed the same damaging the plaintiff's maize and bananas which precipitated this suit and the application for injunction whereby the defendant was restrained by an order of injunction from interfering with the suit property.

9. The plaintiff in cross examination maintained they had been using the whole parcel of land. He denied that his claim is restricted to a portion of 1.1Ha as pleaded in the originating summons and the supporting affidavit. He stated his father bought the whole parcel of land and not half portion and was using the entire parcel of land comprised in the title.

10. PW2 Mdogo Osire testified that he knew Agao Monyenye (deceased) and Murwa Ayiemi (also deceased) but stated he did not know the defendant. The witness stated that he was present when the plaintiff's father Agao Monyenye, bought the land from Murwa Ayiemi in 1977. He stated the sale price was kshs. 10,000/= and one cow and sum of kshs. 7,000/= was paid in his presence and the balance of kshs. 3,000/= later. The witness stated that Agao Monyenye started using the property immediately he bought the same and that the plaintiff continued using the land after his father's death and that he remains in possession to date.

11. In cross examination by counsel for the defendant the witness stated that the plaintiff's father bought the entire parcel of land and was using the whole of the land. The witness further stated that he was present when the tribunal heard the dispute. The witness stated that at the time of the purchase it was Agao Monyenye who was using the land as Murwa Ayiemi who was previously farming on the land had left. The witness explained that the defendant was not using any part of the land and that no other person other than the plaintiff was using the land.

12. PW3 John Ochako Motio stated in his evidence that he was Assistant Chief of Bogitaa upto 1981. He stated he knew both the plaintiff's and the defendant's fathers who were from his sublocation. He also knew the plaintiff and the defendant. The witness stated that Murwa Ayiemi sold the suit land to Agao Monyenye in 1977 and that he witnessed the payment of the final instalment of kshs. 3,500/= and 1 white cow to Murwa Ayiemi by Agao Monyenye which were effected at his office. According to the witness the sale was for the whole of land parcel 1060 and that Agao Monyenye started using the whole parcel of land following the sale and after his death the plaintiff continued using the land. The witness affirmed that from the time Murwa Ayiemi sold the land he never subsequently used the land and the defendant equally has never used the land. He further stated he gave evidence before the Land Disputes Tribunal although he did not know how the tribunal decided. The witness further stated that no party has built on the suit property and that the plaintiff's residence is about 1.5kms while the defendant resides in Nyaribari Masaba.

13. The defendant's case.

The defendant testified that he resides in Nyaribari Masaba and that he knows the plaintiff as a neighbour. He affirmed that he knew the plaintiff's father who he acknowledged was sold a portion of the suit property by his deceased father though the defendant stated that the land sold to the plaintiff's father was actually a portion of land parcel 103 but not 1060. The defendant stated it was only on 21st September 1988 that he and his siblings discussed the sale of land parcel 1060 with the plaintiff's father and signed a memorandum of agreement (DEx1). The defendant stated that his father had allowed Agao Monyenye (plaintiff's father) to use Plot No. 1060 because they were friends but averred that the process of sale of the plot never materialized. The defendant further stated that they sought the assistant chief's assistance to get Agao Monyenye and his children to vacate the suit land to no effect.

14. The defendant further testified that the plaintiff initiated the land dispute tribunal proceedings claiming land parcel 1060. The defendant denied that the plaintiff was entitled to the portion of 1.1Ha that he was claiming out of parcel 1060. The defendant however conceded that the plaintiff and his brother were using the whole of parcel 1060 although the defendants have been trying to get them to vacate since the 1980s. The defendant avers that the plaintiffs are forcibly using land parcel 1060 and

parcel 1053 which are adjacent to each other.

15. The defendant under cross examination stated that land parcel 1053 was sold by his father to the plaintiff's grandfather. The defendant affirmed that the plaintiffs were using land parcel 1060 in 1988 when he and his brothers visited the shamba with a view of discussing sale of the land with the plaintiffs resulting in the memorandum of agreement (DEx1) made on 21st September 1988. The intended sale transaction, however, did not materialize. The defendant asserted the plaintiffs refused to vacate from the land though the defendant has never taken any court action. The defendant's position was that his father only sold land parcel 1053 and not 1060. The defendant explained that their family moved to Nyaribari Masaba because parcel 1060 was associated with the occurrence of children deaths. The defendant further explained the mooted sale in 1988 of the suit land did not materialize because their children (defendants) objected to the sale. The defendant further stated they had wanted to plough the land in the year 2000 but the plaintiffs prevented them from doing so and chased them away and continued using the land upto 2011 when there were proceedings before the Tribunal.

16. The parties after the close of the trial filed final closing written submissions. The plaintiff's submissions were filed on 30th May 2016 and the defendant's submissions were filed on 2nd June 2016. The parties did not file any joint set of agreed issues though the plaintiff filed his own set of agreed issues on 10th July 2013. I have reviewed the pleadings, the evidence and the parties written submissions and the following are the issues that arise for determination by the court:-

(i) Whether the plaintiff had acquired title by way of adverse possession over LR No. Wanjare/Bogitaa/1060 or any portion thereof.

(ii) Whether the defendant has locus to be sued for and on behalf of the estate of Murwa Ayiemi (deceased).

(iii) Whether the plaintiff is entitled to the reliefs sought.

17. As the issue whether or not the defendant has been properly sued as the personal legal representative of the estate of Murwa Ayiemi concerns the competency of the suit, I will address the same first. The plaintiff by originating summons filed on 25th July 2012 clearly indicated he was suing the defendant as the legal administrator of the estate of the late Murwa Ayiemi. The abstract of title in respect of land parcel **Wanjare/Bogitaa/1060** and the copy of official search annexed to the originating summons showed that Murwa Ayiemi was the registered proprietor of the land and was so registered on 4th August 1976. As the plaintiff admits Murwa Ayiemi was deceased at the time he initiated the present suit, it follows that the suit could only have been instituted against the personal legal representative of the deceased. The plaintiff indeed acknowledged this fact and that explains why he stated he was suing the plaintiff as the legal representative of the deceased. Was Orina Omurwa the legal administrator of the estate of Murwa Ayiemi deceased?

18. The defendant by his replying affidavit did not expressly deny that he was the legal representative of his deceased father but pointedly under paragraph **2(a)** of the replying affidavit stated thus:-

“The plaintiff's action is misconceived and bad in law – the same ought to be struck out with costs as the defendant is non suited.”

The plaintiff for his part did not furnish any evidence to show that the defendant was indeed the personal legal representative of the late Murwa Ayiemi. The defendant in his submissions submitted that it was his elder brother, Mathew Karinga Murwa who was appointed the administrator of the estate of the late Murwa Ayiemi and not himself. The defendant attached to his submissions Gazette Notice No. 3858 of 13th August, 1993 which shows that Mathew Karinga Murwa petitioned for a grant of letters of administration intestate to the estate of Murwa Ayiemi in Kisii HC Succession Cause No. 9 of 1992.

19. The defendant surprisingly did not raise the issue of lack of capacity to represent the estate of Murwa

Ayiemi as the duly constituted legal representative and for all intent and purposes the matter proceeds on the basis and assumption that the defendant was the legal administrator of the deceased. The ideal situation would have been for the issue of locus standi of the defendant to be taken as a preliminary issue so that the question whether or not the defendant had capacity to represent the estate of the deceased could be determined at the earliest opportunity so that the court would not as it were labour in vain.

20. The court being cognizant of the position that a legal issue can be raised by a party at any stage of the proceedings and particularly one that challenges the jurisdiction of the court and/or competency of the proceedings the court took the unusual step of seeking to peruse the proceedings in regard to HC Succession Cause No. 9 of 1992 and in that regard called for the record from the court registry. The record was availed and on perusal inter alia the following were the findings:-

- 1. Vide an order made in Kisii HC Misc Civil Application No. 158 of 2014 on 11th December 2014 a skeleton court file in respect of HC Succession Cause No. 9 of 1992 was ordered reconstructed on the basis of documents supplied by Mathew Karinga Murwa the petitioner in the succession cause.**
- 2. On 25th February 1994 grant of letters of administration intestate to the estate of Murwa Ayiemi were granted to Mathew Karinga Murwa by Mbaluto, J. (as he then was).**
- 3. On 17th October 2000 a certificate of confirmation of grant was issued to the said Mathew Karinga Murwa by Wambiliyangah, J. (as he then was).**
- 4. The certificate of confirmation of grant shows that the property LR No. Wanjare/Bogitaa/1060 was granted to James Onchiro Motieri absolutely.**
- 5. The law firm of Nyamurongi & Company Advocates acted for the applicant in the application for reconstruction of the succession file**

21. From the above findings it is clear that the defendant whom the firm of Nyamurongi & Company Advocates acted for in these proceedings was fully aware that he was not the administrator of the deceased estate and yet chose not to make that disclosure. Be it as it may be, what is now evident is that the defendant lacked the locus to represent the estate of Murwa Ayiemi (deceased) as he was not the administrator of the estate. The plaintiff's suit therefore against the defendant is incompetent and is unsustainable against the deceased estate. The same is in the premises ordered struck out.

22. As the plaintiff's suit is founded on a claim of adverse possession against the estate of the deceased and the appropriate party has not been brought to court, I will desist from making any findings on the basis of the evidence adduced as the plaintiff is still entitled to bring a fresh suit on the same grounds and facts against the administrator of the deceased estate and if I make findings of fact on the basis of the evidence adduced that may be prejudicial in any such subsequent suit. I will leave that to the court that may be called upon to adjudicate the matter in any such subsequent suit. I will in the circumstances make no determination on the issue whether or not the plaintiff's occupation and possession of the suit property constituted adverse possession.

23. In the result therefore I strike out the plaintiff's suit for being incompetent for want of locus on the part of the defendant. However, I decline to award any costs to the defendant who it is my view failed to make disclosure that he was not the administrator of the deceased estate while he had the information leading to the court spending too much time conducting a trial which turned out to be a nullity. I order that each party will bear their own costs of the struck out suit.

24. Orders accordingly.

Judgment dated, signed and delivered at Kisii this 11th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mamboga for Oguttu for the plaintiff

Mr. Nyandieka for Nyamurongi for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE