



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC APPEAL NO. 10 OF 2020**

**JOSEPH KIRUI ALIAS MADAKAS.....APPELLANT**

**-VERSUS-**

**DANIEL KIPYEGON LANGAT.....RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION**

1. This Appeal arises from the Judgment and decree delivered in Kilgoris Principal Magistrate Court ELC No. 121 of 2018 by Hon. R. M. Oanda on 20<sup>th</sup> February, 2020, whose effect was to allow the Respondent's suit against the Defendant/Appellant. The grounds in the Memorandum of Appeal dated 10.03.2020 are that: -

**i. THAT the Learned Trial Magistrate erred in law and in fact in considering the Respondent's case and failing to consider the Appellant's Counter-claim, the weight of the evidence in support, the Appellant's submissions and the principles of law applicable.**

**ii. THAT the Learned Trial Magistrate erred both in law and fact in finding that the Appellant proved his case when the weight of evidence strongly pointed to the application of adverse possession against the Respondent.**

**iii. THAT the Learned Trial Magistrate erred both in law and fact by proceeding on wrong principles of law as to arrive at an erroneous determination of the suit, a determination not supported by law and the evidence.**

2. The final orders from the impugned trial court's judgment and decree were as follows;

a) The Defendant has ninety days (90) from the date of this judgment to arrange and vacate the suit property failure to which he shall be evicted.

b) Permanent injunction is hereby issued against the defendant, agents, servants, and/or any other person acting under him from trespassing, dealing, working and/or occupying the suit property, after giving vacant possession of the suit property or eviction (as the case may be).

c) The plaintiff is awarded Kshs. 200,000/= (Two Hundred Thousand Shillings Only).

d) Cost of the suit and interest to the plaintiff.

e) The Defendant's counterclaim is hereby dismissed.

3. The background to this appeal is that the Respondent/Plaintiff is the registered owner of the suit property L.R. TRANSMARA/OLOSAKWANA "B"/558. However, sometimes in 1996, the Appellant/ Defendant wrongfully and without the Plaintiff's consent entered into possession of the said suit parcel, occupying about 4acres and has remained in the illegal possession to date thereby dispossessing the plaintiff. That despite the numerous occasional protests by the Plaintiff, the Defendant and his children ignored, neglected and refused to move out of the said parcel of land. The continued trespass necessitated the suit by the Plaintiff vide a Plaint dated 30.06.2010, seeking permanent injunction against the Defendant/ Respondent restraining him from trespassing onto, entering, cultivating, using, occupying, possessing and dealing with the suit property in any way.

4. The Defendant/Appellant in response denied all the allegations of trespass made by the Plaintiff and further filed an Originating Summons claiming that he had acquired title to the suit property by way of adverse possession as a counterclaim and thus urged the court to order that he be registered as the owner. It was his contention that the plaintiff's failure to asset ownership since 1996 for a period of over 41 years was statutorily barred to do the same. Further, having made tangible developments in the land had put him in the position of the exclusive owner. The Originating Summons filed in the High Court was later consolidated with the original suit by Consent of both parties on 16.10.2018.

5. On 16.03.2021, this court issued directions on the mode of hearing of the Appeal and directed that the same be canvassed by way of written submissions to be filed and exchanged within 21days by the Appellant and 21 days upon service by the Respondent.

6. The Appellant through the firm of Mutai J.K & Co. Advocates filed their written submissions dated 15.04.2021 while the Respondent, acting in person, filed his submissions dated 21.06.2021.I have taken both submissions into consideration in arriving at my decision.

#### APPELLANT'S SUBMISSIONS

7. The Appellant made his submissions on the 3 grounds of appeal as contained in his Memorandum of Appeal. On the 1<sup>st</sup> ground of failing to consider his counterclaim, he submitted that the trial magistrate widely considered the Respondent's case and failed to consider the merits of his counterclaim, according to him, there was no reasoning or analysis of the facts, evidence and the testimonies given in court in support of his claim; but went ahead in finding that the counterclaim was unsustainable and refused to grant it. He therefore submitted that his Originating Summons was not given due consideration and determination.

8. He also submitted that the Respondent's suit was clearly time barred and this was apparent from his plaint in paragraph 5, where he deponed that the cause of action arose sometimes in 1996 when the Appellant allegedly wrongfully entered into the suit property and reiterated the same in his testimony, he thus relied on section 7 of the Limitations of Actions Act in stating that the Respondent's suit was time barred; from 1996 to the time of instituting the suit in 2010 is around 14years.

9. Further, he also relied on Section 37(a) of the Limitations of Actions Act in submitting that at the time of registration and acquiring title by the Respondent in 2010; the interests by the Appellant by the law of prescription under the principle of adverse possession had run its full term as per the Respondent's evidence on record. Thus the title held by the Respondent is purely on trust basis for the Appellant. According to him, the said principles and/or conditions for adverse possession to apply were aptly submitted in the lower court but were not considered at all by the trial magistrate.

10. He also submitted that the evidence of the witnesses manifestly indicated that he was and had been in open, quiet, continuous and uninterrupted possession of the suit property for a period of over 19years. It was his contention that further evidence indicated that his parents occupied the land between the year 1954 and the year 1986 when his father passed on and was buried on the land. Their occupation continued until 1991, when the Respondent allegedly purchased the land from one Musekenya, and even after that until 2010 when the Respondent filed the suit against him for eviction.

11. On the 2<sup>nd</sup> ground of appeal, he submitted that the preponderance of the evidence he produced in court supported his claim on adverse possession and thus the trial magistrate fell into error by making a finding in favor of the Respondent, whose case was riddled with contradictions.

12. He further submitted that the Respondent's documents were not produced as exhibits, the documents were not formally produced as exhibits in court and therefore their reference in the judgment by the trial magistrate amounts to grave injustice.

13. On ground 3 of Appeal, it was his submission that the trial magistrate arrived at an erroneous determination by focusing on the Respondent's case and the application of section 26(1) of the Land Registration Act instead of considering the principles of adverse possession and the evidence presented. He therefore urged the court to allow the appeal, set aside the trial court judgment and enter judgment for the Appellant as prayed in the Counterclaim.

### **RESPONDENT'S SUBMISSIONS**

14. It is the Respondent's submission that he proved his case in the trial court to the required standard as to his ownership of the suit property and produced several documents; title deed, certificate of official search, Green card, Map, notice to Vacate dated 12/06/10 and an Agreement between him and Musekenya, in support of his claim of ownership.

15. He further submitted that the prayer for eviction and any other relevant issue would only be effective from the date the title deed was issued and in this case, the same was issued on 21.05.2010 and thus he laid his claim from 2010. In conclusion he urged the court to dismiss the Appellant's appeal with costs and interest, a further cost for damages for use and occupation up to the date for delivery of possession and lastly that the trial court judgment be upheld and the grant for execution be allowed.

16. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as follows: -

***“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

17. I will now proceed to re-evaluate and re-assess each of the party's claim and their witnesses from the lower court record. The Respondent testified as PW1 and called one witness; it was his testimony that he was the true owner of the suit property L.R. TRANSMARA/OLOSAKWANA “B”/558 measuring 5.45Ha having the title deed, certificate of official search and a map signifying his portion in the land. It was his testimony that he sued the Defendant for trespass and illegal occupation of his land who despite the several requests that he moves out he has refused. On cross-examination, he stated that he bought the suit land in 1991 and was given vacant possession and the land was transferred to him, however, the defendant entered into the said land in 1996 and have been living on the suit property without his consent. He also confirmed that he had not built any single structure on the land nor set foot on the land.

18. PW2 – Richard Kiprono Malel testified that he knew both the Plaintiff and the Defendant. He relied and adopted his witness statement as his testimony and in addition stated that the suit property which is at the border between Transmara and Bomet belonged to Daniel (the Plaintiff) and further that the Defendant entered into the suit land and built thereon in 1996. On cross-examination, he maintained that the defendant was staying on the plaintiff's land. The Plaintiff then closed his case.

19. The Appellant/Defendant/ testified as DW1 and called 3 witnesses. It was his testimony that the suit land was his ancestral land and they have been living on the said land with his parents and siblings together with their families. That upon the death of his father in 1986, he was buried on the said land and nobody objected to his burial on the said land. He further stated that the title deed produced by the plaintiff was not genuine since no mutation nor subdivision was ever done. He did also mention about the counterclaim he had lodged against the plaintiff and stated that they had been living on the suit land since 1959 and thus urged the court to cancel the plaintiff's title and give them the authority to use their land. On cross-examination, he maintained that they got the land in 1959 though he has no title deed, green card or even a search certificate to the suit parcel. He also denied being given a notice to vacate as alleged by the plaintiff.

20. Kipngeno Arap Maritim testified as DW2; it was his testimony that he had known the defendant since 1973 when he was born and they have been staying on the suit property. He also confirmed that the defendant's father who is since deceased was buried on

the suit property in 1986 and he even attended the burial; nobody opposed the burial on the pretext that the land is not his. Further, he stated he has never seen any house built or belonging to the plaintiff.

21. Francis Rono testified as DW3, it was his testimony that he was born in 1944 at Bomet and later moved to Transmara, where he has been staying since he was a youth. He confirmed knowing the defendant since his childhood and that the defendant's father who died in 1986 was buried at the suit property. He further stated that the defendant's mother and his siblings together with their families are all staying on the said property todate and added that he had never seen the plaintiff set foot on the suit land.

22. Stanley Cheruiyot Rono testified as DW4; he testified that the defendant was his neighbor where they stay at Ngendale Transmara East and that he had known the defendant since he was born. He states that the defendant and all his brothers and mother all live on the suit parcel and further confirmed that the defendant's father died in 1986 and was buried on the suit land and no one objected to the said burial on that land. On cross-examination, he maintained that the suit land belongs to the defendant's father even though there was no title deed to prove the same. The Defence then closed their case.

23. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the parties' submissions in totality; I find that the Issues for determination arising therefrom are as follows;

a) Whether the trial court had jurisdiction to hear and determine the defendant's counter-claim

b) Whether in the circumstances, this Court should interfere with the exercise of discretion by the trial court and set aside its judgement.

A. Whether the trial court had jurisdiction to hear and determine the defendant's counter-claim on Adverse Possession

24. As was held in the celebrated case of **Owners of Motor Vessel "Lillian S"**, jurisdiction is everything and it goes to the root of the case; without jurisdiction, the court must down its tools.

25. **Section 38** of the **Limitation of Actions Act** specifies only the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. The section provides as follows:

**"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."**(emphasis mine)

26. I have carefully examined pleadings and the lower court record as contained in the Record of Appeal, it is clear that the plaintiff's suit was on ownership of the suit property and thus sought eviction orders and permanent injunction. The Defendant in response to the said allegation made by the Plaintiff claimed that he had been living on the suit land together with his family as an ancestral land for a period of 14years. These facts other than being contained in the High Court Originating Summons which was consolidated with the lower court suit was also reiterated by the sworn testimony of the Appellant/ Defendant and his 3 witnesses at the trial stage.

27. In view of the foregoing, I find that the trial magistrate did not have the requisite jurisdiction to entertain the defendant's claim on adverse possession.

28. Having found that the trial magistrate did not have the requisite jurisdiction to entertain the Appellant/Defendant's claim on adverse possession, I find that it would be an academic exercise to discuss whether this court should interfere with the exercise of discretion by the trial court.

**CONCLUSION**

29. In conclusion, I accordingly find that the Appeal is **merited** and is therefore allowed with cost on the following terms.

**a) The Appeal is allowed to the extent of the hearing and determination of the Appellant/Defendant Counterclaim on Adverse Possession claim by the trial magistrate.**

**b) That the initial order for consolidation of the High Court Originating Summons with the lower court plaintiff's suit and the same be reinstated and transferred to the ELC Court in Kilgoris for hearing and determination; which outcome will eventually determine the plaintiff's suit before the Principal Magistrate's Court in Kilgoris.**

**c) That the entire judgment be and is hereby set aside.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 23<sup>RD</sup> DAY OF FEBRUARY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

Mr. Mutai for the Appellant

Mr. Kipyegon Lagat Respondent in person

Tom Maurice – Court Assistant



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