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| Case Number:   | Originating Summons 17 of 2021 (Formerly Migori Etc OS E009 of 2020)                             |
| Date Delivered:  | 01 Mar 2022  |
| Case Class:  | Civil  |
| Court:   | Environment and Land Court at Homa Bay   |
| Case Action:   | Judgment   |
| Judge:   | George Martin Ongondo  |
| Citation:  | Ishmael Owano Owaya v Lonah Bol Okuro & another [2022] eKLR                                      |
| Advocates:   | Mr. Nyakundi, learned counsel for the defendant.<br>O.H Bunde learned counsel for the Plaintiff. |
| Case Summary:  | -  |
| Court Division:  | Environment and Land   |
| History Magistrates:   | -  |
| County:  | Homa Bay   |
| Docket Number:   | -  |
| History Docket Number:   | -  |
| Case Outcome:  | Suit ordered   |
| History County:  | -  |
| Representation By Advocates:   | Both Parties Represented   |
| Advocates For:   | -  |
| Advocates Against:   | -  |
| Sum Awarded:   | -  |
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**

**ELC O.S 17 OF 2021**

**(FORMERLY MIGORI ELC O.S E009 OF 2020)**

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: LR NO. KANYADA/KANYABALA/3646 AND 3647**

**ISHMAEL OWANO OWAYA .....PLAINTIFF**

**VERSUS**

**LONAH BOL OKURO .....1<sup>ST</sup> DEFENDANT**

**CLIFF ORIWO OKURO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. On 27<sup>th</sup> October 2020, the plaintiff namely Ishmael Owano Owaya mounted this suit by way of an Originating Summons dated 26<sup>th</sup> October 2020 claiming to have acquired title over a portion of LR Numbers Kanyada/Kanyabala/3646 and 3647 measuring approximately seven decimal three hectares (7.3 Ha) in area and five decimal seven hectares (5.7 Ha) in area respectively (the suit parcels of land herein) by prescription and or adverse possession for determination of the following issues;

a. A declaration that the defendants' rights to recover a portion of land known as **LR No. Kanyada/Kanyabala/3646 and 3647** measuring **7.3 Ha and 5.7 Ha** respectively is barred under the limitations of actions Act, chapter 22 of laws of Kenya, and their titles thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 50 years.

b. There be an order that the plaintiff be registered as the proprietor of portions of **LR No. Kanyada/Kanyabala/3646 and 3647** measuring **7.3 Ha and 5.7 Ha** respectively in place of the Defendants who currently hold the titles to the suit land.

c. There be an order restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said portions of land measuring **7.3 Ha and 5.7 Ha** comprising of all the parcels of land known as **LR No. Kanyada/Kanyabal/3646 and 3646 and 3647** in any manner whatsoever and/or howsoever.

d. The Deputy Registrar and/or the Executive Officer of this Honourable Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of a portion of land measuring 7.3 Ha and 5.7 ha comprising the parcels of land known as **LR No. Kanyada/Kanyabala/ 3646 and 3647** in favour of the plaintiff, in the event of default by the Defendants to execute the necessary transfer instruments.

e. Costs of this originating summons be borne by the defendants.

- f. Such further and/or other orders be made as the court may deem fit and expedient, in circumstances of this case.
2. The plaintiff is represented by the firm of O.H Bunde and Company Advocates. Previously, he was represented by the firm of Ochoki and Company Advocates.
3. The plaintiff's claim is anchored on his supporting affidavit of 24 paragraphs sworn on even date and the annexed documents marked as "IOO 1" to "IOO 4" (PEXhibits 1 to 5) which include; photographs showing activities carried out by him on the suit parcels of land (IOO 1) and copies of certificates of official search regarding the suit parcels of land (IOO 3a and 3b). The claim is also founded upon grounds (a) to (xv) stated on the face of the originating summons.
4. Precisely and concisely, the plaintiff's complaint is that his family and himself have been in possession and occupation of the suit parcels of land for over 50 years. That the plaintiff's grand-father, Diang'a Wendo (Deceased-1) had given the original land, LR no. Kanyada/Kanyabala/1013 to Christopher Okuro Aruji (Deceased-1) to settle thereon and hold it in trust for the plaintiff. That deceased-2 took advantage, transferred and registered the whole of the original land in his name. That upon the death of deceased-2, the defendants and Consaga Aoko Okuro (Deceased-3) took out letters of administration in respect of the estate of deceased-2 in Homa Bay High Court Probate and Administration Cause number 698 of 2014 (the P & A Cause) and caused the original land to be sub divided into the suit parcels of land, transferred and registered themselves as the current proprietors thereof. Thus, it precipitated the instant suit.
5. The defendants through the firm of James Nyakundi and Company Advocates, opposed the originating summons by way of the 1<sup>st</sup> defendant's replying affidavit sworn on 21<sup>st</sup> January 2021 and filed in court on 25<sup>th</sup> January 2021. He deposed therein, inter alia;
- a) "THAT various developments including the fence alluded to herein existed before the making of this Application and we have maintained *status quo* about the same.
- b) THAT the Defendants have been and are still in physical possession of the Land in question hence the Plaintiff cannot claim adverse possession as he has not met the adverse possession threshold.
- c) THAT I pray that the Plaintiff's Application be struck off for lack of merit and a waste of the Court's time."
6. The 1<sup>st</sup> defendant also stated that there was an attempt to evict the plaintiff from the suit parcels of land but the plaintiff obtained orders in the P & A Cause (LCO-1) and that she has maintained status quo maintained over the suit parcels of land in compliance with the said orders. That an attempt to acquire ownership of the suit parcels of land by the plaintiff would jeopardize the beneficiaries. That the status quo orders (LCO-1) and the court's orders dated 11<sup>th</sup> January 2016 that directed the parties to seek amicable settlement under the guidance of the Chief Arujo location (LCO-2) made in the P & A Cause, are annexed to the 1<sup>st</sup> defendant's affidavit.
7. The suit was heard by way of viva voce evidence pursuant to this court's orders and directions given on 25<sup>th</sup> October 2021.
8. In his testimony, the plaintiff (PW1) relied on his statement in form of his supporting affidavit sworn on 26<sup>th</sup> October 2020 and PEXhibits 1 to 5 as stated in paragraph 3 hereinabove. He stated in part that he is claiming the original land which is now the suit parcels of land.
9. PW2, Dickson Owigo Dianga testified that PW1 is his nephew. That the defendants came from Tanganyika. He relied on his statement dated 1<sup>st</sup> November 2021 as part of his evidence.
10. The defendants' counsel was duly served with a hearing notice dated 26<sup>th</sup> October 2021 as disclosed in the affidavit of service sworn on 29<sup>th</sup> October 2021 by Okoth Herman Bunde, learned counsel for the plaintiff and another affidavit of service sworn on even date by Kevin Otieno Okeya, an authorized process server. Having been given an opportunity for hearing of the suit, the defendants and their counsel failed to appear at the hearing of the suit on 1<sup>st</sup> December 202. Thus, the suit was heard bearing in mind **Articles 48, 50 (1) and 159 (2) (b) of the Constitution of Kenya, 2010.**
11. The plaintiff's counsel presented oral submissions that;

a) It is clear from the evidence of PW1 and PW2 that the plaintiff has been in possession of ancestral land namely the suit parcels of land for more than 12 years.

b) That the defendants have an alternative land, LR No. Kanyada/Kanyabala/1212

c) The originating summons dated 26<sup>th</sup> October 2020 be allowed in terms of prayers (1) to (6) therein.

12. I have duly considered the entire originating summons, the replying affidavit, the testimonies of PW1 and PW2 as well as the oral submissions by learned counsel for the plaintiff. From the foregoing, does the plaintiff's claim satisfy the three pillars which anchor adverse possession as held in the case of **Wilson Kazungu Katana and 101 others-vs-Salim Abdallah Bakshwein and another (2015) eKLR**"

13. On the first pillar namely whether the suit parcels of land are registered in the name of person (s) other than the applicant, it is essential that adverse possession should be of the whole or defined portion of land portion of land; see **Gatimu Kinguru-vs-Muya Gathangi(2008) 1 KLR 1007 at 1015.**

14. Notably, PW1 is claiming a defined portion of land as discerned in the originating summons, the grounds thereon and the applicant's supporting affidavit to the originating summons and PExhibits 2, 3 (b) and 3 (c). He also testified in part;

*"I claim a piece of land measuring approximately 13 Ha in LR No. kanyada/Kayabala/1013 now LR Nos. Kayada Kayabala/3647."*

15. Clearly, the suit parcels of land are registered in the name of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant and others as shown in Pexhibits 3 (b) and (c). The mutation Form (PExhibit 3 (a)) shows the defendants and another being the persons interested in the original land.

16. The second pillar is that the applicant must have been in open, peaceful and continuous possession of the land in question for the prescribed period of time. PW1 has been in possession and occupation of the suit parcels of land for the prescribed period of time as revealed in the originating summons and the accompanying documents as well as the testimonies of PW1, PW2 and PExhibits 1 and 4. Paragraph 20 of his supporting affidavit reads, inter alia;

*".....I have occupied and or possessed the suit land for over 50 years....."*

17. The third pillar, is whether the defendants been dispossessed from the suit parcels of land" Plainly, PW1 testified in part;

*"....The defendants do not live, possess or occupy the suit parcels of land...."*

18. It must be remembered that a grant of letters of administration in respect of the estate of the deceased-2 was issued in Homa Bay High Court Probate and Administration Cause No. 698 of 2014 (the P & A cause). Further to this court's orders of 15<sup>th</sup> December 2021, I have perused the original record and certified typed copies of proceedings, rulings and orders in respect of the P & A Cause.

19. In the P & A Cause, on 15<sup>th</sup> December 2014, the court (D S Majanja, J) ordered that ;

*"Summons for confirmation of grant allowed in terms of paragraph 6(a) of the affidavit in support by Lornah Okuro and Consaga Okuro."*

20. It is noted that on 18<sup>th</sup> September 2019, the court (J R Karanjah, J) disposed of the P & A Cause thus;

*"So, the matter is for mention today on the way forward regarding the application for revocation of grant dated 30<sup>th</sup> March, 2017 rather than 22<sup>nd</sup> January, 2018. None of the parties and specifically the applicant is present to take directions. Therefore, the application dated 30<sup>th</sup> March, 2017 be and is hereby dismissed for want of prosecution."*

21. Moreover, I do not lose sight of prayer number 6 in the Originating Summons and as pointed out in paragraph 1 (f) hereinabove. By virtue of **Article 10 (2) (b) of the Constitution of Kenya, 2010** and authoritative pronouncements including **Mumo-vs-Makau (2002) 1 EA 170**, **Isack M’Inanga Kiebia-vs-Isaaya Theuri M’Lintari and another (2018) eKLR** and **Willy Kimutai Kitilit-vs-Michael Kibet (2018) eKLR**, customary trust is created over the suit parcels of land as stated in paragraph 7 of the plaintiff’s supporting affidavit and ground 7 of the Originating Summons. The defendants denied the existence of such trust thereon, but the plaintiff has proved otherwise thus, this court must protect and promote the said principle.

22. It is established law that the burden was always on the plaintiff to prove his or her case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof; see **Kirugi and another-vs-Kabiya and 3 others (1987) KLR 347**.

23. It is the finding of this court that the plaintiff’s claim is firm and cogent. The defendants’ assertion that Deceased-2 allowed the plaintiff to occupy the suit parcels of land is unsubstantiated and fails. Therefore, the plaintiff’s case against the defendants has been proved on a balance of probabilities; see Sections 107 to 110 of the Evidence Act (Cap 80) and the case of **Ahmed Abdulkarim-vs-Member for Lands and Mines (1958) EA 436 at 441**.

24. A fortiori, judgment be and is hereby entered for the plaintiff against the defendants jointly for orders 1 to 5 and a declaration that he has acquired customary trust over the suit parcels of land in view of prayer 6 in the Originating Summons dated 26<sup>th</sup> October 2020 and lodged in court on 27<sup>th</sup> October 2020.

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 1ST MARCH 2022.**

**G.M.A ONG’ONDO**

**JUDGE**

**PRESENT:**

**A) MR. BANA, LEARNED COUNSEL HOLDING BRIEF FOR MR. NYAKUNDI, LEARNED COUNSEL FOR THE DEFENDANT.**

**B) MR. MANDELE MIGILE, LEARNED COUNSEL HOLDING BRIEF FOR O.H BUNDE LEARNED COUNSEL FOR THE PLAINTIFF.**

**C) OKELLO, COURT ASSISTANT.**



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