



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT AND LAND CASE NO.69 OF 2016

CHRISTOPHER WANYAMA SUDI.....PLAINTIFF

VERSUS

MAYEKWE FARMERS SOCIETY LTD.....DEFNDANT

JUDGEMENT

CHRISTOPHER WANYAMA SUDI (the plaintiff herein) filed this suit seeking the following remedies against the defendant (MAYEKWE FARMERS SOCIETY LTD)

- (a) A declaration that the contract which was entered into between the plaintiff and the Defendant and breached dated 23rd February 1987 is null and void.***
- (b) A permanent injunction against the defendant, its agents, employees workers and/or servants from encroaching, interfering and/or working on the land parcel NO. MALAKISI/N. WAMONO/714 which is the property of the plaintiff.***
- (c) Any other relief this Honourable Court may deem fit and just to grant.***

The basis of the Plaintiffs claim is that at all material times while being the registered owner of the land parcel **NO. MALAKISI/N. WAMONO/714** measuring 11.6Ha (hereinafter the suit land), he entered into an agreement dated 23rd February 1987 to sell to the defendant a portion measuring three(3) acres at a consideration of Ksh.25,000 per acre. That the defendant made the first payment of Ksh.10,000 on 6th June 1988 and the last payment was made on 28th January 1994 by which time the defendant had paid Ksh.50,900 leaving a balance of Ksh.24,00 which amount remains un-paid to-date despite several demands. The defendant is therefore in breach of the said agreement particulars of which are pleaded in paragraph 6(I) to (VI) of the plaint hence this suit.

The defendant filed a defence and Counter-claim in which he admitted that the plaintiff is the registered proprietor of the suit land and that the parties entered into the aforesaid agreement. The defendant however denied having breached the agreement by failing to pay the balance adding that infact the full purchase price was paid in instalments until completion and that the defendant was allowed to utilize the three(3) acres immediately after the execution of the agreement. That the defendant has, with the knowledge of the plaintiff, fenced off the three(3) acres which was surrendered to it by the plaintiff without any coercion and therefore the plaintiff is not entitled to the Orders sought in his plaint and his claim is time barred and should be struck out.

The defendant's Counter – claim sought a declaration that having taken possession of the three(3) acres out of the suit land on 23rd February 1987 and occupied it for the last 29 years, it is entitled to orders in adverse possession thereof and the plaintiff should execute all the relevant documents to transfer that portion to it.

The plaintiff filed a reply to the defence and a defence to the Counter – claim joining issues with the defendant adding that on several occasions he has interrupted the defendant's occupation of the said portion and that the defendant has resorted to using the Administration Officers to intimidate him. That the occupation was therefore with the Plaintiff's permission which is not even for 29 years. The plaintiff therefore sought the dismissal of the Counter – claim.

The plaintiff was the only witness in support of his claim and he adopted as his evidence his statement dated 20th July 2016 in which he confirmed that on 23rd February 1987 he entered into an agreement to sell to the defendant three(3) acres out of the suit land at a consideration of Ksh.25,000 thus making a total of Ksh.75,000. That to-date, the defendant has only paid Ksh.50,900 made up as follows:

DATE AMOUNT

6.6.1988 - Ksh.10,000

16.12.1991 - Ksh.6,000

10.1.1992 - Ksh.1,000

10.3.1992 - Ksh.7,000

14.8.1992 - Ksh.2,000

24.2.1993 - Ksh.2,500

27.5.1993 - Ksh.3,000

14.8.1993 - Ksh.2,000

15.10.1993 - Ksh.11,895

28.1.1994 - Ksh.6,000

Total - Ksh.50,900

That since the last payment on 28th January 1994, the defendant has refused to pay the balance of Ksh.24,000 and only uses the Administration to frustrate him yet they use the suit land for agricultural purposes. The defendant is also threatening to bar the plaintiff from accessing the suit.

The defendant called as its witnesses the Chairman **BENSON WATHI (DW)** the Secretary **SAMUEL WEKESA SUMUNI (DW2)** and a member **MOSES SERESE (DW3)** who all adopted as their evidence their statements dated 29th August 2016 and also produced their list of documents as their documentary evidence. Their evidence is that the defendant and plaintiff entered into the said agreement dated 23rd February 1987 by which the plaintiff was to sell the defendant three(3) acres out of the suit land. That the agreement was voluntary and the defendant has for the past 29 years occupied their portion of the suit land which is surveyed. The defendant also states that it fully paid the purchase price of Kshs.75,000 through instalments.

Submissions have been filed both by **Mr. WAMALWA** instructed by **WAMALWA SIMIYU & CO. ADVOCATES** for the plaintiff and **Mr. WATTANGA** instructed by **MAKOKHA WATTANGA & LUYALI ASSOCIATES** for the defendant.

I have considered the evidence by both parties and the submissions by Counsel.

In his submissions, Counsel for the plaintiff has asked me to find that this suit is governed by the Co-operative Society Act since the defendant is a registered Co-operative Society and that this dispute should first be handled by the Co-operative Disputes Tribunal as stipulated under the said Act.

That should be the starting point because if that submission is true, then I must down my tools in this matter because I will cease to have the jurisdiction to proceed any further – **OWNERS OF THE MOTOR V 'LILLIAN S' V CALTEX OIL KENYA LTD 1989 KLR 1**. Indeed the issue of jurisdiction ought to be raised at the earliest opportunity as a Preliminary Objection and not this late when proceedings have come to an end. I will nonetheless consider it even if it has been raised late.

It is of course correct, as submitted by **Mr. WATTANGA**, that a dispute between a Co-operative Society and its members ought to be determined by the Co-operative Tribunal established under **Section 76 of the Co-operative Societies Act Cap 490 LAWS OF KENYA**.

However, there is no evidence that the plaintiff is a member, past or present, of the defendant. This dispute is therefore properly before this Court and I must therefore exercise my jurisdiction and determine it.

It is not in dispute that the parties herein entered into a written agreement on 23rd February 1987 by which the defendant was to purchase three(3) acres out of the suit land at a consideration of Ksh.75,000/-.

It is also common ground that the suit land is registered in the names of the plaintiff as per the certificate of Search dated 31st May 2016 which is part of the Plaintiff's documents. While it is the defendant's case that it fully paid the whole of the purchase price in full, the plaintiff's case is that the defendant has only paid a sum of Ksh.50,900 through instalments the last payment having been made on 28th January 1994 leaving an un-paid balance of Ksh.24,000 (it should actually be Ksh.24,100 if my mathematics is correct).

In an attempt to prove that it has fully paid the purchase price through instalments, the defendant's Chairman produced two vouchers for the sums of Ksh.17,720 and Ksh.13,320 which it claimed the plaintiff omitted from his list of documentary exhibits and which, added to the receipts produced by the plaintiff, add upto to Ksh.75,000/-. I have examined the two vouchers. The voucher for Ksh.17,720 is dated 14th

July 1989 but does not bear the names of the plaintiff. Instead, it bears the names of **CHOSHOKO NURSERY, NAMUNDI NURSERY and CHEBUSIENYA NURSERY**. I do not consider that payment to have been made to the plaintiff. After all, all the other receipts and vouchers bear the plaintiff's names. There is no reason why the voucher for Ksh.17,720 could not be in the plaintiff's names. With regard to the vouchers for Kshs.13,220 dated 12th April 1990, it is indeed in the plaintiff's names and reads "**LAND PURCHASE.**" I am satisfied that the plaintiff received that sum as part payment of the three(3) acres out of the suit land. However, the agreement did not stipulate any time frame for the completion of the payment of the purchase price.

The Defendant therefore continued to pay and the plaintiff to receive various instalments over a period spanning six years (the plaintiff's statement shows that the first instalment of Ksh.10,000 was made on 6th June 1988 and the last instalment of Ksh.6,000 on 28th January 1994). Time was therefore not of the essence in the parties agreement. It is the plaintiff's case however that after 28th January 1994, the defendant has refused to make any further payments and instead uses the local Administration to frustrate him. Having found that some of the payments allegedly paid to the plaintiff by the defendant were not in fact paid, it is clear that there was a breach on the part of the defendant.

Having said so, however, it is my finding that the plaintiff's claim for orders restraining the defendant from using the portion of the suit land which they occupy is statute barred. By the plaintiff's own evidence, the defendant made the last payment of Ksh.6,000 on 28th January 1994. This suit was filed on 20th July 2016. It is my finding that the cause of action arose on 28th January 1994 when the defendant, as per the plaintiff's own admission, paid the last instalment and therefore by the time this suit was filed, a period of 12 years and 6 months had lapsed. It is now too late for the plaintiff to recover the three(3) acres out of the suit land because under Section 7 of the Limitation of Actions Act, it is provided as follows:

7 "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

The Plaintiff's claim to the three(3) acres out of the suit land is extinguished by operation of the law and since that is the main remedy that he seeks before this Court, I am afraid it is not available. His claim must therefore be struck out having been caught by the Limitation Act.

The defendant has counter – claimed for orders that it is entitled to the three(3) acres out of the suit land by way of adverse possession having been in occupation thereof since 23rd February 1987 when the agreement was executed. That occupation is not denied. In paragraph 7 of his statement, the plaintiff states:

"That the defendant have been using my land for agricultural purposes where they have been planting maize, coffee settling (sic) and tomatoes harvesting in large quantities and using the same proceeds to pay me".

He also concedes in paragraph 10 of his statement that the defendant has "***fenced off my land purporting to fence the three acres without even surveying with the area Chief and defendants agents/servants.***"

Further, in paragraph 11 of the same statement he has stated as follows:

7 "That they also went ahead and constructed a temporary structure in my land to lay a claim on my land."

When he was cross-examined by **Mr. WATTANGA**, the plaintiff said:

"I entered into a sale agreement to sell the land to the defendant at Kshs.75,000. Then were to take possession of the land immediately. They took possession and have been using it to-date."

The above statements by the plaintiff confirmed the evidence by the defendant's Chairman who in his statement stated that the defendant took possession of the three(3) acres out of the suit on 23rd February 1987 and has been using it from that date to-date a period of over 29 years without interruption. There is no evidence from the plaintiff that from the time the agreement was executed (23rd February 1987) or the time the defendant made the last payment (28th January 1994) he has filed any case to assert his ownership of the portion occupied by the defendant or to evict them. The plaintiff's Counsel **Mr. WAMALWA** has submitted that the defendant's claim to the three(3) acres out of the suit land cannot be sustained because there have been constant disputes over the said land. The fact is that since 23rd February 1987 and upto the time this suit was filed, the plaintiff has not filed any suit against the defendant over the portion in dispute. Adverse possession is only interrupted when the registered proprietor files a suit against the party in possession – **GITHU V NDEETE 1984 KLR 776**. It is correct as submitted by the plaintiff's Counsel that notices have been issued to the defendant to vacate the portion of the suit land that they occupy. However, the law is that such notices alone do not interrupt the time for purposes of adverse possession. The Plaintiff's Counsel **Mr. WAMALWA** further submitted that the defendant cannot sustain a claim for adverse possession because it entered the suit land with the consent of the plaintiff. It is true that a person who enters the land in dispute with the consent of the registered proprietor cannot claim it through adverse possession. The circumstances in this case, and which are not controverted, are that the defendant took possession of the three(3) acres out of the suit land and have continued to use it as their own with the knowledge of the plaintiff openly and without interruption since 23rd February 1987. That entry was pursuant to a sale agreement which was however breached by the defendant who did not pay the whole of the purchase price.

While the legal title remained with the plaintiff as the registered owner all the time that the defendant made the payments towards the purchase price in instalments, he (plaintiff) was always in the position of a trustee unless he brought an action to repossess the land before the expiry of twelve years. Unfortunately, he did not and that is why I have struck out his claim. A similar scenario was considered by the Court of Appeal in the case of **PUBLIC TRUSTEE V WANDURU NDEGWA C.A. CIVIL APPEAL NO.73 of 1982 (1984 eKLR)** where the

Court held as follows:

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession, the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession. The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment.”

By the Plaintiff’s own evidence, the Defendant is in possession of the portion of three(3) acres out of the suit land pursuant to the agreement dated 23rd February 1987. Whereas the defendant claims to have made the full payment of the purchase price of Ksh.75,000, this Court has found that in fact that is not the correct position. There has been a breach in that part of the purchase price cannot be said to have been paid to the plaintiff. The plaintiff has, by his own evidence, stated that he received the last payment of Ksh.6,000 on 28th January 1994 and that, by law, is when the time for purposes of the limitation period started to run and by the time this suit was filed on 20th July 2016, the defendant had been in possession of the suit land for twenty two (22) years openly, exclusively and without any interruption with the knowledge of the plaintiff.

In my view, the defendant has shown from the evidence that it is entitled to a portion of three(3) acres out of the suit land by way of adverse possession. In **KASUVE V MWAANI INVESTMENT LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal re-stated what a party seeking land through adverse possession must prove. It said:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of the owner on his own volition”.

And in **WAMBUGU V NJUGUNA 1983 KLR 172**, the same Court said:

“The proper way of assessing proof of adverse possession would then 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 been in possession of the requisite number of years”.

The plaintiff has clearly been dispossessed of the portion of the suit land which the defendant now occupies. Although the plaintiff suggested that the occupation has been forceful through intimidation by the local Administration, no evidence was led to prove that. The fact is that the defendant took possession of the portion of the suit land following a sale agreement which was later breached but the plaintiff took no action to re-assert his ownership thereof while time continued to run. By the time he filed this suit on 20th July 2016, his right to that portion of the suit land had been extinguished. The defendant is therefore entitled to the orders sought in his counter – claim.

On costs, the defendant was the party in breach even though their agreement did not provide for a time frame within which the full purchase price ought to have been paid. Being the author of the plaintiff’s misfortune, I do not think it is just that I award it costs.

The up-shot of the above is that this Court makes the following Orders:

- 1. The plaintiff’s suit is time barred and is struck out.**
- 2. Judgement is entered for the defendant against plaintiff in its counter – claim to the effect that the defendant be registered as the proprietor of three(3) acres of land out of the land parcel NO. N. MALAKISI/N. WAMONO/714 by way of adverse possession.**
- 3. The plaintiff do execute all the relevant documents to effect the transfer of three(3) acres out of land parcel NO. N. MALAKISI/N. WAMONO/714 within 45 days of the decree herein failure to which the Deputy Registrar of this Court shall be at liberty to do so on behalf of the Plaintiff.**
- 4. Each party to bear their own costs.**

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018

Judgement dated, delivered and signed in open Court at Bungoma this 18th day of October 2018.

Mr. Wamalwa for the plaintiff present

Mr. Makokha for the defendant present

Right of Appeal.

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018