



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 290 OF 2016 (O.S)

LORNA ADHIAMBO RAGOT.....PLAINTIFF

VERSUS

ESTHER ANGIENDA OKOYO.....1ST DEFENDANT

ANTONE OUMA OINDO.....2ND DEFENDANT

JUDGEMENT

Lorna Adhiambo Ragot (hereinafter referred to as the Plaintiff filed an Originating Summons under order 37 rule 7 of the Civil Procedure Rules 2020 against Esther Angienda Okoyo (hereinafter referred to as the defendant in respect of Kisumu/Wathorego/3664 by virtue of Adverse Possession claiming that the plaintiff has occupied the parcel of land since 1999 and has enjoined a quiet peaceful and continuous occupation and or possession of same with the defendants knowledge and or notice.

The plaintiff prays that the court determines the following issues:-

- 1. That the Applicant/Plaintiff to be declared the proprietor of parcel of Land Parcel Number Kisumu/Wathorego/3664 which she has occupied and cultivated openly, exclusively, continuously and without interruption from 1999 to date, for a period over 12 years.**
- 2. That the applicant has acquired a bona fide title to land parcel number Kisumu/Wathorego/3664 by adverse possession.**
- 3. That the Applicant is entitled to be registered as the proprietor of land parcel number Kisumu/Wathorego/3664.**
- 4. The defendant be ordered to transfer the said parcel number Kisumu/Wathorego/3664 to the Applicant.**
- 5. That in default of the defendant failing to transfer the said parcel to the Applicant, the Deputy Registrar to execute the necessary documents to effect the transfer of ownership of land parcel number Kisumu/Wathorego/3664 from the Respondent to the Applicant.**
- 6. That the Respondent be restrained from entering, wasting, damaging and/or in any way alienating Land Parcel Number Kisumu/Wathorego/3664 until the hearing and determination of this matter.**
- 7. That the costs of this suit be awarded to the Plaintiff/Applicant.**

The Originating Summons is based on grounds that the Land parcel Kisumu/Wathorego/3664 is subdivision from the original land parcel number Kisumu/Wathorego/1775. The applicant bought a portion of land parcel number Kisumu/Wathorego/1775 from Antone Ouma Oindo in the year 1999 and the survey report indicates that parcel she is currently occupying is Kisumu/Wathorego/3664 which for some inexplicable reasons is now registered in the name of the defendant/respondent. The applicant has been in quiet exclusive possession and occupation of land parcel number Kisumu/Wathorego/3664 in its entirety for a period exceeding 12 years to date and has therefore acquired title by adverse possession. That the said occupation and cultivation has been continuous and un-interrupted with the defendant's knowledge. That on the strength of grounds (a), (b), (c) and (d) the Plaintiff/applicant is entitled to be registered as proprietor of the land parcel number Kisumu/Wathorego/3664.

In the supporting affidavit, the plaintiff states that on 25th June, 1999 she entered into land sale agreement with one Antone Ouma Oindo for the purchase of a portion of land parcel number Kisumu/Wathorego/1775 which was at the time registered in the name of his late father

Augustinus Oindo Anudo with the understanding he was to conduct succession in his father's state to enable the transfer of her portion into her name. She fenced off a portion of the land she bought and has since then been cultivating the said land subsequently constructed her house on the said land parcel and has been living peacefully on the said land.

That upon the said Antone Ouma conducting succession, he transferred the said land parcel into his name further subdivided it and sold other portions and the portion left was Kisumu/Wathorego/3663 to be further subdivided to the plaintiff.

That the applicant attended the land control board in 2013 for consent for sub-division and the same was approved but when she engaged the services of a surveyor to map out her portion, she was shocked to discover that the portion the parcel she bought and which she currently occupying which is land parcel number Kisumu/Wathorego/3664 has now been secretly registered in the name of the defendant/respondent.

That the said Antone Ouma then failed to attend the second Land Control Board for consent to transfer even after signing the transfer forms and this prompted the plaintiff to report this matter to the police and he was charged fraud in Kisumu Chief Magistrates criminal case number 237/2016 which is still ongoing.

That the plaintiff also reported this matter to the area assistant chief who upon his own investigations discovered that the said Antone Ouma had also sold the suit parcel of land to the second buyer who is the respondent herein.

That todate the plaintiff has been in uninterrupted occupation of the said land since 1999 and that is where her homestead stands. That prior to that, neither the defendant nor any of his family members or agents has interrupted her occupation of the said parcel of land which has been open, continuous and peaceful. That the defendant's title to the said land parcel has been extinguished by the plaintiff's continuous open and uninterrupted occupation. The Originating Summons was amended and Antone Ouma Oindo made a 2nd defendant.

The 1st Defendant filed a replying affidavit whose gist is that by a written agreement of sale of land dated the 20th day of May 2011, she bought land parcel number Kisumu/Wathorego/3664 from James Oluoch K. Oyier. That prior to entering into the sale of land agreement aforesaid, the 1st defendant conducted due diligence to be certain that indeed the land belonged to and was registered in the name of the seller at the time.

That having looked at all the documents shown to her by the seller, upto and including a title deed in his name, she became convinced that he land was actually his and proceeded with the transaction to conclusion. That having paid the agreed purchase price Kshs. 550,000/= and obtaining the consent of the Land Control Board to transfer, a transfer form was executed between the vendor then and the 1st defendant. Eventually the suit property herein was transferred into the 1st defendant's name and title deed issued accordingly.

That in the circumstances, the suit parcel herein is registered into the 1st defendant's name as the absolute proprietor thereof and has remained so registered since the year 2011 todate. It is within the 1st defendant's knowledge that she was entering into the sale agreement aforesaid, and indeed prior to that point, she visited the suit parcel of land herein and found that the same was indeed a vacant parcel of land.

Immediately after the execution of the agreement between herself and the vendor aforementioned was put in possession of the suit parcel of land and she has continued to keep that possession to-date. That over and above the normal due diligence expected of a buyer such as herself, she insisted that the vendor exhibit to her documents showing not only the fact of his ownership of the suit parcel, but also how he came into the said ownership.

That in compliance with her request, the vendor exhibited to her and gave her copies of KRA PIN Certificate of one Antone Ouma Oindo, National Identity card of Antone Ouma Oindo, Application for consent of the Land Control Board dated 17th January, 2011, Consent of the Land Control Board dated the 8th day of April 2011, Transfer of land form dated the 12th day of April 2011, Official search certificate for the suit property herein, Title deed dated the 23rd day of August 2011 in the name of Antone Ouma Oindo.

That the vendor who sold the suit property to the 1st defendant had indicated to her that he had earlier bought the same from one Antone Ouma Oindo, the 2nd Defendant herein. That the suit property was vacant at the time the 1st Defendant assumed possession thereof in the year 2011 and therefore the Plaintiff's assertion that he has had possession or lived upon the suit parcel of land from the year 1999 is a brazen lie.

That the application is bad in law and totally incompetent for failure by the Plaintiff to exhibit a certified copy of an extract of the record of registration of the suit parcel herein. The 1st Defendant therefore reserves the right to raise a preliminary objection on this issue to have this suit struck out.

That sometimes in the year 2015, a person then unknown to the 1st Defendant encroached upon the suit parcel herein and put up a temporary structure thereon, she has been battling ever since to have the trespasser vacate the land.

That the plaintiff herein purports to have been given leave to enter the suit parcel herein as a purchaser, his occupation thereof, even if the same had been for a period in excess of 12 years, cannot confer title adverse to that of the owner.

That it is not noteworthy that while the plaintiff purports to have bought a portion of land parcel number Kisumu/Wathorego/1775 by agreement dated the 25th day of June 1999, there is absolutely no evidence to suggest that the suit parcel herein was created as a result of a sub-division of parcel number 1775. That indeed the certificate of official search dated the 7th day of September 2016 annexed to the Plaintiff's own affidavit in support of this application shows clearly that the suit property herein is a sub-division of plot number 6.

That in all circumstances, the plaintiff has not enjoyed open, peaceful or uninterrupted possession of the suit property herein that would entitle him to be deemed to have held title adverse to that of the 1st Defendant.

That upon taking possession of the suit parcel herein, the 1st defendant put the same to use for agricultural purposes. Crops planted by herself are on the land to date except upon the small part encroached upon by the plaintiff herein.

That consequently, at the hearing hereof, the 1st defendant shall seek orders from the court to have the plaintiff evicted from her parcel of land and the caution registered in her favour against the 1st defendant title be removed.

That the 1st defendant is a bonafide purchaser for value without notice of any third party claim over suit parcel herein. Likewise, the person who sold the suit parcel to her also bought the same when it was registered in the name of the said vendor. There was no notation of any third party claim, least of all of the plaintiff herein.

That it is therefore the duty of the plaintiff to exhaustively explain why she did not have the suit parcel herein transferred into her name, if indeed she had bought it in the year 1999.

That prior to the completion of the succession process, no person is allowed to dispose of any property of the estate. It is indeed illegal to do so.

That to the extent that the Plaintiff's claim is based on having purchased land prior to succession the claim is illegal and the court cannot be asked to enforce the same. The claim must fail.

In the further affidavit the Plaintiff states that she entered into agreement with the 2nd Defendant when the land was registered in the name of his father Augustino Oindo Amondo. She states that she was the 1st bonafide purchaser for value. That no due diligence was done by the 1st Defendant.

When the matter came up for hearing the Plaintiff adopted the supporting affidavit dated 3/11/2016 and the written statement dated 3/11/2016. On cross examination, she states that she is occupying Kisumu/Wathorego/3664. She started cultivating on the land in 1999 and constructed in 2012.

PW2, John Oyier testified that he was a witness to sale agreement between the plaintiff and the 2nd Defendant. The plaintiff bought a portion of parcel number Kisumu/Wathorego/1775. The plaintiff constructed on the land but does not live on the land. She bought the land after the owner had died but before succession cause. After succession and confirmation and subdivision the parcel number changed and the plaintiff occupied 3664.

PW3 Lucas Okoth Onindo also relied on his statement which was adopted as evidence in chief. e states that the 2nd Defendant sold the land to the plaintiff. The land was in their father's name. At the time of sale, no succession had been done.

DW1, was the agent between the 1st Defendant and James Oluoch Ka-Oier who was selling Kisumu/Wathorego/3664. The purchase price was Kshs. 500,000. Thereafter, due process was followed and the 1st Defendant was registered as proprietor. She cultivated and planted potatoes.

DW2, Esther Angech Okoyo relied on the replying affidavit and the supplementary affidavit which were adopted as evidence in chief. On cross examination, she states that she visited the land in May 2011 but before then, she was working in Uganda. She purchased the land from Mr. James Koyier who had fenced the land. She has used the land since 2011 upto 2012. She has never cultivated the land again.

DW3, James Oluoch Ka-Oyier lives in Migos. He filed a statement that the court adopted as evidence in chief. He states that her bought the parcel of land from Antone Ouma Oindo, the 2nd Defendant and sold the same to the 1st Defendant.

I have considered the originating summons, supporting affidavit, replying affidavit and submissions on record and do find that when the plaintiff entered the land it was registered in the names of a deceased person and not in the names of the 1st Defendant.

The doctrine of adverse possession applies against a land owner, properly registered as the proprietor of the land in dispute, but the said land is in actual and exclusive possession of an adversary and he fails to take action within the period of 12 years from the date when he was dispossessed. In this case, the proprietor was deceased at the time of entry and therefore the principle does not apply against him as he was not dispossessed.

The doctrine of adverse possession is properly captured in the Limitation of Actions Act Cap 22 Laws of Kenya as follows- Section 7 provides: -

“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”

Further in **Section 13**

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, **Section 38**(1) and (2) states;

“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years.

Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

The gist of adverse possession is that the owner of the land must have been dispossessed or has discontinued possession of the property

In this matter, the 2nd Defendant was the registered proprietor of the suit property on the 2/8/2010 and title deed was issued on 23/8/2010, and therefore the 12 years period of adverse possession started running against him on the 2/8/2010 hence a claim of adverse possession could only have become ripe on the 2/8/2022.

The Originating Summons was filed on 7/11/2016, approximated 6 years short of the 12 years period.

The 1st Defendant was registered on 20th June 2011 and therefore equally the 12 years period has not materialized.

The 2nd Defendant's activities of selling the parcel of land before a cause of succession and transaction was an illegality. The 2nd defendant act of selling a portion of the parcel of land to the plaintiff when it was still registered in his father's name was a nullity as he had no powers to do so.

Section 45 of the Law of Succession Act provides:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a

deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

I do find that the plaintiff has not proved his case as required in law and the same is dismissed with costs. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.