



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO.52 OF 2013 (OS)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22, LAWS OF KENYA)**

AND

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

BETWEEN

TOBIAS ONYOYO OGUTU .....PLAINTIFF

VERSUS

MARGARET SIMBA OKIRI .....1<sup>ST</sup> DEFENDANT

CHARLES OGWENO OGUTU.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. The plaintiff brought this suit by way of originating summons dated 7<sup>th</sup> February 2013 seeking:
  - i. **A declaration that the defendants right to recover land parcel No. East Karachuonyo/Kobuya/1062 measuring 1.3 ha is barred under the Limitation of Actions Act Cap 22 Laws of Kenya and their 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 12 years.**
  - ii. **That there be an order that any registration or transfer already done regarding the land parcel No. East Karachuonyo/ Kobuya/1062 be cancelled forthwith.**
  - iii. **That there be an order restraining the defendants by themselves, their agents, servants and employees from interfering with the plaintiff's peaceful possession of the said land parcel No. East Karachuonyo/Kobuya/1062 measuring 1.3ha.**
  - iv. **That there be a declaration that the title deed for land parcel No. East Karachuonyo/Kobuya/1062 already issued to either the defendants or anybody else is null and void in so far as the said land parcel measuring 1.3ha occupied by the plaintiff is concerned.**
  - v. **That there be a declaration that the register with regard to the land parcel No. East Karachuonyo/Kobuya/1062 be rectified to reflect the sole proprietor as the plaintiff having been in occupation and possession since January, 1996.**

- vi. **That the costs of the originating summons be borne by the defendants.**
- vii. **Such further and/or other orders as may be made by this honourable court as it deems fit and expedient in the circumstances of this case.**

2. The originating summons was supported by the affidavit sworn by the plaintiff on 7<sup>th</sup> February 2013. In the said affidavit, the plaintiff deposed that one, **Simeon Okiri Bolo**, deceased sold to him all that parcel of land known as **LR No. Karachuonyo/Kobuya/1062** (“hereinafter referred to as **“the suit property”**”) in the year 1996 in which year he also took possession of the property. The plaintiff deposed further that while the said Simeon Okiri Bolo, deceased (hereinafter referred to only as **“the deceased”**) was still alive he put up his homestead on the suit property and also engaged in some agricultural activities thereon. The plaintiff claimed that on 13<sup>th</sup> February 2003, he paid to one, John Ondijo Oyieko a sum of ksh. 13,000/= being a refund of the money that the said John Ondijo Oyieko’s father had paid to the deceased for the suit property. This payment he made following agreement that was reached before the area chief on 2<sup>nd</sup> January 2003 between the plaintiff, the said John Ondijo Oyieko and the family of the deceased. The plaintiff deposed that the 1<sup>st</sup> defendant who is the widow of the deceased obtained grant of letter of administration in respect of the estate of the deceased and caused the suit property to be transferred and registered in her name on 25<sup>th</sup> October 2011. The 1<sup>st</sup> defendant thereafter caused the suit property to be transferred to the 2<sup>nd</sup> defendant on 4<sup>th</sup> October 2012.
3. The plaintiff has contended that the transfer of the suit property from the name of the deceased to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup> defendant was meant to dispossess him of the suit property which he has occupied for over 16 years. The plaintiff has contended that he has continuously, openly and without any interruption occupied the suit property since January, 1996. The plaintiff has contended that the 1<sup>st</sup> defendant’s rights over the suit property had been extinguished by operation of law by the time she purported to transfer the suit property to the 2<sup>nd</sup> defendant. It is on account of the foregoing that the plaintiff has sought the reliefs prayed for in the originating summons. The plaintiff annexed to his application as exhibits; a copy of a note acknowledging receipt of the sum of ksh. 13,000 from the plaintiff signed by one, John Ondijo Oyieko and dated 13<sup>th</sup> February 2003, a copy of the minutes of the meeting that was held before the chief of Kobuya location on 2<sup>nd</sup> January 2003 regarding the dispute between the plaintiff and the said John Ondijo Oyieko over the suit property, copies of letters from the chief Kobuya location dated 11<sup>th</sup> May 2012 and 8<sup>th</sup> November 2012 confirming that the suit property was sold to the plaintiff by the deceased, a copy of grant of letters of administration intestate that was issued to the 1<sup>st</sup> defendant in respect of the estate of the deceased, Simeon Okiri Bolo and copies of certificates of official search on the title of the suit property dated 2<sup>nd</sup> May 2012 and 16<sup>th</sup> January 2013.
4. The plaintiff’s application was opposed by the defendants through separate replying affidavits sworn on 22<sup>nd</sup> February 2013. In her response to the plaintiff’s claim, the 1<sup>st</sup> defendant denied that the plaintiff entered into an agreement for sale with the deceased with respect to the suit property as claimed or at all. The 1<sup>st</sup> defendant denied further that the plaintiff is in occupation of the suit property. The 1<sup>st</sup> defendant deposed that the plaintiff has never entered or taken possession of the suit property or any portion thereof and that the alleged entry into the suit property by the plaintiff is not true. The 1<sup>st</sup> defendant denied that the plaintiff has acquired the title of the suit property by adverse possession. The 1<sup>st</sup> defendant contended further that the plaintiff’s claim over the suit property on account of adverse possession is misplaced in that the plaintiff had filed an application for revocation of the grant of letters of administration in respect of the estate of the deceased that was issued to the 1<sup>st</sup> defendant on the ground that he is a beneficiary of the estate of the deceased. The 1<sup>st</sup> defendant contended that if the plaintiff is a beneficiary of the estate of the deceased then he cannot acquire any property of the deceased by adverse possession; his possession of such property being on account of his status as a beneficiary. The 1<sup>st</sup> defendant contended that the suit property was at all material times registered in the name of the deceased and that upon obtaining a grant of letters of administration of the estate of the deceased, she sold and transferred the property to the 2<sup>nd</sup> defendant. The 1<sup>st</sup>

- defendant has contended that the sale and transfer of the suit property to the 2<sup>nd</sup> defendant was lawfully carried out. The 1<sup>st</sup> defendant annexed to her affidavit as exhibits; photocopies of the application that the plaintiff had filed for revocation of the grant of letters of administration that was issued to her, the affidavits that the plaintiff had filed in support of that application and her affidavit in response.
5. In his replying affidavit, the 2<sup>nd</sup> defendant contended that the sale and transfer of the suit property by the 1<sup>st</sup> defendant to him was lawful. The 2<sup>nd</sup> defendant deposed that before he entered into agreement for sale with the 1<sup>st</sup> defendant he visited the suit property and ascertained that it was vacant. He also carried an official search on the title of the said property which confirmed that the same was registered in the name of the 1<sup>st</sup> defendant as the proprietor thereof. The 2<sup>nd</sup> defendant deposed that after the suit property was sold and transferred to him, he took possession thereof and he has remained in possession to date. The 2<sup>nd</sup> defendant has termed the plaintiff's claim over the suit property as pre-mature misconceived and legally untenable. The 2<sup>nd</sup> defendant annexed to his affidavit as exhibits, copies of certificates of official search on the title of the suit property dated 16<sup>th</sup> January 2013 and 2<sup>nd</sup> October 2011.
  6. When the originating summons came up for directions on 30<sup>th</sup> May 2013, the parties agreed that the same be heard through affidavit evidence and that the parties do make submissions on the application in writing. Following these directions, the defendants filed their written submissions on 20<sup>th</sup> August 2014 while the plaintiff did so on 5<sup>th</sup> December 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the defendants in opposition to the application. Finally, I have considered the parties' respective submissions and the case law cited in support thereof. There is only one issue for determination in this suit namely, whether the plaintiff has acquired proprietary interest in the suit property by adverse possession. In the case of **Kasure –vs- Mwani Investments Ltd and Others [2004] 1 E. A. 82 (CA)**, it was held that;

**“Any person who claims to have been entitled to land by adverse possession may apply to the High Court for an order that he be registered as the proprietor of the land. 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 dispossession the owner or after the discontinuation of possession by the owner of his own volition Wanje –vs- Saikwa (No. 2) [1984] KLR 284 followed. The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession (Githu –vs- Ndete [1984] KLR 776 followed.”**

7. The onus was upon the plaintiff to prove on a balance of probability that he has been in exclusive possession of the suit openly and continuously for 12 years. The plaintiff has claimed that he entered into possession of the suit property in January, 1996 after the same was sold to him by the deceased, Simeon Okiri Bolo. The plaintiff has claimed further that upon taking possession of the suit property, he set up his homestead thereon and he has also been carrying out agricultural activities on a portion thereof. The defendants have denied the plaintiff's claim that the suit property was sold to him by the deceased. The defendants have also denied that the plaintiff has at any one time been in possession of the suit property. The 2<sup>nd</sup> defendant has contended that before he purchased the suit property from the 1<sup>st</sup> defendant he inspected the suit property and found it vacant. The 2<sup>nd</sup> defendant contended that upon transfer of the suit property to him, he took possession thereof and he has remained in such possession to date. The defendants stated in their affidavits that the plaintiff had not placed any evidence before the court in proof of his possession of the suit property. The plaintiff did not file a supplementary or further affidavit in response to the averments in the defendants' affidavits regarding the status of the suit property more particularly whether the same was occupied by the plaintiff or the 2<sup>nd</sup> defendant.
8. I am in agreement with the submissions by the defendants that on the material before the court, it is not clear as to when the plaintiff entered the suit property if at all he did. On one hand, the plaintiff has claimed that he entered into the suit property in the year 1996 after he purchased the

same from the deceased. On the other hand, the plaintiff has claimed that he made a refund of kshs. 13,000/= on 13<sup>th</sup> February 2003 to one, John Ondijo Oyieko whose father had purchased the property from the deceased. It is not clear therefore whether the plaintiff purchased the property from the deceased in the year 1996 or from John Ondijo Oyieko in the year 2003 after the death of the deceased who died on 5<sup>th</sup> September 1996. In his affidavit sworn on 2<sup>nd</sup> July 2012 in support of his application for revocation of grant of letters of administration that was issued to the 1<sup>st</sup> defendant, the plaintiff stated in paragraph 4 thereof that he paid kshs. 13,000/= for the suit property. A copy of the acknowledgement of receipt of the said payment that was attached to the said affidavit as "T001" and which is attached to the affidavit in support of the present application as "T001(a)" shows that the payment was made on 13<sup>th</sup> February 2003 to one, John Ondijo Oyieko. The letter dated 11<sup>th</sup> May 2012 from the chief Kobuya location which is addressed "to whom it may concern" which is attached to the plaintiff's affidavit filed herein as exhibit "T003(a)" also indicates that the plaintiff purchased the suit property on "2<sup>nd</sup> day of January, 2003").

9. From the foregoing, it is not certain as to when the plaintiff purchased the suit property and from whom. Since the date of the purchase of the suit property by the plaintiff is not certain, the same uncertainty clouds his date of occupation or entry if at all in the suit property assuming that such entry could only have taken place following the purchase of the property. That said, the plaintiff's claim is not based on the agreement for sale that he entered into with the deceased. It is for adverse possession. The agreement for sale that I have discussed at length above would only be a pointer as to when if at all the plaintiff entered and took possession of the suit property. Leaving the said agreements aside, the plaintiff had to prove his actual possession of the suit property. The plaintiff who has claimed that he entered the suit property in 1996 and set up his homestead thereon in addition to carrying out agricultural activities on the same did not place any evidence before the court to prove his occupation of the suit property. There is no evidence before me of any homestead or agricultural undertakings on the suit property. The plaintiff did not produce such evidence even after being challenged expressly by the defendants in their replying affidavit to do so.
10. In the absence of any evidence of the plaintiff's occupation of the suit property, I am inclined to agree with the defendants that the plaintiff has not been in occupation of the suit property. The 2<sup>nd</sup> defendant's contention that he purchased the suit property in vacant possession has not been challenged by the plaintiff. I don't think that the 2<sup>nd</sup> defendant would have purchased the suit property if the plaintiff's homestead was situated thereon. The plaintiff has not claimed that there has been an attempt to evict him from the suit property. From the totality of the foregoing, I am not satisfied that the plaintiff is in occupation of the suit property and that he has had such occupation for 12 years.
11. The upshot of the foregoing is that the plaintiff has failed to prove his case against the defendants on a balance of probability. The Originating Summons dated 7<sup>th</sup> February 2013 has no merit. The same is dismissed with costs to the defendants.

**Delivered, signed and dated at KISII this 13<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Bunde for the plaintiff

Mr. Bigogo h/b for Oguttu for the defendants

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**