



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NO.54 OF 2021

ANTIPA MOLO OONGO.....PLAINTIFF

VERSUS

PETER OCHIENG CHORE.....1ST DEFENDANT

MAURICE ACHOLA CHORE.....2ND DEFENDANT

DANIEL AKOTH CHORE.....3RD DEFENDANT

JUDGEMENT

Introduction

1. By way of an originating summons dated 6/01/2014, the plaintiff instituted suit against the defendants. It was the gravamen of his claim that he was an adverse possessor and purchaser of land parcel number **UYOMA/KATWENGA/931** (“**the suit property**”) which was registered in the names of the defendants and that the vendor, one Akumu Achama had erroneously transferred to him land parcel number **UYOMA/KATWENGA/2883** instead of the suit property. He prayed for the court to declare him an adverse possessor of the suit property and transfer **UYOMA/KATWENGA/2883** to the defendants and transfer the suit property to him.

2. By way of a replying affidavit dated 24/02/2014, the defendants denied the plaintiff’s claim and asserted that the plaintiff had purchased **UYOMA/KATWENGA/2883** from their Uncle Akumu Achama and not the suit property and that the plaintiff had never been in occupation and possession of the suit property.

3. The plaintiff filed a supplementary dated 15/04/2015 in which he denied the defendants assertions.

4. The defendants filed a further affidavit dated 1/07/2019.

The plaintiff’s case and evidence

5. The plaintiff’s case is contained in his originating summons and affidavit in its support dated 23/12/2013, supplementary affidavit, witness statement dated 18/03/2021, documents produced as “**P Exh 1 to 5**” and oral evidence tendered in court during the hearing of his case.

6. By a power of attorney dated 17/11/2017 and a written authority dated 8/03/2019, the plaintiff appointed his nephew one John Apiyo Agida to act for him in this suit.

7. He testified as “**PW 1**”. It was his testimony that on 2/08/2000, the defendants fraudulently registered the suit property in their names. It was the plaintiff’s case that there was an error in the registration of the suit property and that of **UYOMA/KATWENGA/2883**; Akumu Achama had mistakenly registered **UYOMA/KATWENGA/2883** in the name of the plaintiff instead of the suit property.

8. It was his testimony that he purchased the suit property from Akumu Achama on 2/06/ 1972 and that he had occupied it from the date of purchase to the year 2004.

9. He testified that he had cultivated the suit property together with his two brothers; Wilson Okuro Oongo and Charles Adede Oongo from 1972 to 2004. It was his testimony that though he resided in a place called Asembo, his brother Wilson Okuro Oongo had resided on the suit property from 1974 to 1991. While his other brother Charles Adede Oongo and his wives had resided on the suit property upto 2004 before their untimely demise. It was his testimony that his family ceased occupation and possession of the suit property in the year 2004.

10. It was the plaintiffs testimony that he had filed a dispute at Bondo District Land Disputes Tribunal on 2/3/2006 and that the Tribunal by

its judgement, cancelled the defendants' title documents to the suit property. It was the plaintiff's case that the defendants appealed to the Provincial Land Disputes Appeals Committee and that the decision of the Tribunal was upheld by the Committee. It was the plaintiff's assertions that the decision of the Tribunal and Committee were respectively adopted by Bondo Magistrates Court and Kisumu High Court.

11. It was the plaintiffs' case that the defendants acquired title documents to the suit property without obtaining Grant of Letters of Administration.

The defendants' case and evidence

12. The Defendants' case is contained in their replying affidavit dated 24/02/2014, further affidavit dated 1/07/2019, documents produced as "D Exh 1 to 3" and oral evidence tendered in court during the hearing.

13. The defendants' testimony was led by the 1st defendant who testified as "DW 1". In summary, it was his testimony that in 1973, their deceased uncle Akumu Achama sold **UYOMA/KATWENGA/2883** to the plaintiff and that the plaintiff had neither occupied nor cultivated either the suit property or **UYOMA/KATWENGA/2883** and that his uncle had used the suit property for over 40 years and that upon his demise in the year 1984, the defendants carried out probate proceedings on his estate and that they [defendant's] had the suit property registered in their names.

14. It was his testimony that it was their uncle's wife, one Masela Akumu who had transferred the suit property to the defendants.

15. In cross examination, he admitted that he did not obtain Grant of Letters of Administration and that he and his co-defendants had transferred the suit property to their names through a process he termed as "succession through lands office".

16. In re-examination, he testified that the the plaintiff's brothers had lived on the suit property with the understanding that they would be given an alternate parcel of land.

The plaintiff's submissions

17. The Plaintiff filed written submissions dated 2/12/2021 in which he reiterated the averments contained in his pleadings and oral evidence. He submitted that he had proved that he purchased the suit property from Akumu Achama. He urged the court to allow his suit as prayed.

The defendants' submissions

18. The defendants filed their written submissions dated 31/01/2022. In their submissions, they identified one issue for determination; whether the plaintiff is entitled to the orders sought.

19. In their submissions, the defendants elaborated on the legal and jurisprudential framework of adverse possession. They placed reliance on **Sections 7,13, 37 and 38 of the Limitation of Actions Act and Order 37 of the Civil Procedure Rules** and several authorities including **Gabriel Mbui v Mukindia Maranya [1993] eKLR, Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR, Kweyu v Omutut [1990] KLR 709.**

20. The defendants asserted that the plaintiff did not have a valid Sale Agreement. Further, the defendants submitted that the plaintiff had not satisfied the court that he had met all the conditions necessary to acquire the suit property by way of adverse possession.

21. They submitted that the plaintiff's supplementary list and bundle of documents dated 2/12/2021 could not form part of pleadings. In support of this, they placed reliance on the case of **Peter Simiyu v National Industrial Credit Bank and another [2020] eKLR** where the court held that evidence cannot to be introduced by way of submissions.

Analysis and determination

22. I have considered the pleadings together with written submissions and evidence tendered. The key issues falling for determination are;(i) Whether the plaintiff's supplementary list of documents dated 2/12/2021 is properly on record(ii)Whether the suit is properly before this court (iii)Whether fraud was pleaded by the plaintiff (iv) Whether the plaintiff was a purchaser of the suit property (v) Whether the plaintiff has established a claim of adverse possession(vi) Whether the plaintiff is entitled to the orders sought and, (vii) Who shall bear the costs of the suit. This court shall make sequential pronouncements on the seven issues.

23. The 1st issue is that the plaintiff filed a supplementary list and bundle of documents dated 2/12/2021 without leave of the court. **Order 3 Rule 2 of the Civil Procedure Rules** provides that the documents a party intends to rely upon during the hearing of the suit shall be filed together with the plaint. The intent of discovery of documents is to ensure *parties are provided with relevant documentary material well before the trial so as to assist them in appraising the strengths or weaknesses of their cases*. This position was upheld by the courts in the cases of **Concord Insurance Co. Ltd -vs- NIC Bank Ltd [2013] eKLR and Leslie Okubo Atuma -vs- National Bank of Kenya Ltd [2015] eKLR**. **These documents were filed after the hearing of the suit and the defendants will be highly prejudiced if they are admitted. I find that the list and bundle of documents dated 2/12/2021 are improperly on record and in accordance with the provisions of Order 2 Rule 15 of the Civil Procedure Rules, I strike them out from the court record.**

24. On the 2nd issue, the plaintiff filed suit on 2/03/2006 in Bondo District Land Disputes Tribunal and his claim was successful. Dissatisfied by this decision, the defendants appealed to the Provincial Land Disputes Appeals Committee Nyanza in Land Appeal Case Number 329 of 2006.

25. In the present case, parties have produced the proceedings of the Tribunal and Committee. In the Tribunal, the plaintiff's claim was allowed. However, on appeal, the Committee rightfully so, held that it did not have jurisdiction to preside over disputes on registered parcels of land. It gave the parties a right of appeal hence this suit. The parties did not produce evidence to demonstrate that the decisions of the Tribunal and Committee were adopted by the court and therefore it is the finding of this court that this suit is properly before it.

26. The 3rd issue is on the plaintiff's pleadings, the plaintiff in his pleadings alleged that the defendants had fraudulently transferred the suit property to their names. However, he did not specifically plead fraud or illegality. It is trite law that fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. The settled law has been upheld in several Court of Appeal decisions; **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)**, **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR (Civil Appeal No 132 of 2005)** and **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**.

27. During hearing, it emerged that the defendants had not obtained Grant of Letters of Administration to the Estate of Akumu Achama who was the previous registered proprietor of the suit property. It is settled law that parties are bound by their pleadings and because the issue was not specifically pleaded, this court will refrain from determining this issue and parties are at liberty to raise this issue in a different forum.

28. The 4th issue is whether the plaintiff was a purchaser of the suit property. The plaintiff testified that sometimes in 1972, he purchased the suit property from Akumu Achama. Nevertheless, during land registration in the Section, he was erroneously registered as the proprietor of **UYOMA/KATWENGA/2883** instead of the suit property. He produced as "**P Exh 1**" a Sale Agreement as evidence of purchase. During cross examination, he testified that the Sale Agreement did not disclose that he purchased the suit property. Though the agreement meets the provisions of **Section 3(3) of the Law of Contract Act**, it does not disclose the property that was the subject of purchase.

29. The parties are not in consensus on which property the plaintiff purchased; it is the plaintiff's case that he purchased the suit property while it is the defendants' case that the plaintiff purchased **UYOMA/KATWENGA/2883**.

30. The register of the suit property was opened in 1977 and it was not possible for the particulars of the suit property to be particularised in the Sale Agreement. Nevertheless, the land adjudication process was a laborious process and it involved a recording officer, a demarcation officer and an adjudication officer with several dispute resolution mechanisms. The plaintiff has not adduced evidence of the circumstances that led to the Akumu Achama being registered as the registered owner of the suit land and him being registered as the registered owner of **UYOMA/KATWENGA/2883**. The fact that he was registered as the proprietor of **UYOMA/KATWENGA/2883** and not the suit property in my view infers that he purchased **UYOMA/KATWENGA/2883** and not the suit property. It is the finding of this court on this issue that the plaintiff did not purchase the suit property.

31. On the 5th issue, the legal framework of the doctrine of adverse possession is provided for in various statutory provisions including **Sections 7,13, 17 and 38 (1) and (2) of the Limitation of Actions Act** and **Section 28 (h) of the Land Registration Act** and judicial decisions.

32. In the case of **Sammy Mwangangi & 10 others vs Commissioner of Lands & 3 others [2021] eKLR**, the Supreme Court of Kenya held that the principles of adverse possession are well settled. In the case of **Mtana Lewa vs. Kahindi Ngala (2015) eKLR**, the Court of Appeal held as follows:

"The process springs into action essentially by default or inaction of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act..."

33. It is a principle of adverse possession that a plaintiff must prove that he had been in continuous and uninterrupted possession of the land for at least 12 years. It is the plaintiff's case in his originating summons, that he had been in occupation of the suit property from 1972. In his supplementary affidavit, it was his case that he, together with his brothers; Charles Adede Oongo and Wilson Okuro Oongo started cultivating the suit property from the year 1972.

34. It was his case that he resided at a place called Asembo while his brother Wilson resided on the suit property upto the year 1991. As for his brother Charles, it was his testimony that Charles and his family resided on the suit property upto the year 2004. He asserted that his brother Charles and his family had lived on the suit property for a period of 32 years before his untimely death and that of his wives. Upon Charles's death, his children vacated the suit property in the year 2004. It was his testimony that his occupation on the suit property was interrupted in the year 2004.

35. In the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR**, Kuloba J. as he then was, held as follows;

"...the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years next preceding the suit..."

36. From the pleadings, the plaintiff never resided in the suit property, his brother Wilson last resided on the suit property 22 years prior to the time the plaintiff filed suit while his brother Charles and his children last resided on the suit property 9 years prior to the time the plaintiff filed suit. Having failed to prove that he had been in continuous and uninterrupted possession of the suit property for at least 12 years prior to the time he filed suit, it is my finding that the plaintiff has not proved that he was an adverse possessor of the suit property.

37. The court having come to the finding that the plaintiff has not proved his case on a balance of probabilities, it therefore follows that the plaintiff is not entitled to the orders sought in the plaint and in the absence of special circumstances, the general principle that costs follow

the event will apply meaning the plaintiff shall bear the costs of the suit.

38. Ultimately, the court finds that the plaintiff has failed to prove his case against the defendants to the standard required by the law. The orders sought are declined and the plaintiff shall bear the costs of this suit.

39. It is so ordered.

Judgement delivered virtually.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF FEBRUARY, 2022

In the presence of:

Mr. Anuro for the defendants.

No appearance for the plaintiff

Court Assistant – Sarah Ooro.

HON. A.Y KOROSS

JUDGE

17/2/2022