



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL SUIT NO. 91 OF 2006 (O.S)

ENOSH ABUYA ACHARPLAINTIFF

VERSUS

ROSE AOKODEFENDANT

JUDGMENT

1. The plaintiff moved this court on 30th June 2006 by way of Originating Summons of the same date seeking:- a declaration that he is entitled to be registered as the proprietor of a portion measuring 100feet by 100feet of all that parcel of land known as LR No. Kamagambo/Kanyajuok/10, an order for the subdivision of the said parcel of land into two (2) portions and the registration of a portion thereof measuring 100 feet by 100 feet hereinafter referred to only as “the suit property” into his name. In his affidavit in support of the Originating summons, the plaintiff stated that; sometimes in the year 1996, he purchased a portion of all the parcel of land known as LR No. Kanyamgambo/Kanyajuok/10 (“hereinafter referred to as “**Plot No. 10**”) measuring 100 feet by 100feet (“**the suit property**”) from one, Joseph Okal Nyangowa, deceased. At the time, Plot No. 10 was registered in the name of the said Joseph Okal Nyangowa and his brother, one, Isaya Owino Nyangowa. He purchased the suit property at a consideration of kshs. 30,000/= . He took possession of the suit property immediately the sale transaction was concluded on 15th July 1996 and remained in such possession until the year 2006 when the defendant herein trespassed into the suit property and started interfering with his occupation.
2. The defendant entered appearance and filed a replying affidavit sworn on 31st July 2006. In her affidavit, in opposition to the plaintiff’s claim herein, the defendant stated that Plot No. 10 was at all material times registered in the names of Joseph Okal Nyangowa and Isaya Owino Nyangowa both deceased and that at no time did the two deceased persons jointly sell to the plaintiff a portion of the said parcel of land namely, the suit property. The defendant denied that the plaintiff has acquired title to the suit property by adverse possession contending that the plaintiff has not had possession of the suit property for the prescribed period of time. The defendant claimed that Plot No. 10 belongs to the estates of Joseph Okal Nyangowa and Isaya Owino Nyangowa and that if the plaintiff had been in occupation of the suit property as claimed, such occupation amounted to intermeddling in the estates of deceased persons.
3. The defendants’ replying affidavit was struck out by the court on 8th March 2012 for failure to do discovery within the time that had been set by the court. This suit was set down for formal proof on 22nd May 2013. Although the defendant’s advocate was served with a hearing notice neither the defendant nor her advocate appeared in court for the hearing. The plaintiff gave evidence and

closed his case without calling any witness. The plaintiff testified that he purchased the suit property from Joseph Okal Nyangowa deceased who was the husband of the defendant herein at a consideration of kshs. 30,000.00. The suit property was a portion of Plot No. 10 and it measured 100 feet by 100 feet. Plot No. 10 was subsequently sub-divided which sub-division gave rise to LR No. Kamagambo/Kanyajuok/1317 (“Plot No. 1317”) and LR NO. Kamagambo/Kanyajuok/1318 (“Plot No. 1318”). Plot No. 1317 was registered in the name of Joseph Okal Nyangowa and Isaya Owino Nyangowa who were the proprietors of Plot No. 10 while Plot No. 1318 was registered in the name of one, Odindo Alela. The plaintiff stated that the suit property remained on Plot No. 1317. He purchased the suit property through two (2) agreements for sale. The first agreement for was made on 15th July 1996 and the second one, on 8th October 1999 and he paid the full purchase price to the seller, Joseph Okal Nyangowa deceased. He carried out a search and also obtained a copy of the register for Plot No. 1317. The certificate of official search and a copy of the said register show that that Plot No. 1317 is registered in the names of, Joseph Okal Nyangowa and Isaya Owino Nyangowa. He occupied the suit property until the time when Joseph Nyangowa died in the year 2002 after which the defendant evicted him and/or chased him away from the suit property on which he used to carry out cultivation. The defendant proceeded to sell the suit property to a third party. The plaintiff contended that he is entitled to a portion measuring 100feet by 100feet of Plot No. 1317 more particularly the portion of that plot that belongs to the defendant. The plaintiff produced in evidence as exhibits, copies of the agreements for sale that he had entered into with Joseph Okal Nyangowa, deceased, a certified copy of the register for Plot No. 1317 dated 25th April 2006 and a copy of a certificate of official search in respect of Plot No. 1317. After the close of the plaintiff’s case, the plaintiffs advocate was allowed on application to file written submissions which submissions were filed on 27th June 2013.

4. I have considered the Originating Summons herein together with the supporting affidavit. I have also considered the evidence tendered by the plaintiff and the exhibits produced. According to the reliefs sought in the Originating summons, the plaintiff seeks to be registered as the proprietor of a portion measuring 100feet by 100feet (“the suit property”) of all that parcel of land known as LR. No. Kamagambo/Kajuok/10 (“**Plot No. 10**”) which he claims to have acquired by adverse possession. For a claim to land by adverse possession to succeed, the claimant must prove that he has been in open continuous and uninterrupted possession of the claimed land for a period of not less than 12 years and that his possession has been adverse to the interest of the registered owner of the said land. I am of the opinion that the plaintiff has failed to satisfy these conditions. The plaintiff purchased the suit property on 15th July 1996 from the defendant’s husband Joseph Okal Nyangowa, deceased. The deceased did not transfer the suit property to the plaintiff during his lifetime. After the deceased’s death in the year 2002, the defendant evicted and/or chased the plaintiff away from the suit property. It is this action by the defendant that prompted the filing of this suit. It is clear from the foregoing that as at the time the plaintiff was evicted from the suit property in the year 2002, the plaintiff had not been in occupation of the suit property for a period of 12 years. The plaintiff had infact occupied the suit property for only 6 years. It follows therefore that no prescriptive rights had accrued to the plaintiff as at the time when he was evicted from the suit property on the basis of which he can maintain a suit for adverse possession.
5. I have also observed from the evidence adduced by the plaintiff that Plot No. 10 is no longer in existence the title thereof having been closed on sub-division that gave rise to Plot No. 1317 and Plot No. 1318. The suit property is therefore a portion of Plot No. 1317 and not Plot No. 10. The relief sought in the Originating Summons which seeks the registration in the name of the plaintiff a portion measuring 100feet by 100feet of Plot No. 10 cannot therefore be granted. Again, a claim for adverse possession can only be lodged against the registered owner of land. In this case, the evidence adduced by the plaintiff shows that Plot No. 1317 a portion of which is being claimed by the plaintiff is registered in the names of Joseph Okal Nyangowa and Isaya Owino Nyangowa both deceased. This suit is only maintainable against the estate of the two deceased persons aforesaid. There is no evidence that the defendant herein is the legal representative of the estate of Joseph Okal Nyangowa. In the absence of such proof, the orders sought would not have been issued even if the plaintiff had proved that he has been in occupation of the suit property for uninterrupted period of more than 12 years.
6. Due to the foregoing, it is my finding that the plaintiff has failed to prove his claim against the

defendant to the required standard. The plaintiff's suit is therefore dismissed. Since the suit was not defended, each party shall bear its own costs.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Soire h/b for Sagwe for the Plaintiff

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE