



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 172 of 2010

IN THE MATTER OF SECTION 37 OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

AND

IN THE MATTER OF THE REGISTERED LANDS ACT (CAP 300 LAWS OF KENYA)

AND

IN THE MATTER OF ORDER XXXVI RULE 3D AND 3F CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN APPLICATION FOR THE DECLARATION OF ACQUISITION BY ADVERSE POSSESSION OF LAND REGISTERED UNDER THE REGISTERED LAND ACT.

BETWEEN

HELLEN ADHIAMBO OMORO PLAINTIFF

AND

FILEMON ONDIEK KIAGE 1ST DEFENDANT

JOSEPH ODHIAMBO ONDIEK 2ND DEFENDANT

JUDGMENT

1. Hellen Adhiambo Omoro, the plaintiff herein, commenced these proceedings by way of O.S dated 14th May 2010 for the determination of the following issues concerning Land Parcel No. W. Kasipul/Konyango/Kokal/1601.

- Whether there was a contract of sale of land between the plaintiff and the deceased proprietor concerning a portion of land PNO. W. Kasipul/Konyango-Kokal/1601? And if so what was the consideration thereof and was the same paid in full?*
- Whether the deceased proprietor put the plaintiff in possession or occupation thereof; and if so when did the plaintiff start to occupy the same;*

3. *Whether the said occupation and possession of the portion measuring 50 feet by 100 feet can now amount to adverse possession, and if so what is the effect thereof?*
4. *Whether Filemon Ondiek Kiage, now registered as the proprietor on second registration by virtue of being the administrator of the estate of Kiage Ayata should fulfill the obligations of the deceased or not?*
5. *Whether an injunction should issue against the defendants, their agents, servants or anybody deriving authority from them, restraining them from evicting, dispossessing or in any way interfering with the plaintiff's occupation, use and quiet enjoyment of the portion measuring 50 feet by 100 feet of the suit land.*
6. *Whether the defendants should be ordered to pay compensation to the plaintiff for any losses incurred through the acts of the 2nd defendant in refusing to transfer to the plaintiff the suit land.*
7. *Whether the defendants should pay the costs of this suit.*
8. *That such orders may be issued by the court as may attain the ends of justice.*

2. The O.S is supported by the affidavit sworn by the plaintiff on 14th May 2010. The O.S was served upon the 2nd defendant's advocates, M/s Maurice Onyino on 25th May 2010. The said firm of advocates entered appearance on 7th July 2010. There is however no evidence that the 1st defendant, Filemon Ondiek Kiage was served.

3. The matter was fixed for directions on 24th October 2011. On that day, only Mr. G.S. Okoth appeared but there was no appearance for either defendant. Though Mr. Okoth informed the court that the defendants had been served for the directions, the court has subsequently established that there is no affidavit of service on the file. On the 24th October 2011, the court acting under the mistaken impression that all parties had been served, directed that the OS and the accompanying affidavit were to be treated as a plaint and because the defendants and their counsel were absent, the plaintiff was to file and serve written submissions within 30 days from that date. The written submissions together with relevant authorities were duly filed on 24th November 2011. There is no evidence on the record to show that a copy of these submissions was served upon the two defendants in this case or even on the 2nd defendant's advocates M/s Maurice Onyino Advocate.

4. It has thus dawned on the court that the defendants in this case are being condemned unheard because there is no evidence on record to show that the 1st defendant was ever served with the O.S. And for both defendants, there is no evidence that they were ever served with the Notice for the directions slated for 24th October 2011. Infact on the 14th February 2012, a representative of M/s G.S. Okoth took an ex-parte date at the registry for 8th March 2012. It was thus incumbent upon the plaintiff through her advocate to serve the defendants with a notice for the 8th March 2012 as directed by the Deputy Registrar of this court.

5. In the circumstances of this case, I am of the considered view that there has been a serious breach of the defendants' rights to be heard in this matter as they have not been accorded a fair hearing in terms of **Article 50 (1) of the Constitution of Kenya, 2010.**

6. Accordingly, and in the interests of justice, I hereby set aside all orders made by myself culminating in the hearing of this matter ex parte. The case shall therefore be heard afresh on a date to be taken at the registry. Costs of the suit todate shall abide the outcome of the fresh hearing of this case.

7. It is so ordered.

Dated and delivered at Kisii this 25th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Ongoso (present) for Plaintiff

Mr. Onyino (absent) for 1st Defendant

Mr. Onyino (absent) for 2nd Defendant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.