



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 93 OF 2006 (O.S.)

GIDEON S. MASINJILA APPLICANT

VERSUS

TIMEOH S. M. MASINJILA RESPONDENT

JUDGMENT

The applicant brought this suit by way of originating summons seeking a declaration of this court to the effect that he had acquired by adverse possession the title in respect of the parcel of land known as Butsotso/Shikoti/1934 (the suit land). The applicant alleges that in 1986, he entered into an agreement with the respondent whereby he agreed to exchange parcel No. Idakho/Shikulu/975 with the suit parcel of land. He averred that after executing the said agreement, in performance of the said agreement, the applicant took possession of the suit parcel of land whilst the respondent took possession of the parcel of land that was formerly owned by the applicant. According to the applicant, the respondent had refused to facilitate the transfer of the suit land into his name. The applicant stated that the respondent had deliberately failed to transfer the said parcel of land in order to frustrate the agreement. It is the applicant's case that despite the respondent's failure to transfer the suit parcel of land to him, the applicant has been in exclusive, peaceful and continuous occupation of the suit land since 1986 to date (a period of more than twelve (12) years) and therefore he is entitled to be declared to be in adverse possession of the suit parcel of land. The applicant averred that the respondent's title to the suit parcel of land had been extinguished by virtue of the operation of the law. The applicant therefore urged the court to reach a finding in his favour and therefore declare him to be the owner of the suit land by virtue of adverse possession and the operation of the law.

The suit is opposed. The respondent filed a replying affidavit denying that he ever entered into an agreement with the applicant whereby he agreed to exchange the suit land with the parcel of land known as Idakho/Shikulu/975. He accused the applicant for having breached the agreement by failing to pay the balance of the agreed consideration of Kshs.31,000/= out of Kshs. 65,000/= which the applicant was required to pay to the respondent on account of the fact that the suit parcel of land was larger in acreage than the parcel of land that was being exchanged. The respondent denied the allegation by the applicant to the effect that he had been in peaceful, continuous and uninterrupted occupation of the suit parcel of land for a period of more than twelve (12) years. He explained that in the period that the applicant claims to have been in adverse occupation of the suit parcel of the land, the respondent was fending off several cases which had been filed by one Lutomiah Teminika Kate which cases were finally resolved in the respondent's favour in 1999. The respondent denied that he ever had the intention of transferring the suit parcel of land to the applicant. He put the applicant to strict proof thereof. He averred that he had constructed houses on the suit parcel of land and was therefore entitled to ownership of the same. He urged the court to dismiss the applicant's suit with costs.

Prior to the hearing of this case, counsel for the parties herein agreed that the dispute be determined by

the parties adducing viva voce evidence. The hearing commenced before Lenaola, J. On 16th of December, 2010, the learned judge heard the evidence of the applicant. The applicant closed his case. The hearing of the defence case was scheduled for 16th May, 2011. By that date, Lenaola, J. no longer exercised jurisdiction in the High Court at Kakamega since he had been transferred to Nairobi. The parties appeared before the present court. They indicated their wish for this court to proceed with the hearing of the case from where it had reached. This court duly proceeded and heard the evidence adduced by the respondent. The respondent closed his case. This court has carefully considered the evidence adduced by both the applicant and the respondent.

The facts of this case are more or less not in dispute. The applicant and respondent are brothers. On 1st November 1986, the applicant and the respondent entered into an agreement whereby the applicant agreed to exchange his parcel of land known as Idakho/Shikulu/975 (but appears in the agreement as parcel No. 795) with the respondent's parcel of land known as Butsotso/Shikoti/1934 (the suit parcel of land) (agreement produced as applicant's exhibit No.1). The applicant's parcel of land was approximately nine (9) acres whilst the respondent's parcel of land was sixteen (16) acres. It appeared that the applicant and the respondent did not initially take into account the difference in acreage of the respective parcels of land when they entered into the first agreement. They did enter into a subsequent agreement whereby the applicant agreed to pay to the respondent a sum of Kshs.65,000/= for the extra acreage. The agreement was produced as applicant's exhibit No.4. It is common ground that the applicant paid the sum of Kshs.34,000/= at the time the subsequent agreement was entered into. It was apparent that the dispute between the applicant and the respondent was caused by the refusal by the applicant to pay the balance of Kshs.31,000/= within the stipulated period. This refusal became a bone of contention between the applicant and the respondent. It led to the breakdown of the brotherly relationship between the applicant and respondent. The respondent, despite earlier indicating that he was willing to transfer the suit parcel of land to the respondent, refused to keep his promise. Meanwhile, in part performance of the agreement the applicant took possession of the suit parcel of land. Whereas the applicant testified that he took possession of the suit land in 1986, the respondent in his testimony stated that the applicant took occupation of the same in 1992. What is not in dispute is that the applicant has been in continuous and uninterrupted occupation of the suit parcel of land for a period more than eighteen (18) years. The respondent on the other hand has been in occupation of the parcel of land formerly owned by the applicant known as Idakho/Shikulu/975.

The respondent purported to refund the applicant the sum of Kshs.34,000/= in 2000 in a bid to revoke the agreement. The applicant on his part, deposited the sum of Kshs.29,000/= into the account of the respondent without the respondent's knowledge on 4th February, 2010 when this suit was pending before this court. Upon evaluating the evidence adduced by both the applicant and the respondent, It was clear to this court that the applicant has been in actual occupation of the suit parcel of land for uninterrupted period of more than eighteen (18) years. It was apparent to the court that in 2000, the respondent changed his mind in regard to the entire exchange agreement. He used the excuse of failure by the applicant to pay the balance of Kshs.31,000/= to attempt to rescind the agreement. However, the respondent was thwarted by the applicant when he attempted to retake occupation of the suit parcel of land.

Has the applicant established his case that he is entitled to ownership of suit parcel of land by adverse possession? The respondent admits that the applicant has been in occupation of the suit parcel of land at least from the year 1992. The respondent took possession of the applicant's parcel of land at nearly the same time. It was clear to the court that the both the applicant and the respondent acquired title of their respective portions of land that they are currently in occupation of by virtue of the operation of the law. They acquired title to their respective portions of land (in the case of the applicant, the suit land) by adverse possession. The respondent disputes that the applicant was in lawful occupation of the suit land. This is because he had given him notice in 2000 of his intention to rescind the contract. Having read the letter which was produced by the respondent as the respondent's exhibit No. 3, this court formed the view that the said letter did not constitute a positive assertion of ownership by the respondent. In **Githu v. Ndeete [1984]KLR 776** at page 780, the Court of Appeal held as follows:

“Assertion of right occurs when the owner takes proceedings or makes an effective entry into the land;

see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act."

In the present case, it was clear that the respondent did not take any positive action to rescind the contract. In any event, he could not have purported to rescind the contract when he was already in occupation of the applicant's former parcel of land.

The issue that this court will have to resolve is whether the applicant paid the agreed balance of Kshs.31,000/= for the extra acreage in the parcel of land that he exchanged with the respondent. It was clear from the evidence that the applicant only paid the sum of Kshs.34,000/= at the time the subsequent agreement was entered into in 1988. By purporting to pay the balance of Kshs.29,000/= more than twenty three (23) years beyond the period he was required to have paid the sum, the applicant was engaging in mischief. This court is of the opinion that the applicant is only entitled to the acreage equivalent to what he paid for. The agreed purchase consideration in the subsequent agreement (applicant's exhibit No.4) was Kshs.10,000/= per acre. The applicant paid for 3.4 acres. He did not pay for 3.1 acres. The respondent is entitled to this acreage.

In the premises therefore, this court holds as follows:

- i) This court declares that the applicant is the owner of 12.6 acres of the parcel of land known as Butsotso/Shikoti/1934 having occupied the same for a period of more than twelve (12) years peacefully, continuously and without any interruption.
- ii) The respondent is hereby declared to be the owner of the parcel of land known as Idakho/Shikukulu/975.
- iii) The respondent is entitled to 3.1 acres in parcel No. Butsotso/Shikoti/1934. This acreage shall be hived off and excised from the suit parcel of land and transferred to the respondent.
- iv) The respondent shall refund to the applicant the sum of Kshs.31,000/= within thirty (30) days of the date of this judgment.
- v) Each party shall bear their own costs.

DATED AT KAKAMEGA THIS 16TH DAY OF MAY, 2011

**L. KIMARU
JUDGE**