



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 95 of 2009

IN THE MATTER OF REGISTERED LAND ACT

BETWEEN

PETER OWINO OPUDO.....APPLICANT

VERSUS

SUSHILA HARBANSLAL KOHLI.....1ST RESPONDENT

NAVAL HARBANSLAL KOHLI.....2ND RESPONDENT

NASHA NAVAL KOHLI.....3RD RESPONDENT

MUNICIPAL COUNCIL OF NAKURU....4TH RESPONDENT

JUDGMENT

In his amended Originating Summons (OS) in this case the plaintiff, Peter Owino Opondo, seeks the following reliefs:-

1. **“THAT the Honourable court be pleased to declare and order that SUSHILA HARBANSLAL KOHLI and NAVAL HARBANSLAL KOHLI be presumed dead.**
2. **THAT the Honourable Court be pleased to declare PETER OWINO OPUDO the applicant herein a beneficiary to NAVAL HARBANSLAL KOHLI and SUSHILA HARBANSLAL KOHLI in all that parcel of land referred to as LR NO. NAKURU MUNICIPALITY BLOCK 8/63.**
3. **THAT amternatively the Honourable court be pleased to declare PETER OWNIO OPUDO the legal and beneficial owner of all that parcel of land known as LR NO. NAKURU/MUNICIPALITY BLOCK 8/63 through adverse possession.**
4. **THAT the Honourable court be pleased to order the Nakuru District Land Registrar to transfer and issue a new title to LR NO. NAKURU MUNICIPALITY BLOCK 8/63 in the name PETER OWINO OPUDO.**
5. **THAT the Honourable court be pleased to nominate and order the Executive Officer and the Chief Magistrate Court of Nakfuru to execute, endorse and sign any conveyance and or transaction in the place of the subjects NAVAL HARBANSLAL KOHLI and SUSHILA HARBANSLAL KOHLI in order to effect transfer of LR. NO. NAKURU MUNICIPALITY BLOCK 8/63 from the names of NAVAL BARBANSLAL KOHLI and SUSHILA HARBANSLAL KOHLI to that of the applicant PETER OWINO OPUDO.**
6. **THAT the cost herein be provided for.”**

It is bases on the grounds that:-

1. **“THAT the applicant was taken in and employed by the subjects to take care of their land and has resided on the land since 1970.**
2. **THAT the subjects are deceased to the best of knowledge of the applicant who cannot obtain their death certificates.**
3. **THAT for thirty nine years now the applicant has resided on the yard alone with his family taking care of the land alone and has not heard from the subjects or their kith and kin or anybody else in relation to the suit land since the year 2002.**
4. **THAT LR NO. NAKURU MUNICIPALITY BLOCK 8/63 where the land is situated is registered in the name of the 1st and 2nd subjects and the same is at risk of waste unless the applicant is registered therein as owner to enable him continue reside (sic) therein taking care of it as the subjects left him to do.**
5. **THAT the applicant was taken in by the subjects who are no more and he is the only one with a legitimate interest and entitlement in the said land as beneficiary and through adverse possession and is prejudiced in the circumstances unless the orders south are granted.”**

In his affidavit in support of the application the plaintiff claimed that in 1970 when he was only 15 years old the late Harbanslal Ramnath Kohli (the deceased) who was then residing with his family in Shah Estate Nakuru employed him as a houseboy at a salary of Kshs.300/- per month.

For his residence the deceased built for him a house on **Title No. Nakuru Municipality Block 8/63** (the suit land). So he used to work in the deceased's house at Shah Estate during the day and retire every evening to the suit land for the night.

In 1978 the deceased's family moved to Milimani Estate in Nakuru and he continued to work for them while residing on the suit land.

The deceased's widow, Sushila Narbanslal Kohli, the first defendant, died in Nairobi sometimes in November 2001 and on 8th April 2002 the deceased's son Naval Harbanslal Kholi the second defendant also died in Nairobi.

After the deceased's death the suit land had been transferred to the 1st and 2nd defendants.

Rates for the suit land have not been paid for a long time and the Municipal Council of Nakuru the 4th defendant has threatened to sell it to recover the outstanding rates.

That since 2002 when the 3rd defendant paid him Kshs.1,600/- he has not been paid any salary. The deceased's family having left him to take care of the suit land and he has resided on it since 1970 he has acquired title to it by adverse possession.

As the land is now registered in the names of deceased persons and he has resided on it without interruption since 1970, the plaintiff further deposes that he is “the only person with a legitimate claim and entitlement” to the land presently and that it should therefore be transferred to him so that he can continue to peacefully reside on and protect it.

With leave of court the plaintiff served the OS by advertisement in the print media. On 26th May Anil Walia who said that the 1st defendant appointed him as her attorney to protect her interest in this case swore a replying affidavit on behalf of the 1st and 3rd defendants. He

deposed that contrary to the plaintiff's claims, the 1st defendant is alive and well. She resides in U.K. with the 3rd defendant. She left the title to the suit land with him when she went to U.K. and he now has authority to deal with the issue of rates due to the 4th defendant. He said he also knows the plaintiff as an employee of the defendants. He confirmed that the deceased died on 4th April 2000 and the plaintiff attended his cremation as an employee and the 2nd defendant also died later.

In his view as the plaintiff has admittedly been residing on the suit land as an employee his adverse possession claim is misconceived, incompetent and bad in law. He said this is a classic case of an employee trying to grab his master's land.

Even if it is found that the plaintiff ceased to be an employee of the defendants in 2002 when he said the 3rd defendant last paid him, his adverse possession claim can only accrue after the year 2014. With that he prayed for the dismissal of this case with costs.

In response the plaintiff filed a further affidavit in which he dismissed the replying affidavit contending that Anil Valia, the deponent, is an imposter and is not an Attorney of the 1st defendant as he claims.

A.S. Abdulahi, the Town Clerk of the 4th defendant swore a replying affidavit in response to this OS on behalf of the Council. He said the Council's only interest in the suit land is recovery of the arrears of rates which as of last year amounted to Kshs.9,642,137/-.

After directions were taken, the plaintiff and the 1st defendant testified. In his evidence the plaintiff said the deceased employed him in 1970 in Kisumu. In 1972 they moved to Londiani and then to Nakuru in 1974. In 1982 the deceased built for him a servants quarters on the suit land to take care of the suit although he also had guards. In 1992 the deceased sold all his lorries and told the plaintiff he was not going to work from the suit land. He allowed the plaintiff to farm on it. In 1998 his 5 years old daughter Janet Adhiambo died and the deceased allowed him to bury her on the land.

The deceased died in 2000. In 2002 the 2nd defendant became sick and the family moved to Nairobi and he moved with them there. In April 2002 the 2nd defendant died in Nairobi. He remained with the 1st and 3rd defendant. After sometime the two fought and the 1st defendant moved to Anil Valia's home where she stayed for sometime before she migrated to London. Before that she went to the suit land and told him she was leaving it to him. She did not dismiss him or pay him his salary arrears.

After disposing of all the family assets the 3rd defendant went to the suit property in 2002, paid him Kshs.1,600/- and told him he could take the suit land as she was not interested in it. She then also left for London. He has since not heard from them and thinks they are dead. He disputed the Power of Attorney given to Anil Valia and demanded that if the 1st defendant is indeed alive then she should come and testify. If she comes, pays his salary arrears and asks him to leave he has no objection leaving the suit land.

He said he sued the Municipal Council of Nakuru because it took a notice to him demanding Kshs.1,974,231/- but it later on changed and demanded Kshs.9,642,137/- and was threatening to sell the land. He took the first demand notice to Mr. Anil Valia who said he was not interested in the land and that whoever was left with it should pay the rates.

In cross examination in the presence of the 1st defendant after she had come from UK, he dropped his claim that she be declared or presumed dead and demanded an unspecified sum for taking care of the land. He conceded that he is her employee and that he is residing on the land on account of his employment.

The 1st defendant's testimony was short and to the point. Contrary to the plaintiff's allegations, she is alive and well. Sometimes early this

year, a friend from Eldoret who had seen the advertisement of this case in a newspaper rang her. She thereafter gave Mr. Anil Walia a Power of Attorney to take care of her interest. She denied having given the land to the plaintiff. When she left for England in 2005 the plaintiff was working for one Kondolla. At his request she allowed him to continue staying on the land until she got alternative accommodation. Asked to pay him for taking care of the land she retorted that if anything it is the plaintiff who should pay her rent for staying on her land. She denied having left him to take care of the land and said the land was empty and there was nothing to be guarded.

Counsel for the parties based their submissions on their respective clients' averments and evidence as summarized above. I have considered them and the evidence on record. The plaintiff's claim in this suit is twofold that he has acquired title to the suit land by adverse possession and that the first defendant gave him the suit land. Because she has not been seen for a long time she should be presumed dead and the land be transferred to him by the Executive Officer of this court.

It is a very serious thing to claim that someone is dead. One had better have a sound basis before making such a claim. When the claim is found to be hollow, it speaks volumes about the claimant.

I need not waste time on the law on presumption of death. The first defendant is alive and well. When she came to court, instead of apologizing, the plaintiff unflinchingly turned round and asked for payment for taking care of the suit land. Seeing that the plaintiff is a turncoat, I refused to adjourn the hearing to enable him to apply to amend his OS to claim that payment. I dismiss his claim on that ground.

Adverse possession does not arise where the claimant is on the land with the consent of the owner. It therefore follows that the plaintiff's adverse possession claim in this case has absolutely no basis in view of his concession in cross-examination that he is on the suit land on account of his employment and with the consent of the owner. Even if he did not have that consent having ceased to be the 1st defendant's employee only in 2002 adverse possession has not accrued.

This is a frivolous suit which has absolutely no basis. I dismiss it with costs.

DATED and SIGNED this 28th day of April, 2010.

D. K. MARAGA
JUDGE.