



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Case 162 of 2007

ATIANG'A SIALA PLAINTIFF

-VERSUS-

TERESIA ADHIAMBO]

ODHIAMBO SHIKUKU]

OTIENO SHIKUKU] RESPONDENTS

Coram:

Mwera J.

Mwamu for Plaintiff

Orengo for the Defendant

Raymond CC.

JUDGMENT

By the originating summons brought under O36 CPR and S. 3A CPA the applicant Atianga Siala sought orders from this court to the effect that –

- a) he be declared the adverse owner of Plot No. KSU/CHIGA/231 a portion of which he bought, occupied developed and used since 1992 with the knowledge, permission and without the hindrance of the respondents herein.
- b) the respondents be declared legal trustees, being apparent heirs of one Tobias Sikuku Onyango from whom the applicant brought the suit land and they do give beneficial interest therein to the applicant as an adverse possessor.
- c) the respondents be compelled as trustees of the estate of Tobias Sikuku Onyango to specifically perform the sale contract between the applicant and the late Tobias Onyango so that the suit land is duly transferred to the applicant.
- d) in default of compliance with (c) above the court's deputy registrar do sign the requisite documents to effect the desired transfer.

The grounds on which the summons was based included a claim that the applicant had entered into, grazed on cultivated and developed plot no. 231 for over 15 years. That that was done openly and with full knowledge and consent of the respondents over that period without interference from them. He should be granted the orders accordingly. And that the respondents had threatened to invade, trespass and regain the suit land. A supporting affidavit with annexures was filed – mostly centering on the “sale agreement” between the applicant and Tobias Sikuku (Shikuku) Onyango and the payments made thereof – over a period of time.

A further affidavit was sworn and filed on 18.7.2008 appending a certificate of official search to the effect that the suit parcel KSU/CHIGA/231 was registered in the name of one Ndugu Wakoyo since 14.12.1983. That certificate also showed that a restriction was put on the title on 20/5/2008 with remarks “**DECEASED DEATH**” (not clear).

The respondents filed a replying affidavit sworn by the first of them – Teresia Adhiambo Sikuku, the mother of the 2nd and 3rd respondents – Odhiambo and Otieno Sikuku. In essence it was denied that the applicant bought the suit land from Tobias Sikuku, now deceased, the husband of Teresia, and that this land had always been registered in the name of Ndugu Wakoyo. Signatures and thumb-prints appearing on the “sale agreement” as against payments made by the applicant to Tobias, and to Teresia his wife, were denied. Whatever that the affidavits said of both sides is incorporated in the evidence that the court heard while hearing the O.S as if it was a plaint. While the entertaining the O. S. the applicant appeared by Mr. Mwamu, as the plaintiff while Mr. Orengo, represented the respondents as defendants.

The plaintiff (PW1) told the court that he knew the 3 defendants – a mother with her 2 sons, as neighbours in Kolwa Location of Kisumu East. On 4.4.92 the plaintiff entered into a land purchase agreement with the late Tobias Sikuku, husband of Teresia, the 1st defendant in respect of the suit land plot no. 231 for Ksh 25,000/=. The agreement was signed by the plaintiff, Tobias before a local assistant chief and that Teresia thumb-printed the document (Exh. 1 (a) (b) (c)) as the seller’s witness. Initially Ksh 3,000/= was paid but the whole purchase price was paid by 1997 against the signatures of Tobias and at some stage, the 1st defendant (Teresia) thumb-printed the document and received some payment. All the time Tobias went for payment and signed for it, Teresia was present. Then PW1 made a search on plot no. 231 and found that it was in the name of one Ndugu Wakoyo (Exh P2). The court heard that this Ndugu Wakoyo had no children; he never married and Tobias was his step-son (or nephew?). When Ndugu died in 1978 his brother, one Onyango Wakoyo took over the land, then Onyango must have died too, and his son Tobias was thus the one selling the land – even as it remained in Ndugu Wakoyo’s name all the time. That since April 1992 the plaintiff went into occupation growing all kinds of crops, a thing he had even done for the current season only that the defendants got in the way. The court learned that the defendants live and occupy Plot no. 228, which Onyango Wakoyo owned and the acts complained of as against the defendants only began in 1999 after Tobias died. It was alleged that the defendants had declined to petition to administer the estate of Ndugu Wakoyo, so as to facilitate the transfer of the suit land to plaintiff but instead they had resorted to interfering with his use of plot no. 231 since August 2007. The court was urged to find that the defendants are trustees of the late Tobias Sikuku. The plaintiff had tilled the land for 15 years growing crops and trees. At some stage the 2nd and 3rd defendants chased the power company team which came to the plaintiff’s plot no. 231 and even burnt his cassava crop. As a result the 3rd defendant (Otieno) was charged in WINAM SRM CR. C. NO. 2071/07, where he was found guilty and fined Ksh 10,000/=.

At this point the defendants had not acquired the services of counsel so the 1st defendant cross – examined the plaintiff. He maintained that the sale agreement was duly executed and she “signed” as her husband’s witness, as per her identity card number noted there-under – no. 101756168/70. PW1 again went over the process where, to him, the land once registered in the name of Ndugu Wakoyo, “passed” to his brother Onyango Wakoyo who in turn “passed” it to Tobias Sikuku Onyango who then “sold” it to the plaintiff. Tobias never gave a title to him at all.

The court then heard Elizabeth Akinyi Atyang (PW2), a primary school teacher and wife of the plaintiff. She, too, knew the 3 defendants – a mother with her 2 sons. She recalled that on 4.4.92. she was present

when the 1st defendant, with her late husband (Tobias) accompanied a clan elder and one Jared Airo, to the home of a local assistant chief where Tobias and PW1 (the plaintiff) executed an agreement to sell/buy land No. 231 for Ksh 25,000/= - Ksh 3,000/= was paid to Tobias and the 1st defendant (Teresia) thumb-printed the agreement. PW2 was told that she could sign the document at a later stage. Payments to Tobias were made over a period, always in the presence of Teresia. PW2 particularly recalled 7.12.94 when Ksh 500/= was paid over. Payments were signed for by Tobias. Teresia once came to be paid and one John Odhiambo (PW3) witnessed the payment. The witness was firm that Teresia (1st defendant) whom she had known for the last 22 years was present when Tobias sold the land to Atiang (the plaintiff). Up-to 1999 when Tobias died and as late as 2007 the defendants gave no problem to the plaintiff's use of plot no. 231. The plaintiff had all along grown crops on the land and so when he got a letter from a local chief in 2007 that he did not own the land, that shocked him. The defendants started to graze on the land; they burnt down a cassava crop and chased away a power company team that had come to supply electricity to PW1's home over plot no. 231.

In cross – examination by Mr. Orengo, the court heard that the whole purchase agreement comprised four (4) documents signed at different times. To PW2, the land belonged to Ndungu Wakoyo. It was later inherited by Onyango Wakoyo. She did not know if any party petitioned for letters to administer the estate of Ndugu Wakoyo. And the 2nd and 3rd defendants, sons of Teresia (1st defendant) were sued because they had been destroying the plaintiff's crops.

John Odhiambo (PW3), self-employed, also knew the 3 defendants herein as well as the plaintiff for a long time. The plaintiff bought the land in dispute on 4.4.92. The witness was present when due agreement was executed. PW3 also saw Teresia receive one instalment on 4.10.94 on the account of the said sale agreement. She took Ksh 400/= (Exh P3). The plaintiff had all along been growing maize, cassava and sorghum on plot no. 231. Teresia who could not sign had her name appended to the sale agreement (Exh P1).

Teresia Adhiambo Sikuku (DW1, 1st defendant) then testified on her own behalf and on behalf of her 2 sons. When Tobias died Teresia was left on plot no. 206 – belonging to their grand father. Her family has always cultivated a portion of the land in dispute – not all of it. In 2004 the plaintiff began to cultivate the land claiming that he got it from the late Tobias in exchange of employment at a place DW1 described as “Marine Fisheries” where the plaintiff allegedly worked. Tobias was taken there as a cleaner.

DW1 who said that she never went to school, denied that Tobias sold this land to the plaintiff or that she witnessed such a deal. She just thumb-printed a document at “Marine Fisheries”, which was not the sale agreement (Exh P1). The plaintiff never came to or began using the land in 1992. He began doing so in 2004. She had left her identity card at home and that being illiterate Teresia usually thumb-printed documents. She claimed that the plaintiff got her identity card number from the office where he used to work with her late husband, Tobias and that she saw him doing it. Teresia did not tell the court why that was done and when but she said that it was when she visited her late husband's place of work. She denied taking any instalment payment from the plaintiff in presence of John Odhiambo (PW3). However, the 3rd defendant (Otieno) was charged in court for fighting with Elizabeth Atiang (or Etyang) on the subject land – not with malicious damage to property. When the plaintiff began using the land in 2004, Teresia complained to him about it but she did not go to anybody in authority. She did not take out letters to administer the estate of Ndugu Wakoyo but they claim his land because he was their grandfather. After Ndugu died his brother, Thomas Onyango who would have been entitled also died leaving Maria, who also died. Then she added:

“After all these people had died only Odhiambo Wakoyo, who is alive and at home would claim this land. He is my brother-in-law.”

Both sides submitted, when the trial ended.

Mr. Mwamu submitted on behalf of the plaintiff that a valid sale agreement was executed between the

plaintiff and Tobias who had authority to sell plot no. 231 because its owner, Ndugu Wakoyo, died without children and so it passed/reverted to his brother, Onyango, the father of Tobias. That the children of the seller had no right to bar the plaintiff from the land he had openly and notoriously occupied from 1992, in 2007 – after 16 years. Referring to O36 rr 1, 3D CPR, counsel maintained that the plaintiff was in order to take out the O. S under review. The plaintiff had been in occupation for well over the requisite 12 years and going by the sale agreement, occupation started in 1992 and there was no move to disturb it. The cases of Gathwi Murathe –vs- Gakuru Gathumbi – CIVIL APPEAL NO. 49/96, PETER THUO KAIRU –VS- KURIA GICHERU (1988) 2 KAR 111 at 114 were cited.

On their part it was submitted for the defendants that the order the plaintiff seeks to be registered proprietor of plot 231 by virtue of adverse possession cannot issue because the defendants are not the registered owners of that plot. It is in the name of Ndugu Wakoyo (deceased) according to evidence tendered. Mr. Orenge posited that neither the plaintiff nor the defendants had locus standi to litigate over plot no. 231 which to date remains in the name of Ndugu Wakoyo. The plaintiff had no claim against Ndugu Wakoyo’s estate and he could not move against the estate of Tobias Sikuku when there was no party (not even the defendants) with a grant to administer the estate of Tobias. And with the defendants not being the legal representatives of Ndugu Wakoyo, the plaintiff could not validly sue them on account of the land that was/is still in the name of Ndugu Wakoyo and the case of Evans Obino Nyamosi -vs- Ndege Okangi CIVIL APPEAL NO. 32/98 (C.A) was cited in this regard. In the same vein the case of Francis Weta Opwoko & Ors –vs- Alfred Kweyu CIVIL APPEAL 221/02 (C.A) in that it, too, ruled that the parties like the defendants herein not being registered over the land in dispute, plot 231 still in the name of Ndugu Wakoyo, it was futile to sue them with a view to get orders directing them to transfer that land to the plaintiff. They just did not have the capacity to do such a thing. It was added that as such with the defendants not being the true owners of plot no. 231 orders sought do not lie. Further, that Tobias Sikuku from whom the plaintiff “bought” the land was neither its proprietor nor the legal representative of Ndugu Wakoyo, said to have died in 1978.

Counsel questioned the point in time when the claimed adverse possession began – in 1992 as per the plaintiff or 2004 according to the defendants and as against who. The issue of instalment payments came up in the defendant’s submission to the effect that if the last one was on 19.4.1997, then time began to run after this date, according to the case of Sospeter Wanyoike –vs- Waithaka Kahiri (1979) KLR 236. And on making the totals as per payments claimed by the plaintiff, he had only paid Ksh 10,100/= as at 19.4.97 and so he never paid the full purchase price Ksh 25,000/= at all.

The right to recover plot no. 231 could not accrue or be litigated against the defendants at this time at all. They are/were not the registered owners, they are/were not the legal representatives of the registered proprietor Ndugu Wakoyo, and if their interest falls in the future, time does not start running against them until that interest/right precipitates. And for now that is still in the future.

Regarding declaring the defendants trustees of the estate of Tobias Sikuku, it was submitted that the plaintiff had not established how the defendants were “apparent heirs” of Tobias Sikuku and if such a term existed in law at all. That the plaintiff had not demonstrated that he was entitled to be registered over plot 231 by virtue of adverse possession and so the issue of a trust did not arise.

Further, that specific performance could not be ordered in this cause even had there been a valid transaction between him and the deceased Tobias Sikuku because there was no land control board consent within six months from 4.4.92 or any such other applicable time to transfer plot no. 231 (See S. 6 Land Control Board Act Cap. 302). Other cases cited copies thereof were not availed e.g Hirani (Hiram?) Ngaithe Githire –vs- Wanjiku Munge [1977] KLR 50.

In determining this case the court will consider the following:

- i) The status of a sale agreement –vs- title by adverse possession.
- ii) Locus standi and

iii) Conclusion.

i) **Sale Agreements -vs- Adverse Possession:**

A sale agreement need not feature where a party seeks to get title by virtue of S. 38 Limitation of Actions Act (adverse possession) unless it is intended to show the period when that party claims he went into possession and so invoking the O. S procedure under O36 CPR by moving the High Court (S. 38 Cap. 22).

38 (1) --- for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land,

As it is the law one who has occupied and used another's land, openly and without hindrance for 12 years and more, one can seek to oust the title of the registered proprietor. In doing so the applicant shall file an O. S under S. 36 r. 3D CPR and:

(2) The summons shall be supported by an affidavit to which a certified extract of the title to land in question has been annexed."

It does not involve establishing that there was a valid sale contract that falls to be enforced in specific performance as the plaintiff sought in his ground (d) of the O.S, now being treated as a plaint. Two claims one under adverse possession and one based on contract cannot lie side by side in an originating summons of this nature. However it is remarked that in the event a transaction to sell/purchase land started with a sale agreement, which became void as per S. 6 of Land Control Act (for want of consent) then adverse possession begins to run at the end of those six months and in case the applicant has been in open possession and use of the suit land, he could sue for adverse possession after 12 years.

ii) Locus Standi: It is not in dispute that plot no. 231 has always been in the name of Ndugu Wakoyo, now deceased. The late Tobias Sikuku from whom the plaintiff claims to have bought the land did not petition to succeed or administer it as part of the estate of Ndugu Wakoyo. Accordingly he could not purport to sell it to the plaintiff. He just did not have the capacity to do so. In the same way that the defendants have as at this time no capacity to litigate over the land of Ndugu Wakoyo. They have not petitioned for letters of grant to administer his estate and therefore the plaintiff sued the wrong parties. They may agitate over it as relatives of the late Ndugu Wakoyo. Their interest over plot 231 may be in equity for now, but they have no legal right/interest so far. Even as relatives of Tobias Sikuku, nothing is traced through him to Ndugu Wakoyo, that would entitle someone, here the plaintiff, to sue the defendants in respect of plot no. 231. There is just no link.

iii) Conclusion: The plaintiff claims to have bought plot no. 231 from Tobias Sikuku and apparently he did not fully pay Ksh 25,000/=. But he was buying the land from a person who had no capacity to give a good title to him. Tobias was not the registered owner. To date the land is in the name of Ndugu Wakoyo, deceased. Tobias did not become Ndugu's legal representative or in any way acquire legal interest in plot no. 231 by which the defendants can be given the novel description of his apparent heirs. So such a sale agreement was invalid in all ways. It could never be enforced as it stands. Even if it had been valid, it became void six months after 19.4.97 when the last payment was allegedly made, without the requisite land control board consent. And in any event as noted above a claim on a land sale contract does not lie side by side with a claim on account of adverse possession.

And even with all the above, the plaintiff could not obtain orders to get a title by adverse possession against the defendants. First and foremost they are not the registered proprietors of plot no. 231. Ndugu Wakoyo is. Then even had they been the registered proprietors, after the sale agreement was last acknowledged on 19.4.97, and the plaintiff did not obtain due consent within six months, adverse possession if it began to run after the six months from 19.4.97, twelve or more years had not expired by 27.11.2007 when this O. S was filed to entitle one to title by adverse possession. Only ten (10) years and eleven (11) months had gone by.

In sum this O. S fails in all respects with costs to the defendants.

Judgment accordingly.

Delivered on 14.5.2009.

J. W. MWERA

JUDGE

JWM/hao