

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT 178 OF 1999

ROBERT OMUMU OKANG'A alias

ROBERT OBINGO OKANG'A.....PLAINTIFF

V E R S U S

ISAIAH INDETIES OJIANGU.....DEFENDANT

JUDGEMENT

The Plaintiff, **Robert Okanga alias Robert Obingo Okanga**, filed suit on 18.4.2000 by way of Originating Summons of the same date against **Isaiah Indeties Ojiangu**, the Defendant seeking declarations whether he had acquired the whole of the parcel of land comprised in land title No. Marama/Shiatsala/1298 (the suit land) by virtue of adverse possession of more than 12 years and whether the title of the Defendant had been extinguished by the Plaintiff's adverse possession and whether the Plaintiff should be registered as the proprietor of the said land and whether the registration of the Defendant should be cancelled. Besides these declarations, no order was sought or prayed for. The Defendant did not enter appearance or file defence. The case proceeded to hearing ex-parte on 25-4-2005.

In his evidence, the Plaintiff stated that he originally owned the suit land and that he leased a portion of one acre of it to the Defendant who demanded the title Deed and thereafter fraudulently transferred the said land to himself. This is not borne out by evidence as the original owner of the land was Obingu Okang'a whereas the Plaintiff's name is Robert Omumu Okang'a alias Robert Obingu Okanga. Nor is the plaintiff's oral evidence consistent with the Plaintiff's affidavit evidence in which the latter alleged he sold one acre of the said land to the Defendant.

Though the plaintiff's name is not very dissimilar to that of the original owner, the two names are not the same. No evidence was led to explain these dissimilarities and in their face it cannot be assumed that the name of the original registered owner was necessarily that of the plaintiff. At any rate, if the land was fraudulently transferred as alleged, the more rational way of retrieving it was for the plaintiff to seek its recovery on the basis that it was fraudulently transferred to the Defendant. He could have sued and showed by evidence that the transfer to the Defendant was obtained through forgery.

But no matter. The Plaintiff's case hinged on adverse possession. He testified that he occupied the land less one acre which he had leased to the Defendant. He said the Defendant tilled the one acre for 8 yrs. He said he has been on the land for 22 yrs from 1985. He said the Defendant stopped tilling the one acre leased to him in 1993. The extract of the title to the suit land subsequently filed after institution of the suit shows that the Defendant became the registered owner on 20/12/83. The Plaintiff said he has a house on the suit land. If he has been on the land for 22 years, todate, it means he entered the land in 1983. He testified that the Defendant has never removed him from the land.

In his affidavit sworn on 16/11/99, the Plaintiff's averments were different. He stated that as the registered proprietor of the suit land, the Plaintiff sold one acre of land in 1978 to the Defendant who in 1985 attempted but failed to take from him possession of the suit land having fraudulently transferred the whole of it to his name.

The Plaintiff knew as early as 1985 that his land had been transferred to the Defendant, but he took no action to retrieve it. Instead, he chose to wait for 22 years to make a claim for adverse possession! I watched the plaintiff give evidence, and observed his demeanour and have had regard to the contradiction in his oral evidence in court from the evidence in his affidavit, in support of the originating Summons and bearing in mind that the evidence by the Plaintiff that his land was fraudulently transferred to the Defendant against whom he is seeking title through adverse possession, I find it hard to believe. I do not find the plaintiff truthful or his evidence credible or his allegations plausible. The fact that the action was not contested did not mean the standard of proof (on the balance of probabilities) was lessened. I am unable to believe the Plaintiff's evidence that he has been on the land since 1983 waiting to take action to retrieve it by making a claim by way of adverse possession! Although in evidence the plaintiff said the Defendant occupied one acre for 8 yrs, in his Notice of Motion the Plaintiff stated that the Defendant never set foot on the land!

The affidavit in the suit was sworn by the Plaintiff on 16-11-2000 in support of the originating Summons dated 18-11-2000! The finger print on the said affidavit does not indicate the finger from which it was taken. In circumstances where the deponent cannot read or write, as in this case, it is desirable to show in the jurat that the affidavit has been read over and explained to the deponent who had put his mark or finger print indicating the finger whose print is put on it.

Moreover, rule 3D of Order 36 requires that an action for adverse possession must be commenced by Originating Summons supported by an affidavit to which must be attached an extract of title. In this suit, no extract of title was annexed to the supporting affidavit. And no leave was sought to do so when it was subsequently done. This was a fatal defect. The subsequent filing of the extract of title without leave did not cure the defect and it matters not that the suit was not defended. This is a badly prosecuted suit where the evidence in court did not harmonize with the evidence in the supporting affidavit. But even more fundamental are the shortcomings I have pointed out above.

In the premises, it is my finding that the plaintiff was not truthful in his evidence which I disbelieve not only because of its inconsistency (as between the oral and the affidavit evidence) but also because the plaintiff, though ostensibly unsophisticated, was sly. He seemed to withhold the truth. He was not honest. I am unable to grant the declarations sought. I dismiss the suit with no order as to costs.

Dated at Kakamega this 17th day of June, 2005.

G. B. M. KARIUKI

J U D G E