



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT (O.S) NO.172 OF 2001

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

IN THE MATTER OF LAND PARCEL NO. KABONDO/KODHOCH EAST

ALBERT OMONDI NDIGA PLAINTIFF

VERSUS

DANIEL ONYANGO OKELO DEFENDANT.

JUDGMENT

The plaintiff ALBERT OMONDI NDIGA brought this suit by way of originating summons under order 35 rule 3D CPR and s.38 of the Limitation of Actions Act seeking for an order to be registered as proprietor of 2½ acres of parcel land No. Kabondo/Kodhochi East/298 and that the defendant he ordered to execute all necessary documents to transfer that portion of land failing which the Executive Officer of the Court to sign the same. He also prays for costs.

The land in dispute was initially in 1965 registered the name of JOANES GORI. Apparently GORI was a relative of OKELO OCHOLA who is the father of the defendant DANIEL ONYANGO OKELO GORI was from KANO in KISUMU and had moved to live with OCHOLA. OCHOLA gave him the land in question and it was registered in his name, in 1965, however he moved back to his home area in Kano. The land reverted to the defendant's father though still registered in GORI's name. In 1980 the land was registered in the name of the defendant in this suit.

Plaintiff (PW1) told court that in 1967 he bought ½ acre of the land from Okelo Ochola the defendant's father. By then Ogori had moved back to KANO. They wrote an agreement. Later he bought another 2 acres from the same land from defendant's father. Defendant was a witness of both agreements. He said he started living in the land in 1971. He built permanent houses on the land. He fenced the land and has cultivated it. He said however the land was never transferred to him. After the defendant was registered as the proprietor he asked him that they attend land board but defendant became slippery. He reported to the area chief who advised that they attend land board and defendant transfer the land. This he did not do. He said that he has been living in the land for over 12 years and as such he has acquired title by way of adverse possession.

Plaintiff called JOHNSON ONDINDO ORONGO (PW2) who was the chief of the area. He said he received complaint from the plaintiff that the defendant had refused to transfer the land to him. He went to the land with elders and it was agreed that defendant do transfer the land. That was in 1998. He said by then the plaintiff had lived in the land for over 10 years. He has a permanent house on the land and had even buried his child there.

PW3 MARICUS NYAGOL NYANJOG who was the area assistant chief said the plaintiff has over 4 permanent houses on the land.

HENRY OUKO OKELO (PW4) told court that he is the one who wrote the sale agreements. Defendant was present. He too said it was plaintiff who now lives in the land where he has put permanent houses planted trees and crops.

Defendant testified that the land is registered in his name since 1980. Before then it was registered in the names of JOANES GORI. He said his father Ezekiel Olelo did not sell the land to the plaintiff. The two sale agreements produced did not show the parcel number being sold. He said the defendant started living in the land in 1982-85 as a squatter with his consent. He allowed him to live in the land as he looked for a land to buy. He said he issued him with a Notice to vacate the land and he even told the assistant chief to tell him to leave though he could not remember when it was.

There is no dispute that currently the land is registered in the defendant's name. This was done in 1980. Before then it was registered in the names of JOANES GORI. The plaintiff called evidence to show that he had bought part of the land from the defendant's father and brother. Two sale agreements were produced. The defendant had signed them. They were written by PW4 who said plaintiff was present. In cross examination the defendant admitted signing them but he said he was forced to sign as was forced to sign as he was young. Whatever circumstances he admits that there were dealings over the land between the plaintiff and his father. True the parcel number is not shown on the agreement but there is no doubt that the dealings were over the same land. Defendant said the land initially belonged to his father who allowed it to be registered in GORI's name. When GORI returned to his home the land reverted to his father.

After the sale agreement the parties did not attend the land Board. S.6 of Land Control Act requires parties to get land Board Consent within 6 months of an agreement. The sale agreements therefore became null and void and cannot be enforced. I believe the Plaintiff knows this and that is why he is not seeking the court to enforce the agreement. His argument is that after that he continued to live and occupy the land.

The main issue to consider is when time started to run. It should be noted that up to 1980 the land was registered in the name of GORI. Plaintiff said he started living in the land around 1971/74. Defendant said it was in 1980. However the evidence adduced clearly shows that he must have gone into occupation in 1971 as he stated. The void sale agreement was entered into at that time. PW2 the chief said that by 1998 when he was called to arbitrate by the plaintiff he had lived there for over 10 years. The defendant himself admits in cross-examination that the plaintiff was actually already in occupation even before 1980 when he was registered as the owner. Even on re-examination that the plaintiff was actually already in occupation even before 1980 when he was registered as the owner. Even on re-examination by his counsel he confirmed that plaintiff was in occupation before he was registered. There was no evidence that GORI the initial registered owner of the land had at any time since 1971 asked him to vacate the land. He did not interrupt his occupation. In the case of GITHU VS. NDEETE (1984) KLR 776 the court of appeal held that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession. Thus adverse possession by the plaintiff was not interrupted when the registration changed from JONES GORI to the Defendant in 1980. GORI had not by that time asserted his right. It also seems that the defendant did not take any steps to assert his rights and therefore interrupt the adverse possession by the plaintiff after he got registered as the owner. PW1 and 2 said that the defendant never asked them to ask the plaintiff leave the land. In fact it is the plaintiff who in 1998 took complainants to the chief and not the defendant.

The defendant's claim that the plaintiff was a squatter on the land with his permission is not borne by any evidence. He admits that the plaintiff has built permanent houses on the land. He could not have allowed a mere squatter to erect permanent houses. PW2 said that plaintiff even buried his child in the land. This clearly shows that he was not a licence. The Defendant did not say what action he took when all this was going on. Though he said he reported to the assistant chief (PW3) denied this. The plaintiff said he was buying 2½ acres from the suit land. The court believes this is the portion he has been

occupying. Court was told the whole land is four acres. In GITHU'S case cited above the court held that a title by adverse possession can be acquired under Limitation of Actions Act to part of the parcel of land which the owner holds title.

From the above therefore I find that plaintiff has proved his claim that he has acquired two and half acres of land from land parcel No.KABONDO KODHUCH EAST/298 and enter judgment in his favour as prayed. He will also have the costs of the suit.

Dated at Kisii this 12th October 2004.

KABURU BAUNI

JUDGE.

Mr. Ogutu for the defendant.

KABURU BAU

JUDGE.