



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 154 OF 2014 (O.S)

IN THE MATTER OF REGISTERED LAND PARCEL NO. S. TESO/APOKOR/1745

AND

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

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

ROMANS JOSEPH ORONI..... PLAINTIFF/APPLICANT

ISAAC ORONI.....PLAINTIFF/APPLICANT

= VERSUS =

BENJAMIN KNICK OMOITE..... DEFENDANT/RESPONDENT

J U D G E M E N T

1. There were two suits filed regarding the same subject land S. Teso/Apokor/3005 and 3008. The first suit Civil Case No. 154 of 2014 vide an Originating Summons dated 4/8/2014 commenced by Romans Joseph Oroni and Isaac Oroni against Benjamin Knick Omoite sought for determination the following questions;

- (a) Whether or not the applicant's deceased father Lazaro Oroni Odeya did in the year 1990 purchased from Desterio Ojuma Omoite land measuring 80ft by 100ft which was to be excised from L.R S-TESO/APOKOR/1745?
- (b) Whether or not the applicant's late father immediately bought the land and constructed thereon a commercial permanent building?
- (c) Whether or not the respondent has over the years known and acknowledged to the use of the suit land by the applicants' late father and the applicants?
- (d) Whether or not the applicants have been peaceful, quiet and continuous occupation since 1990 a period which is well over 24 years?
- (e) Whether or not the respondent should be condemned to pay the costs of this suit?

2. The second suit civil case No. 88 of 2013 was filed by Benjamin Knick Omoite against Isaac Oroni vide a plaint dated 28/8/2013 and which suit sought the following reliefs;

- (a) An order directing the defendant whether by himself, his agents, servants and or employees and or anybody claiming through him to remove the illegal structures erected on L.R No. SOUTH TESO/APOKOR/3005 and L.R No. SOUTH TESO APOKOR/3008 forthwith and to surrender vacant possession of L.R No. SOUTH TESO/APOKOR/3005 and SOUTH TESO/APOKOR/3008 to the plaintiff forthwith and in default an order of demolition and eviction do issue against the defendant, his agents, servants, employees and or anybody that may be claiming title through him.

(b) An order of permanent injunction restraining the defendant whether by himself, his agents, servants and or employees and or anybody claiming through him from entering, staying and or using L.R No. SOUTH TESO/APOKOR/3005 and L.R No. SOUTH TESO/APOKOR/3008 and or interfering with the plaintiff's use of the said parcels of land.

(c) Costs of the suit.

3. The two suits were consolidated vide order made on 26th January 2016 which read thus; **“By consent of both counsel present, the amended Originating Summons dated 9/1/2015 and the replying affidavit be deemed as plaint and defence respectively. The plaint in case No. 88/2013 be deemed as counter-claim and defence in the consolidated suit. The defence in case No. 88/2013 be deemed as plaint. Plaintiff be granted 21 days to file witness statements. The defendant also given 21 days to file witness statements. Mention on 12/4/2016”.**

4. Pursuant to the above order, the defendant in case No. 154 of 2014 and who is the plaintiff in No. 88/2013 shall hereinafter be referred to as the defendant. The plaintiff in No. 154 of 2014 and who is the defendant in No. 88/2013 hereinafter shall be referred to as the plaintiff. The plaintiff is claiming the suit parcels under the doctrine of adverse possession. The defendant on his part pleaded that he is the registered owner of the two suit parcels from 27th October 2011. That the plaintiff without any colour of right and without permission encroached on to L.R No. South Teso/Apokor/3005 and 3008 and took possession thereof. He is asking the court to grant him orders of eviction and to issue an order of permanent injunction against the plaintiff.

5. The two plaintiffs relied on their evidence and the defendant also relied on his sole evidence. Romans Joseph Oroni opened his statement by saying that he works with Kenya Power & Lighting company in Nairobi. He stated that his father Lazarus Oroni Odeya purchased a piece of land from the defendant's father through an agreement dated 30/9/1990. That the agreed purchase price of Kshs.35,000 was paid in cash. He produced the sale agreement as **Pex 1**. **PW1** continued that another agreement MFI-2 was made later for payment for the access road to the portion purchased earlier. It is his case that they began constructing on the portion purchased by their father by putting up residential and commercial buildings.

6. The plaintiff continued further that the third agreement was made after the death of the defendant's father to facilitate the succession process. That after the succession proceedings was finalised the defendant did not process his title deed. The third agreement dated 7/12/2008 was produced as **Pex 4** and certificate of confirmed grant as **Pex 3**. The green card for the two parcels as **Pex 5(a) and (b)**. He denied losing control of the sold portion as the buildings on the land are being used and the 2nd plaintiff is also on the land.

7. In cross-examination, **PW1** said he was present when the first two agreements were drawn at the defendant's father's home. That the plot number was not given but likely it was parcel No. 1745. He agreed that none of the defendant's family were listed as witnesses to the two agreements. That it is true the agreement of 7/12/2008 indicated payment of a balance of purchase price. That in 1990, they fenced off the sold portion after being shown the ground locations. That it is his father who put up the first building while the 2nd plaintiff constructed the commercial building. That he had taken letters of administration of his father's estate although he did not produce it. That their portion is lying on parcel No. 3005 and 3008. In re-examination, the witness said their portion measures 80 x 100 plus the access road.

8. Isaac Oroni testifying as **PW2** said he started living on parcel No. 3005 and 3008 from the year 2004. That the defendant's father never stopped him from living there and that their portion is fenced off. The land is developed with permanent houses, toilets and trees. He adopted the evidence of **PW1**.

9. In cross-examination, **PW2** said he did not buy the land but was brought on to it by his father in 2004. That he was living on it with his father as he was not married yet. That he built his structure in 2010. He denied beginning to live there in the year 2013. This marked the close of the plaintiffs' case.

10. The defendant Benjamin Knick Omoite gave his testimony on 22/9/2020. He is a teacher at Alupe Primary School and said he knew the plaintiffs although they are not related. **DW1** stated that he took letters of grant in respect of his father's estate over parcel S. Teso/Apokor/1745. According to him, the plaintiffs have not stayed on the land for 24 years since the 2nd plaintiff entered the land in 2011 and put up a permanent house. That when he asked him, **PW2** claimed his father had bought the said land and **PW2** proceeded to show him the agreement dated 1990. **DW1** continued that according to him, the agreements were fictitious because they did not show the parcel number.

11. That in 2008, Lazaro Oroni approached them saying there was a balance of Kshs.5,000 he wished to pay. That Lazaro paid the Kshs.5,000 and this suit was filed in 2014 which is only a period of 6 years from 2008. That there are two houses on the land – a commercial house built in 1985 by his father and which Lazaro had rented to sell charcoal. That he continued paying rent before he turned around to say he bought it. **DW1** further stated that he has subdivided the original land and now Isaac stays on parcel No. 3005 while their shop is on No. 3008. He relied on his witness statement filed and produced the following as;

(i) Agreements Dex 1(a) and (b).

(ii) Development plan Dex 2.

(iii) Agreement dated 7/12/2008 as Dex 3.

12. In cross-examination, **DW1** said his father owned only L.R No. S. Teso/Apokor/1745 which is the only land he could have sold. That both agreements dated 30/9/1990 are forgeries. **DW1** said he was a party to the agreement dated 7/12/2008 which he had signed. That his father died in 2004 without his late father filing any claim against anyone for trespass. **DW1** added that he made a demand to Lazaro to stop building on the land. That his father's name appeared on the approved plan. **DW1** did not have a tenancy agreement between his father and

Lazaro. That paragraph 13 of his affidavit dated 10/6/2013 confirmed the plaintiffs were occupying the land. This marked the close of the defence case.

13. The advocates on record for the parties filed their closing written submissions. The plaintiffs filed theirs on 15/10/2020 while the defendant filed his on 2nd November 2020. The defendant relied on the holdings in the following cases in urging the court to find that the plaintiffs case was not proved and that judgement be entered in his favour;

(a) James Maina Kinya Vs Gerald Kwendaka (2018) eKLR.

“In the instant case the plaintiff was put in possession in 1983 when he completed payment of purchase price. It therefore follows that time started running for purpose of limitation from 1983 when he was granted possession on payment of the purchase price.”

(b) Sisto Wambugu Vs Kamau Njuguna (1983) eKLR.

“For my part, in the peculiar circumstances of this case, it seems to me that it is not sufficient to show that a right of action had accrued. The plaintiff must show some further quality, namely adverse possession. The plaintiff was allowed in possession as a purchaser. If he had been a mere trespasser no doubt the vendors would have brought proceedings. But the vendors, in all the circumstances of the case, seem to have decided by accident or design to allow matters to drift on without taking steps to evict him from the premises, relying on the fact that it would all turn out right in the end when the purchase price was ascertained and completion took place.”

14. After analysis of the oral and documentary evidence adduced together with the submissions rendered, there are two questions for my determination.

(a) Whether or not the plaintiffs have proved their claim of adverse possession over the suit parcels.

OR

(b) Whether or not the defendant as the registered owner of the suit titles is entitled to orders of eviction & permanent injunction.

15. It is settled in law that a claimant for land under the doctrine of adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the said land for a period in excess of 12 years. See the decisions inter alia in the cases of **Sisto Wambugu Vs Kamau Njuguna Supra** and **Ruth Wangai Kenyagia Vs Josephine Muthoni Kinyanjui (2017) eKLR**. The starting disputed point of this Case is whether or not the plaintiffs have been in occupation of the land for a period in excess of 12 years.

16. According to the plaintiffs' they relied on the agreement dated 30/9/1990 to prove the duration of occupation. Both of them stated that their father fenced off the sold portion in 1990 and developed it with a commercial building. In countering the plaintiffs' averment, the defendant stated that the agreement of 1990 was fictitious and that time started running from 7/12/2008 when a payment of Kshs.5000 indicated as balance of the purchase price was made.

17. The defendant stated that the agreement of 30/9/1990 was fictitious but he did not bring any claim of fraud against the plaintiffs in his suit No. 88 of 2013. Secondly he did not lay any basis why he felt the said agreement was fictitious. Thirdly, the agreement of 7/12/2008 made reference to an earlier payment of Kshs.35,000 by Lazaro Oroni. Besides the agreement of 30/9/1990 there was no other agreement shown to this court executed between the defendant's family and the plaintiffs' father. The court finds no basis to ignore the contents of the agreement of 30/9/1990.

18. Having found that the agreement of 30/9/1990 (Pex 1) was the beginning of the transactions concerning the suit titles, the questions then is when did time begin to run? According to the plaintiffs' case time ran from 1990 when their father was put in possession while according to the defendant, time began running in 2008. Pex 1 is a short agreement which read thus;

“Masikilizano juu ya plot baina ya Desterio Ojuma Omoite. Mwenye plot na Lazaro Oroni Odeya, Mununuzi. Wame kubaliana kwa shiling elfu Thelathini na Tano (Kshs.35,000) pekee. Na amelipa cash signed by Mwenye plot & Mununuzi in the presence of 5 named witnesses.”

19. A reading of Pex 1 shows that the agreed purchase price of Kshs.35,000 was paid in cash and in full. The second agreement of even date for the sum of Kshs.13,000 was marked for identification but was not produced so I leave it out of my determination. If Pex 1 was complete as it appears on the face of it, what import did the 3rd agreement of 7/12/2008 have on it? In my opinion, the later agreement of 2008 had no effect for two reasons. First, the agreement of 30/9/1990 made no mention of any balance so the money referred to as balance paid was not a balance in reference to the agreement of 1990. Secondly, the parties in the agreement of 7/12/2008 and that of 30/9/1990 are not the same. In my opinion and I so hold that time for prescriptive rights began to tick six (6) years after 30/9/1990 when the then registered owner was paid the agreed purchase price in full.

20. The second question is whether or not the plaintiffs have proved that their occupation has been peaceful and uninterrupted. The uncontroverted evidence of PW1 and PW2 is that their father fenced off the sold portion in 1990 and later built on it. According to PW1, it's his father who built the commercial structure with PW1's financial support. The defendant laid claim to the commercial structure which had an approved plan 22/4/1985 in his father's name. It is the defendant's case that the plaintiffs' father was merely a tenant who made a turn

around that he bought the plot after the death of the defendant's father. This piece of evidence confirms that the commercial structure was put up in the 80's or 90's.

21. The defendant is claiming eviction orders against the plaintiffs in respect of L.R Nos. 3005 and 3008 as noted in **prayer (a)** of the plaint. He was thus under equal duty just as the plaintiffs to prove his case on a balance of probabilities. He admitted that the 2nd plaintiff has structures on L.R No. 3005 while the commercial building is on L.R No. 3008. From his pleadings, the plaintiffs are in occupation/possession of both plots. Paragraph 4 & 5 of his plaint pleaded thus;

“4. The plaintiff avers that the defendant without any colour of right and without the consent and or permission of the plaintiff and without any probable cause has encroached onto L.R No. SOUTH TESO/APOKOR/3005 and L.R No. SOUTH TESO/APOKOR/3008 and taken possession thereof and have erected thereon unlawful structures in a manner that is detrimental to the plaintiff's rights and in a manner that is likely to cause a breach of the peace.”

“5. The plaintiff's claim against the defendant for an order directing the defendant whether by himself, his agents, servants and or employees and or anybody claiming through him to remove illegal structures erected on L.R No. SOUTH TESO/APOKOR/3005 and L.R No. SOUTH TESO/APOKOR/3008 forthwith and to surrender vacant possession of L.R No. SOUTH TESO/APOKOR/3005 and L.R No. SOUTH TESO/APOKOR/3008 to the plaintiff forthwith and in default an order of demolition and eviction do issue against the defendant, his agents, servants, employees and or anybody that may be claiming title through him.”

22. Nowhere in his pleadings does the defendant state that the commercial building on plot No. 3008 was put up by his father and that the plaintiffs' father was their tenant. His oral evidence given in court that they own the commercial building is not in tandem with his pleadings and in my opinion an afterthought. If indeed his father owned the building, then he should have demonstrated that he/they were in control of the commercial building by elaborating how much rent the Lazaro Oroni-deceased was paying as rent and when the plaintiffs family stopped paying the rent. Why in his suit has he not demanded for mesne profits? All these inactions on the defendant's part only confirm that the plaintiffs' occupation has been peaceful and uninterrupted.

23. Consequently, the registration of the defendant on 27th October 2011 as the administrator of the estate Desterio Ojuma Omoite did not stop time from running in favour of the plaintiffs under the law of adverse possession which herein had accrued at the time of filing of their suit. I am therefore satisfied that the plaintiffs claim is proved and I hereby enter judgement declaring them to be entitled to the suit parcels S. Teso/Apokor/3005 & 3008 by way of adverse possession. On the other hand, the defendant's claim for eviction and or permanent order of injunction is hereby found as wanting in merit. It is hereby dismissed.

24. The costs of the consolidated suit is awarded to the plaintiffs.

Dated, signed & delivered at BUSIA this 4th day of February, 2021.

A. OMOLLO

JUDGE