



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 66 OF 2013 (OS)

MARGARET MOLLY ENDESIA.....PLAINTIFF

VERSUS

CLEMENT ODHIAMBO.....1ST DEFENDANT

CHERRYLINE KHAKAI ACHOKA.....2ND DEFENDANT

JUDGMENT

1. **Margaret Molly Endesia**, the Plaintiff, commenced this suit against **Clement Odhiambo** and **Cherryline Khakai Achoka**, the 1st and 2nd Defendants respectively, through the originating summons dated 19th February, 2013 and amended on the 23rd February, 2017 and filed on the 18th September, 2018, seeking for orders that;

- (a) The Plaintiff has obtained title to part of *Soy/Soy Block 10 (Navillus) 65*, now registered as *Soy/Soy Block 10 (Navillus)/2411*, the suit land, by adverse possession.
- (b) The Defendants' title over the suit land has been extinguished by lapse of time.
- (c) The Defendants are holding title to the suit land in trust for the Plaintiff.
- (d) The Land Registrar to delete the name of the Defendant and enter that of the Plaintiff in its place and issue her with title to the suit land.
- (e) The Defendants pay the costs of the suit.

The originating summons is supported by the Plaintiff's affidavits sworn on the 23rd July, 2017 and 21st November, 2018 in which she depones to the following among others;

- That she was member No. 1256 of Ishieywe Self-Help Group and after balloting got Plot No. 27 measuring 0.12 acres in Soy/Soy Block (Navillus) 65. That her Plot was after subdivision registered as Soy/Soy (Navillus) Block 10/2411 in the name of the 1st Defendant, and later transferred to the 2nd Defendant though she is the one who has been in possession since 1999.
- That she has extensively developed the suit land by building a house and growing crops for over 14 years without any interferences.
- That on the 15th February, 2013, the 2nd Defendant and his workers went to the suit land and uprooted her vegetables but were stopped by her neighbours.
- That after being allocated Plot No. 27 in Soy/Soy Block (Navillus) 65, she paid Kshs.32,000 which included Kshs.24,000 for land measuring 0.25 acres and Kshs.8,000 for the title deed processing.
- That she had been given a Certificate number 188 that indicated her Plot erroneously as Soy/Soy Block 10 (Navillus) 2276, which does not belong to Ishieywe Self Help Group.

2. The suit is opposed by the Defendants through their replying affidavits sworn on the 17th May, 2019 summarized as follows:-

- That the Ishieywe Self Help Group acquired the original parcel from Lonrho Agribusiness E. A. Limited vide the sale agreement dated 20th July, 1999. That the payment exhibited by Plaintiff totals Shs.9,500 which was equivalent to payment for $\frac{1}{16}$ of an acre which could not be the suit land.
- That the Plaintiff encroached onto the suit land on or about 2008 during the post-election violence and it cannot be true to claim to have been in possession from 13th February, 1999.
- That the 1st Defendant is an official of the Group and not owner of the suit land. That he allocated the suit land to John Njuguna who sold it to the 2nd Defendant who is registered as proprietor.
- That the Plaintiff could not have been allocated the suit land in 1999, as she had not completed payment by then, having paid only Kshs.9,500.
- That at the time of balloting in September, 1999, the Plot No. 27 was allocated to **John Njuguna** who took possession immediately. That following the 2007/2008 post-election, John Njuguna left the land briefly and the Plaintiff took possession and despite being asked to vacate has declined.
- That the 2nd Defendant bought the suit land measuring 0.10 hectares from John Njuguna Maina at Kshs.140,000 on the 28th May, 2012. That she took possession and got issued with the title dated 7th December, 2012.
- That John Maina had been a member of Ishieywe Self Help Group and had given her the relevant documents including the ballot for the suit land.
- That the share certificate exhibited by the Plaintiff dated the 13th February, 1999 was a forgery as the Group had not bought the land in question by that date.
- That the structure on the suit land was built on or about 2008 after 2nd Defendant acquired title to the suit land and the Plaintiff has therefore been a trespasser.
- That the 2nd Defendant took possession of the suit land in 2011, obtained title in 2012 and after that the Plaintiff erected the structure on the suit land and therefore has not acquired title by adverse possession.
- That the 2nd Defendant had enlisted the assistance of the Land's office and Police under O.B. No. 07/28/12/2012 to have the Plaintiff vacate the suit land. That the Plaintiff has been hostile towards the 2nd Defendant whenever she attempted to fence off her land.
- That the Plaintiff's occupation of the land was interrupted within one year after the 2nd Defendant acquired title to the suit land.

3. The Plaintiff testified as **PW1** and called **Brigid Achitsa, Francis Mrefu Achinga, John Lumadede** and **Luka Khashereva** who testified as **PW2** to **PW5** respectively. That it is the Plaintiff's case that she was a member of Ishieywe Self Help Group that acquired land parcel Soy/Soy Block 10 (Navillus) 65 from Lonrho E. A. Limited. That she paid Kshs.24,000 and during the balloting got Plot. No. 27 that was after subdivision registered as Soy/Soy Block 10 (Navillus)/2411. That she took possession of the land after it was pointed out to her in 1999 and in 2000 erected a semi-permanent house where her caretaker, PW2, has been staying. That she has fenced the land, planted trees and has been growing maize crops since without interference until the 2nd Defendant came to uproot her vegetables but was stopped. That she had been given in error parcel 2276, but when she went to Lands Office in 2012, she learnt her parcel was 2411, the suit land. That she had further made payment for Kshs.4,500 and title processing fee of Kshs.8,000 to 1st Defendant, the only Ishieywe Self Help Group official then alive, in 2007 but after failing to resolve the matter, she instructed her advocate to file the suit.

4. The 2nd Defendant testified as DW1 while the 1st Defendant testified as **DW4**. The Defendants called **Fanice Muhonje Kioko, Clement Ooko Odhiambo**, and **John Njuguna Maina** who testified as **DW2, DW3** and **DW5** respectively. It is the Defendant's case that the 2nd Defendant bought the suit land from DW5 vide the sale agreement dated the 17th October, 2012. That DW5 had given the 2nd Defendant the share transfer document dated 22nd October, 2012 and the Group officials had confirmed the plot belonged to DW5. That the 2nd Defendant was subsequently issued with the title deed. That when a dispute arose over ownership of the Plot with the Plaintiff, a meeting was held with the Land Registrar and it was resolved the Plot belonged to the 2nd Defendant and that the Plaintiff should be allocated an alternative plot. That the Plaintiff then served the Defendant with the suit papers. That before the meeting with the Land Registrar, the Plaintiff had brought building materials to the suit land and started construction. That the 2nd Defendant reported to the Chief who referred her to the police where she reported under O. B. No. 7 of 28th December, 2012. The 2nd Defendant sought for the court to declare the plot as hers and Plaintiff be restrained from further interference. She also prayed for damages and costs. DW1 confirmed that she has never used the suit land. That the Plaintiff was only hostile towards her when she went to fence the suit land that border her other plot number 26. That she did not know that Plot No. 27 had been balloted by Samwel Maina, father to John Njuguna Maina (**DW5**). DW2, owner of Plot No. 36 testified that the suit land belonged to DW5 who sold it to DW1. That he used to see Samwel Maina who owned Plot No. 29 farming on the suit land No. 27 that belonged to DW5 before he passed on in 2005. That when he saw the Plaintiff come onto the suit land in 2008 and erected a structure and he notified DW5. DW3 testified that she was an employee of Ishieywe Self Help Group until 2015. She confirmed issuing DW1 with a receipt dated 22nd October, 2012 for share transfer. She confirmed that in April, 2008, DW5 had reported to the office that somebody had entered into his Plot. That she had attended the meeting at the Land Registrar's office and it was recommended that the Plaintiff be allocated an alternative plot but she declined. That the Plaintiff had constructed on the suit land in 2008 and not 1999. DW4 who is also the 2nd Defendant testified that he is the founder chairman of Ishieywe Self Help Group incorporated in 1996. That the Group acquired Block No.

65 on the 20th July, 1999 from Lonrho Agribusiness E. A. Limited. That following the subdivision carried out on 4th December, 2006 the plots were allocated. That DW5 had reported through the letter dated 8th May, 2008 that the Plaintiff had entered onto his Plot No. 27. He testified that the Plaintiff does not appear on the allocation list prepared after balloting of plots in Block 65 and therefore has no Plot on that block. That plots in Block 65 were balloted in October, 1999 and thereafter, share certificates issued after payment of Shs.200. That the document the Plaintiff has relied on dated 13th February, 1999 cannot be genuine as land parcel Block 65 had not been acquired by the Group by then. He denied signing the share certificate produced by the Plaintiff. He disputed the claim by PW4 that he was their caretaker from 1998 to 2000 saying that their caretaker was one Jakton who was in the Group's payroll. That Plot No. 27 Block 65 was balloted by DW5 who later sold it to 2nd Defendant. That he took 2nd Defendant to the Land Control Board for consent and transferred the suit land to her. That the receipts the Plaintiff produced for payment of Shs.24,000 shows that the same was made after the balloting of plots in Block 65. That the payment made by the Plaintiff entitles her to a quarter acre plot which she has not been given by the Group. That the Group was ready to give the Plaintiff a quarter acre plot as recommended during the Land Registrar's meeting but she declined and filed this suit instead. That the payments for DW5's plot had been made by his father who later passed on. That the suit land had been registered with him as trustee and he transferred it to the 2nd Defendant after DW5 told him he had sold it to her. That the members started paying for the plots in 1997 after Lonrho advertised sale of the lands. That the sale agreement over Block 65 shows the completion date was May, 1999. That the signature on the share certificate produced by the Plaintiff were genuine. That Plot 27 Block 65 became parcel 2411 after the 2006 subdivision. That payment for plots in Block 65 started being received in January 1999 and that for other blocks in 1997. That the Plaintiff had not participated in the balloting as she had not paid up fully as required. DW5 testified that the suit land belonged to him and that he had farmed on it from 1999 to 2008 when the post-election violence started. That he learnt from DW2 that the Plaintiff had entered onto the suit land in 2008 and he reported to the Ishieywe Self Help Group offices and the Chief. That he sold the land to the 2nd Defendant vide the sale agreement dated 17th October, 2012. DW5 told the Court that his father had paid Kshs.24,000 for the plot before balloting. That his father had also paid Kshs.24,000 for his plot. That his father Samuel Maina died in 2003 and the family is yet to file a succession cause. That the Plaintiff erected a house on the suit land in 2008 and has been cultivating on it since then.

5. The learned Counsel for the Plaintiff and Defendant filed their written submissions dated 30th October, 2020 and 30th November, 2020 respectively.

6. The following are the issues for the court's determinations;

(a) Whether the Plaintiff's occupation and possession of the suit land has been adverse to the title of the registered proprietor(s) and if so from when?

(b) Whether the Defendants' titles to the suit land has been extinguished.

(c) Who pays the costs?

7. The court has carefully considered the pleadings by the parties, the evidence tendered, the written submissions by both learned Counsel, the superior courts' decisions cited thereon and come to the following findings;

(a) That from the testimony tendered by the Plaintiff and her witnesses, and the documentary evidence presented especially the share certificate dated the 13th February, 1999 which DW4, the founder Chairman of Ishieywe Self Help Group, confirmed he signed with other officials who have since died, it is clear the Plaintiff was a member of the said Group. That DW4 confirmed the said share certificate as genuine but pointed out there exist an error on the dates inserted. That it follows that the Plaintiff's claim to the suit land was on the basis of her entitlement as a member. That the evidence availed shows that she believed the plot she had been allocated was parcel 2276 but when she went to the Lands office in 2012, she learnt her entitlement was parcel 2411, the suit land. That up to that moment, she had occupied the suit land as her entitlement as a member of the Group and time for purposes of adverse possession had not started to run in her favour.

(b) That the Plaintiff's occupation and possession of the suit land became adverse to the title of the suit land from 2012 when she discovered it was registered with another person. That by the time the initial originating summons was filed on the 19th February, 2013 a period of less than two years had lapsed from 2012 when the Plaintiff discovered that it was registered with the 2nd Defendant. That period falls short by about ten years from the twelve years prescribed by **Section 7 of the Limitations of Actions Act Chapter 22 of Laws of Kenya.**

(c) That DW5 came to know that the Plaintiff had taken possession of the suit land in 2008. That has been confirmed by DW2 to DW4. That if indeed, the Plaintiff had taken possession of the suit land before 2008, or in 1999, then it is apparent the possession was in the belief the Plot was hers and she was therefore not on adverse possession.

(d) That DW5 was an evasive witness who had difficulties in giving straight answers to the questions put to him and he left the court wondering whether he knew of the land before 2008.

(e) That in view of the findings in (b) and (c) above, it is clear the Plaintiff's possession of the suit land before 2012, when she learnt it was not parcel 2276 but 2411, was not adverse to the title of the registered owner. That the time started to run in her favour from 2012, and by the time the 2nd Defendant wrote to her the letter dated 18th February, 2013 and the 19th February, 2013 when this suit was filed, a period of twelve years had not lapsed to kick in **Section 7 of the Limitation of Actions Act.**

(f) That had the Plaintiff followed the Land Registrar's recommendation that she be allocated an alternative plot, this suit would not have been filed. That Defendants are therefore entitled to be paid costs of the suit as the Plaintiff's claim has failed.

8. That flowing from the foregoing, the court finds no merit in the Plaintiff's claim and the same is dismissed with costs. Orders accordingly.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 17TH DAY OF MARCH, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: M/s Njomo for Magare for Plaintiff

M/s Oduor & Mrs. Okara for Defendants

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.