



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 83 OF 2019

HEBISIABAH MORAA ONDIEKI.....1ST PLAINTIFF

MARY IRENE ATIENO.....2ND PLAINTIFF

CHALRES CHAHYA ARADI.....3RD PLAINTIFF

STEVE BIKO ARADI.....4TH PLAINTIFF

VERSUS

EDWARD O. OKUL1ST DEFENDANT

TOM MBOYA OKU.....2ND DEFENDANT

J U D G M E N T

1. The plaintiffs are the joint administrators of the estate of the late Manoah Kisame Aradi (deceased). By the plaint dated 13th September 2019 filed on the same date, the plaintiffs aver that the deceased had vide an agreement dated 30th October 1985 purchased land parcel LR No. **Nakuru Municipality Block 1 (Langa langa)744** from the late Barrack Deya Okul (deceased) represented in this suit by the defendants who are the administrators of his estate. The plaintiffs pray for judgment against the defendants for orders:-

*(a) A declaration by way of contractual conduct, promissory estoppels and adverse possession. Title No. **Nakuru Municipality Block 1 (Langa-langga) /744** is the property of the plaintiff and the defendants should discharge the same from the liability or encumbrance by Thabiti Finance Company Limited and then register the same in favour of the plaintiffs and/or in the alternative do compensate the plaintiffs at the current market value of the property.*

(b) Any other award the court deem fit and just to grant under its unfettered inherent power to avoid miscarriage of justice with regard to the proprietary or monetary rights of the plaintiffs.

(c) Costs of and incidental to this suit be provided for.

2. The plaintiffs have pleaded that the deceased paid to the late Barrack Deya Okul (deceased) the full consideration of Kshs.100,000/= as per the agreement but the transfer was not effected by the time the deceased passed on. The deceased administrators averred that the late Barrack Okul and the deceased were close friends and that even after the death of Manoah Kisame Aradi Barrack Okul undertook to transfer the suit property to the plaintiffs and in that regard the plaintiffs paid to him a sum of Kshs.300,000/= to facilitate the transfer.

3. In 2015 following the death of Barrack Okul, the defendants as the intended administrators of his estate filed Nakuru High Court Succession Cause No. 236 of 2015 where they included the suit property as part of the assets of the late Barrack Okul's estate.

4. The 1st plaintiff applied as an interested party in the succession matter to have the property distributed to her on behalf of the estate of Manoah Kisame Aradi (deceased). The Hon Justice A. K Ndungu in the succession matter was of the view that the interested party's claim to the suit land was a claim arising out of contract and she could not qualify as a beneficiary of the estate of Barrack Okul unless it was proved the estate of Manoah Aradi was a Creditor to the estate of Barrack Deya Okul (deceased). The judge held the probate Court lacked jurisdiction to ventilate the claims the interested party was raising and opined that it was the Environment and Land Court that possessed the jurisdiction to handle such matter.

5. The defendants filed their defence on 14th February 2020. The defendants admit the agreement dated 30th October 1985 entered into between Barrack Deya Okul (deceased) and Manoah Kisame Aradi (deceased) but deny that the said Manoah Kisame Aradi (deceased) completed payment of the purchase price. The defendants further averred the agreement failed to be completed because the late Barrack Deya Okul (deceased) who was the vendor failed to retrieve the original certificate of lease from Thabiti Finance Co. Ltd to whom it had been pledged as security. The defendants further averred that any claim that Manoah Kisame Aradi and/or his estate may have had respecting the suit property became statute barred by reason of the Limitation of Actions Act, Cap 22 Laws of Kenya and consequently the plaintiffs were non suited.

Evidence by the Parties

6. The 1st plaintiff Hebisibah Moraa Ondieki (PW1) and two other witnesses testified in support of the plaintiffs case. The 1st plaintiff testified that she and the 2nd, 3rd and 4th plaintiffs were the co-administrators of her late husband's estate, Manoah Kisame Aradi (deceased). She testified that her late husband and Barrack Deya Okul (also deceased) had vide an agreement of sale dated 30th October 1985 entered into an agreement where Barrack Okul agreed to sell the suit property, namely Title Number **Nakuru Municipality Block 1 (Langa Langa)/744** to her husband for the consideration of Kshs.100,000/= she explained that both her late husband and the late Barrack Okul were close friends and were both councilors in the defunct Municipal Council of Nakuru. She stated her family had been in possession and occupation of the suit property for over 30 years. She testified that by the time her husband died in 2006, transfer of the plot had not been effected to his name. she explained the transfer had not been done as the title of the plot was not available since the seller, Barack Okul had pledged the same to obtain financing from Thabiti Finance Co Ltd.

7. The 1st plaintiff testified that on the suit property they had constructed a godown which they had been renting out. The witness explained that her husband and the late Barrack Okul never had any dispute respecting the suit property and that in 2008 the late Barrack Okul (deceased) agreed to transfer the suit property but since he did not have the certificate of lease he requested for payment of Kshs.300,000/= to facilitate retrieval of the title from Thabiti Finance. She stated she paid to the said Barrack Okul (deceased) the said sum which was duly acknowledged.

8. She stated Barrack Okul upon receipt of the money executed a blank transfer form but never brought the title to facilitate the completion of the transfer.

9. PW2 James Njoroge Mwangi testified that he rented premises on the suit property from Mr. Aradi (Deceased) and has been running a furniture business on the premises for over 20 years. He affirmed he was given the premises by Mr Aradi (deceased) before he died and was initially paying a monthly rent of Kshs.10,000/= but presently pays Kshs.15,000/= which he pays to the estate of Aradi Administrators at Standard Bank Ltd. He stated he had never received any notice to vacate from the suit premises from any person.

10. In cross examination he denied that Mr. Barrack Okul had at any time requested him to vacate from the property. He denied ever receiving any letter from Mr. Okul or his advocates demanding that he vacates from the premises. He stated Barrack Okul had never visited the plot although the defendants (administrators of his estate) had visited the plot severally. The witness maintained that at no time did the officers of the council come to the plot to enforce any notice for the period he had been a tenant in the premises.

11. PW3 Sospeter Nyakundi Tomato an accountant by profession testified that he knew Mr. Aradi and Mr. Okul (both deceased). He stated that following the death of Mr. Aradi in 2006, his family (late Aradi's) retained his firm as agents for purposes of collecting rent from their various properties. The witness stated that his firm set up a rent collection account at the Standard Chartered Bank where he was a signatory together with his co-Agent. The witness testified that they gave instructions to James Njoroge (PW2) who was carrying on business on the suit property to pay rent through the rent collection account in 2007. He stated that he had known Mr. Aradi as the owner of the suit property. He explained that Mr. Aradi's widows introduced them to all the tenants.

12. The witness further testified that in September 2008 the widows of Mr. Aradi, and Mr. Barrack Okul visited him at his business premises to discuss the issue of title to the suit property. He stated that Mr. Okul indicated that he had lost the title to the property but said he could process a replacement title and to be able to do that he wanted to be paid a sum of Kshs300,000/=. The 1st plaintiff and her co-widow were agreeable and the witness stated he asked them to come back when his Co-Agent was available so that they could withdraw the money from the estate rent account. They came back on 25th September 2008 and the witness paid a sum of Kshs.300,000/= in cash to Okul which he acknowledged by signing the petty cash voucher exhibited in the bundle of documents. Mr Okul availed copy of his PIN, ID and photos and further furnished a copy of the certificate of lease which the witness said he noted had a stamp of Thabiti Finance Bank which Mr. Okul explained away by stating that he had taken a loan from the said bank but he had cleared the same. Mr Okul signed blank transfer of lease forms which are exhibited in the bundle of documents. The witness was emphatic the payment of Kshs.300,000/= was not purchase price but was to enable Mr. Okul to process and avail a new title to enable the process of transfer of the property to the estate of Mr. Aradi to be completed.

13. PW3 testified that after Mr. Okul failed to furnish the title for the plot as he had undertaken, he opted to verify with the Deposit Protection Fund, Central Bank, who were the Liquidators of Thabiti Finance Bank the status of the title of the suit property. Upon visiting the Central Bank the witness stated he discovered the title was still being held by the Bank and the loan amount advanced to Mr. Okul (deceased) was still outstanding.

14. Under cross examination by Mrs Omwenyo advocate for the defendants, the witness explained that he instructed James Mwai (PW2) to pay rent to the Bank on behalf of the estate. He further affirmed he wrote the petty cash voucher that Mr. Okul signed acknowledging receipt of Kshs.300,000/=. He affirmed Mr Okul had no problem transferring the suit property save for the fact that the title was unavailable. He further stated he visited the Deposit Protection Fund (DPF) as the agent of the administrators of the late Aradi's estate and he was facilitated by the estate. He confirmed he ceased acting as the agent for the administrators of the estate and reverted the rent collection role back to the administrators.

15. DW1 Edward Okul, a son of Barrack Okul (deceased) and a Co-administrator of the deceased estate testified on behalf of the defendants. The witness relied on his filed witness statement and the bundle of documents filed on behalf of the defendants which were admitted in evidence as DEX1-13. He testified that his father died on 6th August 2013 and that he was prior to his death the registered owner of the suit property. The witness confirmed that indeed their father had entered into a sale agreement dated 30th October 1985 with the late Aradi but contended that the agreement was not completed on account of non-performance on the part of Mr. Aradi. The witness stated that both his late father and Mr. Aradi (deceased) were councilors in Nakuru and he was not aware of any dispute respecting the suit property between his father and Mr. Aradi.

16. DW1 testified that the suit property had been vacant until 2008 when someone erected an illegal structure thereon. He stated his late father made a complaint about the illegal structure to the council who issued an enforcement notice. He said the structure must have been put up after Mr. Aradi's death and the tenant must equally have been put in after Mr. Aradi died.

17. The witness denied the petty cash voucher and the blank transfer forms were signed by his late father. He stated the signatures were not his father's. He stated however under cross examination that he had not known about the agreement between his late father and Mr. Aradi (deceased) until after the death of Mr. Aradi. He nonetheless acknowledged his father and Mr. Aradi were close friends. The witness admitted Mr. Aradi's family had been in possession of the suit property for a long time and that the title to the property was still held by the Deposit Protection Fund (DPF). The witness stated he could not say when the plaintiffs occupied the suit property explaining that he only got involved in the properties and business of his father after his father's death. He affirmed he only became aware of the plaintiffs claim in regard to the suit property during the succession proceedings.

Submissions, Analysis and Determinations

18. Following the close of the trial the parties filed their closing written submissions as directed by the court. Upon review of the pleadings, the evidence adduced by the parties and the submissions filed on behalf of the parties the following issues arise for determination.

(i) Whether there was a sale agreement between Barrack Deya Okul (deceased) dated 30th October 1985 respecting land parcel Nakuru Municipality/Block 1/744 (Langa langa)?

(ii) Whether Manoah Kisame Aradi (deceased) took possession of the suit property pursuant to the sale agreement and if so, whether he continuously remained in possession?

(iii) Whether the estoppel doctrine and/or the adverse possession doctrine would be applicable in the circumstances of this case?

(iv) Whether the plaintiffs' action is founded on contract, and if so, whether the action is statute barred by reason of the provisions of the Limitation of Actions, Act Cap 22 Laws of Kenya?

(v) What orders/reliefs should the court grant?

19. On the first issue there is no contestation. Both the plaintiffs the defendants agree that the late Barrack Deya Okul and the late Manoah Kisame Aradi entered into a sale agreement dated 30th October 1985 where Mr. Okul agreed to sell land parcel **Nakuru Municipality /Block1/744 Langa langa** to Mr. Aradi for the consideration of Kshs.100.000/=. The copy of the sale agreement was exhibited by both parties. PW1 widow of Mr. Aradi (deceased) testified that her husband paid the full purchase price as per the agreement and took possession and occupation of the suit property. It was her evidence that her family has possessed and utilized he suit property for over 30 years. PW1 testified that her family developed and occupied the suit property without any interruption. The evidence by PW2 James Njoroge who was rented the premises by Mr. Aradi during his lifetime corroborates Pw1's evidence that they took possession and developed the property and were utilizing the same as the owners. PW3 Sospeter Nyakundi affirmed the evidence by PW2 that he was a tenant in the suit premises and that in 2007 when his firm was appointed to collect rent on behalf Mr. Aradi's estate following his death, PW2 was amongst the tenants from whom they collected rent.

20. The evidence by DW1 Edward Okul did not dislodge the plaintiffs evidence. The witness (DW1) in his evidence acknowledged the agreement between his late father and Mr. Aradi. He however, stated the agreement was not completed owing to default the part of Mr. Aradi. He did not particularize the nature of the default. The witness stated he had no knowledge of the suit property until after the death of Mr. Aradi. He stated he only became involved in his father's properties and business after his death. DW1 acknowledged the plaintiffs family had been in possession of the suit property for a long time though he could not tell from which date they took possession.

21. Based on the evidence it is my finding that indeed there was a sale agreement dated 30th October 1985 relating to the suit property between Mr. Aradi (deceased) and Mr. Okul

(deceased). The evidence further establishes that the family of Mr. Aradi took occupation and possession of the suit property, developed some structures thereon which they rented out and were receiving rents. The foregoing discussion and analysis affirmatively disposes the first and second issues.

Whether the estoppel and/or adverse possession doctrine is applicable?

22. The plaintiffs case is not founded on the sale agreement dated 30th October 1985. The plaintiffs are not seeking enforcement of the agreement of sale. The plaintiffs have pleaded the agreement to demonstrate the circumstances under which they entered into possession of the suit property. The plaintiffs under paragraph 4 of the plaint pleaded as follows:-

4. *The plaintiff's case is that on 30th day of October, 1985 the Late Barrack Deya Okul (deceased) fully and exclusively sold title No. Nakuru Municipality Block 1 (Langa langa)/744 and all the proprietary interests therein at a total consideration of Kenya Shillings one hundred Thousand (kshs100,000/=) only the whole of which was fully paid and the former gave up possession in favour of the latter with the commitment and undertaking that he would transfer and register the same in favour of the buyer. Full details and particulars whereof are well known to the defendants.*

23. The plaintiffs under prayer (a) in the plaint are seeking a declaration by way of contractual conduct, promissory estoppel and adverse possession.

24. On the evidence as I have found the plaintiff entered into possession of the suit property following the sale agreement. The evidence that the plaintiffs constructed some structures on the suit property and were renting out the property and collecting rent was not rebutted. PW2 confirmed he was a tenant in the premises before Mr. Aradi died in 2006 and he was paying rent to Mr Aradi and that he thereafter up to the date of the trial was a tenant paying rent to the plaintiffs. There is no evidence that for all the period 1985 upto 2019 when the present suit was filed, the defendants by themselves and /or through their deceased father took any action to have the plaintiffs evicted from the suit property. The correspondences exhibited in the defendant's bundle of documents showing that the defendant's deceased father complained to the Municipal council in 2009 regarding illegal structures in the suit property does not constitute action that would have prevented and/or stopped time from running against him as the title holder if the activities being carried on the property was adverse to his interests as the owner.

25. There is no doubt the defendant's deceased father had acquiesced to the plaintiff's family occupation of the suit property. That the plaintiffs family went ahead and erected structures on the suit property which they were leasing out is sufficient evidence to demonstrate they were treating the land as their own and their activities on the suit land were inconsistent and hostile to the interests of the registered owner. The plaintiffs possession of the land was adverse to the interests of the defendants and constituted adverse possession.

26. In the case of **Wambugu -vs- Njuguna (1983) KLR 172** the court of appeal in considering what constitutes adverse possession under holding 2,3 and 8 stated as follows: -

2. *In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.*

3. *The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.*

8. *Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.*

27. In the present case the plaintiffs took possession of the suit property following the agreement of sale. Under the agreement the final balance of the purchase price of Kshs.40,000/= was payable on 30th November 1985. The plaintiffs testified they paid the full purchase price upon which they took possession. I found the evidence of the plaintiffs believable and I accepted it as more probable than the defendant's assertion that the agreement was rescinded and/or terminated for default on the part of the plaintiffs. The defendants in my view had no explanation for the plaintiffs long uninterrupted possession of the suit property. The only viable explanation must have been that following the agreement, Mr. Aradi's family was let into possession and have since remained in possession to date.

28. The defendants having parted with possession of the suit property and the plaintiffs having adversely possessed the suit property, the defendant's title over the suit property was extinguished after the expiry of 12 years from 1st December 1985 such that by December 1997 the period of adverse possession had lapsed in favour of the plaintiffs. The Defendants under the provisions of section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya lost the right to recover the land from the plaintiffs. Section 7 of the Act is in following terms:-

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7. *Actions to recover land*

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

29. The plaintiffs have been in possession of the suit property for over 30 years and have all the time been enjoying ownership rights. The defendants cannot succeed in an action to recover the land from the plaintiffs by virtue of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. It is inexplicable how the defendant's family let the plaintiff's family to exclusively occupy and possess the suit property for over 30 years and receive rent for the same if the plaintiff's had not indeed purchased the property. The defendant's no doubt would have taken action to recover the property if the agreement was terminated as DW1 alleged. They cannot bring such action now as it was bound to be defeated on account of the limitation of actions.

30. The Defendants submitted the plaintiffs action was statute barred by reason of limitation of actions by virtue of section 4 of the Limitation of Actions Act as the suit was not brought within 6 years of the making of the agreement for sale. As I observed earlier in this judgment, the plaintiffs suit is not founded on contract but rather on possession. Section 4 (1) (a) of the Limitation of Actions Act in the premises has no application.

31. I am conscious that the plaintiffs had not specifically pleaded adverse possession as the basis of their claim. I am also mindful that adverse possession claims under Order 37 Rule 7 of the Civil Procedure Rules ought to be originated by way of originating summons and not by way of plaint. The plaintiffs however pleaded they had exclusive possession of the property and that the deceased Barrack Okul intended to transfer the property save for other intervening factors. The plaintiffs in their prayers were clear they were seeking a declaration of ownership inter alia on account of having been adverse possessors. On the evidence, I have found and held the plaintiffs possession was adverse and the ingredients for adverse possession were met for the requisite statutory period of 12 years prior to the institution of the suit.

32. This court is enjoined under Article 159 (2) (d) of the Constitution and Section 19 of the Environment and Land Court Act 2011 to administer substantive Justice without undue regard to technicalities of procedure. It is my view that adverse possession can be proved even in matters not necessarily commenced by way of originating summons. The court's duty and obligation is to do substantive justice to the parties before it in a just and expeditious manner.

Section 1A (1) of the Civil Procedure Act, Cap 21 Laws of Kenya states the objective of the Act thus: -

Section 1B(1) of the Act further provides:-

Duty of Court 1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Section 1B(1) of the Act further provides:-

Duty of Court

) 1(b) (1) For the purpose of furthering the overriding objective specified in [section 1A](#), the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

33. The overriding objective as embodied under section 1A of the Civil Procedure Act was reproduced more or less in similar terms under section 3 of the Environment and Land Court Act No. 19 of 2011 when it was enacted. Section 3 of the Environment and Land Court Act provides:-

3 Overriding objective

(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.

(2) The Court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).

(3) The parties and their duly authorized representatives, as the case may be, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.

34. Section 19 (1) of the Environment and Land Court Act further enjoins the Court to act expeditiously without undue regard to technicalities of procedure.

35. In the present matter the court is satisfied the plaintiffs have been in possession of the suit property and their possession has been adverse to the interests of the registered owner for a period in excess of 12 years. The defendants right to recover the land has been extinguished by reason of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. On the evidence the plaintiffs have become entitled to be

registered as owners of the suit property under the doctrine of adverse possession. It would in my view amount to miscarriage of justice if the court failed to award the plaintiffs judgment on procedural technicality that the plaintiffs claim was not originated by way of originating summons. Justice ought not to be sacrificed at the altar of procedural technicalities. It is paramount for the court to do what is substantively just without paying too much regard to procedural technicalities.

36. In the present matter both parties have led evidence to suggest the title of the suit property was used to secure a borrowing from Thabiti Finance Co. Ltd (now in liquidation) by Barrack Okul (deceased). The evidence in that regard was scanty. The copy of the title produced in evidence bore the company stamp of Thabiti Finance Company Ltd suggesting the title could have been deposited with them and /or pledged to them. The copy of the certificate of official search for the suit property dated 21st May 2009 exhibited by the defendants did not show there was any charge registered in favour of Thabiti Finance Co. Ltd. It however indicated there was a prohibitory order registered against the title on 26th March 1998 pursuant to an order issued in Civil Suit No.242 of 1992. Regrettably, no details of this suit were furnished by the parties. On the evidence it was therefore not clear what interest Thabiti Finance Co. Ltd (in Liquidation) had in the suit property. The only evidence adduced was that they infact held the original certificate of lease issued in the name of Okul (deceased).

37. In the final result and after due consideration and analysis and evaluation of the evidence, I am satisfied on a balance of probabilities that the plaintiffs have proved they have been in adverse possession of land parcel **Nakuru Municipality/Block 1/744 (Langa langa)** for the requisite period of 12 years. I accordingly enter judgment in favour of the plaintiffs and make the following final orders:-

(i) A declaration be and is hereby issued that the plaintiffs as administrators of the estate of Manoah Kisame Aradi (deceased) have acquired title, to land parcel Nakuru Municipality Block 1/744 (Langa langa) by virtue of being in adverse possession for a period of 12 years.

(ii) That subject to the prohibitory order registered on 26th March 1998 (HCCC No.242 of 1992) being lifted the Land Registrar Nakuru is ordered to register the plaintiffs jointly as the owners of land parcel Nakuru Municipality/Block 1/744 (Langa langa) in place of Barrack Deya Okul (deceased).

(iii) Each party to bear their own costs of the suit.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF MARCH 2021.

J M MUTUNGI

JUDGE