



REPUBLIC OF KENYA



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**Ochoki v Ouko & 2 others (Environment & Land Case 413 of 2018)
[2024] KEELC 641 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 413 OF 2018
LN MBUGUA, J
FEBRUARY 8, 2024**

BETWEEN

CATHERINE ALUVISIA OCHOKI PLAINTIFF

AND

ROSELYN DOLA OUKO 1ST DEFENDANT

AARON TAFARI OUKO 2ND DEFENDANT

DAVID SCOTT ONGOSI 3RD DEFENDANT

JUDGMENT

1. The dispute herein pits 2 families, as between the estate of James Ondimu Ochoki and the estate of Jason Atinda Ouko and who were purchaser and vendor respectively in a sale agreement transaction dated 10.3.1978 where 5 acres out of LR 3589/6 were sold by Jason Atinda Ouko to James Ondimu Ochoki (both deceased).
2. The suit was filed by the initial Plaintiff James Ondimu Ochoki vide an Originating Summons dated 24.1.2013. However, the said plaintiff passed on and was substituted with his widow and legal representative Catherine Aluvisia Ochoki culminating in the Amended plant filed in court on 20.1.2020.
3. In a nutshell, the plaintiff frames the following questions for determination by the court;
 - a. Whether James Ondimu Ochoki (deceased) took possession from Jason Atinda Ouko (deceased) of 5 acres known as LR 3589/57 and LR 3589/58 curved from Title Number 3569/6 I.R 23229 in the year 1978, and if so whether the said possession which has been factual and uninterrupted for over 35 years entitles him to adverse possession.



- b. Whether Jason Atinda Ouko did transfer the said 5 acres to the Plaintiff on 12.7.1993 and whether he should be restrained by a permanent injunction from interfering with the said parcel.
 - c. Whether the plaintiff should be registered as the owner of the 5 acres piece of land.
 - d. Whether the Plaintiff should be compensated by the Defendants for interfering with her quiet possession and whether she is entitled to costs.
4. The defendants opposed the suit vide the replying affidavit sworn on 3.7.2020 by one Aaron Tafari Ouko (2nd defendant), where in the agreement of 1978 between Ochoki and Ouko is admitted but the defendants claim that the balance of the purchase price was not paid.

The Evidence

5. The Plaintiff testified as PW1 where she adopted her affidavit in support of the Originating summons sworn on 21.1.2020 and the annexures thereof as her evidence. Her testimony is that on 10.3.1978, her husband entered into an agreement with the late Jason Atinda Ouko (deceased) to purchase 5 acres which are LR 3589/57 and LR No. 3589/58 curved out of LR No. 3589/6 I.R No. 23229 and that her husband paid the entire purchase price.
6. She further avers that together with her late husband, they put up a residential home and have occupied the 2 plots measuring 5 acres without any interruption for a period of over 20 years.
7. That on 12.7.1993, Jason Atinda Ouko (deceased) transferred LR No. 3589/58 to her husband but he did not transfer LR 3589/57 though her late husband had paid stamp duty for it and unfortunately, the said Ouko passed on. The plaintiff never got titles for the suit plots.
8. She states that on 8.9.2011, they received notices from Advocates for the Administrators of the estate of the late Jason Ouko asking them to regularize their positions, failure to which they would face eviction. They responded by forwarding documents demonstrating their ownership of the suit parcels.
9. Upon cross-examination, PW1 stated that her knowledge of the dispute herein is based on the sale agreement dated 10.3.1978, where the vendor acknowledges the sum of ksh.90,000/= but she has no documents to show that other payments were made.
10. She further stated that the transfer dated 12.7.1993, bears Jason Oukos' signature though the photocopy is a bit blurred out and that it has his passport photograph and it indicates that consideration for the parcel being transferred was ksh.400,000/=which is 3 times the purchase price of ksh.120,000/= as stated in the sale agreement dated 10.3.1978 and that it was lodged for registration on 27.11.2006.
11. PW1 also stated that she moved into the suit land in 1988 with the knowledge of Mr. Ouko and under the assumption that the entire purchase price had been paid.
12. In re-examination, PW1 clarified that the sale agreement dated 10.3.1978 was signed by 3 people including Maucho for J.O Atinda PA No.NP/A7 Folio 10.
13. With regard to the transfer dated 12.7.1993, she availed a clear original.
14. Concerning the variance of consideration in the transfer and the sale agreement, she stated that the reason for the variance could be that rates used to be charged for the entire parcel of Mr. Ouko and not just their portion.



15. PW1 also stated that the delay in execution of transfer for the suit land was caused by delay in subdivision of the mother title.
16. She further stated that she has never been asked to pay a balance of ksh.30,000 and was never told to vacate the suit parcel.
17. The Defendant's case was advanced by DW1, Aaron Tafari Ouko, the 2nd defendant who is a son to Jason Ouko (deceased). He adopted his replying affidavit sworn on 3.7.2020 with the 5 annexures thereof as his evidence. He admits that vide the agreement dated 10.3.1978, their late father agreed to sell to Mr. James Ochoki Ondimu a parcel of land measuring 5 acres out of LR 3589/6 for ksh.120,000/= out of which the Plaintiff paid ksh.90,000 leaving a balance of ksh.30,000/= unpaid to date but he was permitted to take possession by his late father with the expectation that he would pay the balance of the purchase price.
18. That the Plaintiff's contention that their deceased father executed a transfer on 12.7.1993 in relation to LR 3589/58 is untrue and that it beats logic that he would sign a transfer for parcel LR NO. 3589/58 and refuse to sign the one in relation to LR NO. 3589/57 if the Plaintiff had paid the entire purchase price.
19. It is also averred that in 2012, prior to filing of this suit, Mr. Ochoki (deceased) had reached out to him and his brother Mr. Andrew Ouko seeking that he be allowed to settle the balance of the purchase price.
20. It is admitted that on 8.9.2011, their advocates issued a communication to the Plaintiff seeking that they regularize their status on the suit land within 7 days and instead of complying, the Plaintiff proceeded to file this suit.
21. In cross-examination, DW1 stated that vide the sale agreement of 1978, the property being sold was 5 acres out of which 3589/58 was 3.02 acres while 3589/57 was over an acre. According to him, the Plaintiff only purchased 3589/58 and not 3589/57 as there was no transfer signed for it.
22. That as per the clause 2 (a) of the said sale agreement, the purchase price was ksh.120,000.
23. DW1 doesn't know when his father procured a sub divisional plan but contends that his father had an obligation to subdivide the parcel. He further stated that the purchaser took possession upon execution and since then, no notice to vacate the land was ever issued to the Plaintiff, even after their father passed on in the year 1996.
24. DW1 also stated that he is aware that there are houses on parcel LR 3589/58 and that the place is fenced with amenities like water and electricity which the Plaintiff pays and has been paying rates.
25. That he is not aware of any refund made by his father to the purchaser, and is not aware of any notice to terminate the sale.
26. According to DW1, the transfer dated 12.7.1993 is fictitious because it has irregularities like the way the photograph is imposed and the fact that his father's signature is not clear. He admits that the transfer was lodged but he is not aware as to why the same did not go through.
27. In re-examination, DW1 does not dispute the agreement dated 10.3.1978, but he avers that he never got the payment of Ksh.30 000. He was however not engaged in the said transaction.

Submissions

28. The Plaintiff filed submissions dated 24.10.2023 where she argues that her evidence of possession and DW1's admission that her family sits on 5 acres curved from Title Number 3589/6, which they took



- possession of in 1978 meets the threshold for declaration as an adverse possessor. It is further argued that the fact that Mr. Ouko signed the transfer dated 12.7.1993 in favour of Mr. Ochoki shows that Mr. Ochoki had paid what he was required to pay as the balance of the purchase price.
29. It is further submitted that while the Defendants dispute the transfer dated 12.7.1993, they did not call any witness to dislodge its veracity. That in any event, the transfer did not go through as the original title was encumbered.
 30. The Plaintiff also argues that under the sale agreement, the late James Ondimu was under no obligation to pay the balance of ksh.30 000 unless the vendor gave him a copy of the sub divisional deed plan for the plot and he never did so.
 31. In support of her arguments, the plaintiff relied on the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR, as well as decisions of the court in similar matters being; ELC No. 418 of 2018 Fredrick Ayigo Ochoki v Roselyn Dola Ouko and others, Rose Waruinu Muthemba v Rosalya Dola Ouko & 2 others [2020] eKLR and Rahab Wangui Kageni (Suing as the administrator of the estate of Samuel Muhika Kageni) v Roselyn Dola Ouko & another [2019] eKLR.
 32. The Defendant's submissions are dated 6.12.2023, where it is submitted that the Plaintiff failed to prove that her possession of the suit parcel was through force and without the authority of the owner for reasons that her stay on the suit parcel was purely based on a purchaser's interest with full consent and permission of Mr. Ouko by dint of an agreement dated 10.3.1978. To this end, the case of Muhiddin Mohamed Muhiddin (suing for and on behalf of the Estate of Mohamed Muhiddin Mohamed Hatimy) v Jackson Muthama & 168 others [2014] eKLR is relied upon.
 33. The case of M'mbaoni M'thaara v James Mbaka [2017] eKLR was cited to submit that there is need to separate a claim for adverse possession from a claim predicated upon a purchaser's interest and that the 2 should not be conflated.
 34. It is pointed out that the sale agreement between late Mr. Ouko and Mr. Ochoki was never repudiated or terminated by any of the parties, thus adverse possession cannot be sought where there exists a valid sale agreement and that the Plaintiff's claim of having paid the entire purchase price was not proved. To this end, the case of Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, as well as the case of Gabriel Mbui v mukindia Maranya[1993] eKLR were relied upon.

Determination

35. The issue falling for determination is; Whether the plaintiff is entitled to the two suit parcels 3589/57 and 3589/58 by way of adverse possession.
36. The provisions of Section 7 as read with Section 38 of the *Limitation of Actions Act* envisages a claim of adverse possession which is described by the court of Appeal in Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR, as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, it is twelve (12) years....”
37. A party claiming land by adverse possession has to prove exclusive, continuous, uninterrupted possession for a period of 12 years as well as prove that such possession was without the consent of the owner.



38. The Plaintiff claims ownership to parcel LR 3589/57 and LR 35899/58 by way of adverse possession arguing that the parcels which were hived from Title Number 3589/6 I.R No. 23229 were sold to her late husband by Mr. Ouko (deceased) vide a sale agreement dated 10.3.1978.
39. PW1 led evidence that on 12.7.1993, the late Mr. Ouko signed a transfer in respect of LR 35899/58 but failed to transfer the portion known as LR 3589/57. The plaintiff also never got titles.
40. The Defendants admit that indeed the late James Ondimu Ochoki entered into a sale agreement dated 10.3.1978 with Jason Ouko and further admit that the Plaintiff has been in possession of the suit parcels since then whereby, she has fenced the suit parcels, developed the same and also pays rates.
41. However, the defendants argue that the Plaintiff's prayer for adverse possession is unmerited since Mr. Ochoki entered the suit parcel as a purchaser and with the permission of the late Ouko pending full payment of the purchase sum. The defendants claim that although the purchase price was ksh.120,000/=, only Ksh. 90,000/= was acknowledged as having been paid leaving a balance of ksh.30,000/= unpaid to date.
42. There being an admission that the plaintiff has been on the suit land from the time of purchase, the only question to interrogate is whether Mr. Ochoki's occupation on the suit property was with the permission of the owner.
43. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court stated as follows;

“Let no mistake be made that once possession is admitted or established, then its having been adverse is to be assumed. The elements required to make it adverse must be shown to have been present. These being factual matters, evidence is required; and nobody should be hoodwinked to think that if his possession is admitted or proved, then the conclusion is that the other elements must automatically follow.”
44. The entry unto the suit property by the plaintiff was certainly with the permission of the vendor. The parties are in agreement that the plaintiff entered the suit land courtesy of the agreement dated 10.3.1978.
45. A claim for adverse possession cannot issue where occupation is permissive. However, such a claim if based on a sale agreement can be sustained after payment of the last installment which is when limitation of action begins to run. See *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR and *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
46. The sale agreement dated 10.3.1978 set a fixed completion date which was 40 days after execution, that was also the date upon which the balance of Ksh.30 000 was to be paid (See clause 2 (b) and 3 (b) of the Sale agreement). The transaction was never completed, nor was the Ksh.30 000 paid. Thus time can be computed from the 41st date after 10.3.1978. That day would fall on 21.4.1978.
47. PW1, however testified that Mr. Ouko took very long to subdivide the mother title No. 3589/6 thus he issued them with a transfer 15 years later on 12.7.1993. This evidence shifts gears forward as the implication of the transfer document is that the plaintiff was still on the suit land with permission of the vendor. The transfer was however in respect of parcel 3589/58 and it did not go through.
48. Going by the sale agreement dated 10.3.1978, clause 3 (b), the balance of the purchase price would only be paid in exchange for a transfer for the plot (5 acres), and the plaintiff has a transfer albeit for parcel LR 3589/58. Thus the date of 12.7.1993 is the appropriate date to compute time in relation



to a claim of adverse possession. It follows that Plaintiff's rights as an adverse possessor crystallized in the year 2005.

49. The sale agreement which both parties have reads that what was being sold was 5 acres out of parcel 3589/6 which was to be subdivided into several subdivisions. Thus it is clear beyond peradventure that the parcels 58 and 57 only came after the subdivision. During cross examination, DW1 stated that indeed the plaintiff was buying 5 acres of which stroke 58 was 3.02 ha. While 3589/57 was 1. something. The process of subdivision must have been in the hands of the vendor, but defendants have been economical with the truth regarding the acreage of the suit properties. The defendants have not claimed that the two parcels (3589/57 and 3589/58) measure acreage beyond 5 acres.
50. I find that the plaintiff has proved her claim of adverse possession and I therefore proceed to give orders as follows;
1. A declaration is hereby made that the plaintiff is entitled to the properties parcel Nos. 3589/58 and 3589/57 by way of adverse possession.
 2. An order is hereby issued directing the Land Registrar to register the said parcels of land into the Estate of James Ondimu Ochoki.
 3. In order to give effect to the implementation of this judgment, the Deputy registrar of this court is hereby authorized to sign all requisite documents to effect the transfer of the suit properties.
 4. The plaintiff shall meet the costs of the aforementioned transfers.
 5. The defendants are condemned to pay costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Maina for Plaintiff

Ng'eno for Defendant

Court Assistant: Cheronno

