



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 49 OF 2018

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

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULE 2010

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. SOUTH TESO/AMUKURA/1542 AND 1964

AND

IN THE MATTER OF THE ESTATE OF THE LATE EKURUT OPILI EMONGOLIK

BETWEEN

SAFARINO OJUMA ISOGOLI.....APPLICANT

VERSUS

JOSEPH OKOCHIL EKURUT.....1ST RESPONDENT

SAVIOUR OMULA OPILI.....2ND RESPONDENT

THE COUNTY LAND REGISTRAR OF BUSIA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

J U D G E M E N T

Pleadings

1. Sarafino Ojuma Isogol moved the Court by way of Originating Summons dated 4th June 2018 premised on the provisions of Order 37 rule 1 & 7 and sections 37 & 38 of the Limitation of Actions Act. The applicant asked the court to determine the following questions;

- 1) Whether or not the 1st and 2nd Respondents have petitioned for the Estate of the late EKURUT OPILI EMONGOLIK of which the land parcel No. SOUTH TESO/AMUKURA/1542 forms part of the said Estate?**
- 2) Whether or not the applicant bought a portion of land measuring 1.1 hectares or three acres out of land parcel No. SOUTH TESO/AMUKURA/1542 from the late EKURUT OPILI EMONGOLIK and the purchase price paid in full?**
- 3) Whether or not the late EKURUT OPILI EMONGOLIK, had signed all documents of transfer and attended land control board for both subdivision and transfer to obtain a letter of consent prior to his demise?**

4) Whether or not the applicant lawfully or legally obtained the title deed for land parcel No. SOUTH TESO/AMUKURA/1964 a portion of land measuring 1.1 hectares or three acres out of land parcel No. SOUTH TESO/AMUKURA/1542?

5) Whether or not the action by the 3rd Respondent of cancelling the title deed for land parcel No. SOUTH TESO/AMUKURA/1964 and Mutation form that gave rise to the said number was unlawful and illegal?

6) Whether or not the applicant who has been in quiet, peacefully and uninterrupted occupation of the land parcel No. SOUTH TESO/AMUKURA/1964 or a portion of land measuring 1.1 hectares out of the land parcel No. SOUTH TESO/AMUKURA/1542 since 1985, has acquired its proprietorship by adverse possession?

7) Whether or not the 3rd Respondent should be ordered to reinstate the title deed for land parcel No. SOUTH TESO/AMUKURA/1964 and the mutation form that gave rise to the said number and cancel any other number arising out of the land parcel No. SOUTH TESO/AMUKURA/1542 thereto?

8) Whether or not the Respondents should be condemned to pay costs of this suit.

2. After determination of the questions raised above, the applicant urged the court to grant him the following orders;

(a) An order declaring the Applicant's process or procedure of obtaining the Title deed for land parcel No. SOUTH TESO/AMUKURA/1964 was lawful and legal.

(b) An order declaring the Applicant had acquired the land parcel No. SOUTH TESO/AMUKURA/1964 or the portion of land measuring 1.1 hectares out of the land parcel No. SOUTH TESO/AMUKURA/1542 by adverse possession.

(c) An order directing the 3rd Respondent to reinstate the title deed for land parcel No. SOUTH TESO/AMUKURA/1964 and mutation form that gave rise to the said number and cancel any other number arose out of the land parcel No. SOUTH TESO/AMUKURA/1542.

(d) An Order condemning the Respondents to pay cost of this suit.

3. The summons was supported by facts narrated in the applicants' affidavit sworn on 4th June 2018 wherein. He deposed *inter alia*;

(i) He purchased 3 acres of the land SOUTH TESO/AMUKURA/1542 on 6/7/1985 from Ekurut Opili Emongolik.

(ii) The purchased portion was demarcated in the presence of both family members.

(iii) In 1988, L.R SOUTH TESO/AMUKURA/1542 was subdivided into two to create L.R Nos 1964 and 1965.

4. The Applicant continued that after the subdivision, Ekurut Opili began to dodge him forcing him to file a suit vide BSA SRMCC No. 167 of 1992 for an order to compel him. That the said Ekurut entered appearance in the said suit and filed a statement of admission copies of which the Applicant annexed as **SOI-5 (a) & (b)**. Subsequently, on 25/2/1994 they attended Amukura Land Control Board and obtained letter of consent to transfer. The applicant deposed that Mr. Ekurut proceeded to sign all the pending documents of transfer in his favour. However, due to a caution placed by Leseo Emate Pade he was not able to get title immediately.

5. The Applicant added that he acquired his title deed on 9/7/2008. That he has been using the purchased land peacefully from 1985 until 2016 when the 1st and 2nd Respondents stopped him from using it claiming they have a title for the whole parcel. On receipt of the information, the applicant visited the lands office on 17th May 2016 and confirmed what the 1st and 2nd Respondents told him. He states that he was never notified prior to cancellation of his title. He urged the court to reinstate his title.

6. The 1st Respondent filed a replying affidavit on 28/6/2018 for himself and on behalf of the 2nd Respondent to challenge the suit. He deposes that the suit herein is baseless, misconceived and meant to demean justice. He continued that he is the registered owner of parcel No. South Teso/Amukura/3960 and the 2nd Respondent is the owner of 3961 which land they inherited from their deceased father. He contends that title South Teso/Amukura/1542 was equally distributed in Busia Succ. Cause No. 153 of 2007 to the beneficiaries of the estate. The respondents deposed that their father occupied and utilized the whole land undisturbed until 17/6/2018 when they were served with Summons to enter appearance in this case.

7. Mr. Martin Osano the Busia County Land Registrar deposed a replying affidavit on behalf of the 3rd and 4th defendants. He stated that South Teso/Amukura/1542 was initially registered in the names of Ekurut Opili on 3/7/1978. That on 30/6/2008, this title was closed on subdivision which yielded parcel Nos 1964 and 1965 but the same was cancelled after it was discovered it was done fraudulently after the demise of the registered owner. Mr. Osano continued that another sub division was done on 24/4/2015 creating numbers 3960, 3961 and 3962. That parcel numbers 1964 and 1965 no longer exists.

Evidence Adduced

8. The plaintiff relied on the evidence of two witnesses in support of his case. The Applicant testifying as PW1 stated that he bought a portion of land from Ekurut Opili. That L.R No. South Teso/Amukura/1542 was measuring 2.2 Hectares. The sale agreement was prepared

before the village elder and he paid Kshs.10,000 on 16th July 1985. **PW1** continued that Opili had two witnesses during the sale transaction i.e Lazarus Ijaa and Clement Ikea. He produced the agreement as **Pex 1**. The witness further stated that they appeared before the Land Control Board for obtaining consent to subdivide the land and he paid for the survey fee – **Pex 2**. He also produced a copy of the mutation produced for numbers 1964 and 1965 as **Pex 3**.

9. The applicant states that Opili started dodging him at the stage of obtaining consent to transfer. This made him file Case No. 167 of 1992 and in response, Mr. Opili filed a statement of admission produced as **Pex 4**. That Opili proceeded to get him consent to transfer as well as sign the transfer forms for his 1.1ha which documents he presented for registration. The witness produced a title No. South Teso/Amukura/1964 issued in his name as **Pex 7**. The plaintiff stated that he had been farming the land until 2016 when the 1st and 2nd respondents stopped him. That the sub chief for the area advised him to stop for his own safety. He filed this suit seeking for the orders contained in his Originating Summons.

10. In cross-examination, **PW1** said their agreement was dated 6/7/1985, and the consent to transfer issued on 25/2/1994. That it is true the transfer was registered after the death of Opili. That he is aware the 1st & 2nd Respondents carried out succession and re-transferred the land pursuant to the letters of administration. That he was not served with the pleadings in the succession proceedings. In cross examination by counsel for 3rd and 4th defendant, the witness admitted Opili died in 1997. That at the time he registered his transfer, the records read Opili's name.

11. OBASIE PAULINYAN OGRAKOL gave evidence as **PW2**. He stated that previously he served as a member of Amagoro Land Control Board. He confirmed seeing Opili and the plaintiff appearing before the board. That when he asked Opili about his family, he answered that he had another land at Okabwait. That he gave consent for the plaintiff's transaction. In cross-examination the witness said he did not have a document to show he was a member of the Land Control Board. This marked the close of the plaintiff's case.

12. The defendants opened their defence on 7th November 2020 relying on the evidence of the 1st Respondent. Mr. Joseph Okochil Ekurut adopted his witness statement dated 28/6/2018. That he knew the plaintiff when he served them with summons. The witness denied that the plaintiff has used the suit land. According to him, they are the ones living on the land. That they got registered as owners thereof after doing succession between 2007-2009. He denied being aware of parcel No. 1964.

13. He also relied on his documents filed in court which were produced as follows:

- *Copy of greed card for 1542 as Pex 1.*
- *Mutation form for 1542 as Dex 2.*
- *Certificate of confirmation of grant as Dex 3.*
- *Copies of RL7 and RL9 forms as Dex 4.*
- *Copy of title for 1542 as Dex 5.*
- *Copy of title for 3960 as Dex 6.*
- *Copy of title for 3961 as Dex 7.*
- *Certificate of death of Ekurut Opili as Dex 8.*

14. In cross-examination, Mr. Okochil said in 1985 he was 15 years old. That he cannot know whether the plaintiff had bought the land because during that period they had been chased by their father. That Leseo Elemat is the one who took care of the funeral expenses of their father. DW1 admitted being aware of Leseo registering a caution on the suit land. That he removed the caution after he was refunded his money. This marked the close of the 1st and 2nd defendants case. The 3rd and 4th defendants did not adduce any oral evidence.

Submissions

15. The Applicant filed his submissions on 18th November 2020. The 1st and 2nd Respondents filed theirs on 24/11/2020 while the 3rd and 4th Respondents filed none. The Applicant rehashed the contents of his pleadings and his testimony in the submissions. That he did what was required of him as a diligent purchaser. He submitted that the 1st and 2nd Respondents should not go against the wishes of Ekurut Opili. He urged the Court to enter judgment in his favour.

16. The 1st and 2nd Respondents submitted that the green card for L.R No. 1542 shows the title was closed on 24th April 2016 so that the titles the plaintiff seeks to be transferred to him no longer exists. That the court cannot make orders in vain which are incapable of implementation. They urge the court to strike out the suit as being incompetent. On the claim for adverse possession; that the plaintiff having admitted being chased away in 2016 shows interruption of his stay. Secondly the proceedings in CMCC 167 of 1992 proves the occupation was not peaceful. That the two incidents robbed the plaintiff components to prove adverse possession.

Determination

17. I have analysed the pleadings filed, the evidence adduced and the evidence rendered. I deduce from the above two questions which are

for my determination;

(a) *Whether or not the plaintiff's title No. South Teso/Amukura/1964 was procedurally cancelled.*

(b) *Whether or not the applicant is entitled to a portion of the suit land measuring 1.1ha by way of adverse possession.*

18. That the Applicant purchased a portion of the suit title South Teso/Amukura/1542 from Ekurut Opili in 1985 is not in dispute because the Applicant produced a sale agreement in support of this averment. The 1st Respondent also said he was unaware as he had been chased by Ekurut (his father) around 1985 and lived with his uncle for one year. The signatures of the vendor and the purchaser were duly witnessed and the purchase price fully paid. The Applicant further stated that he took possession immediately.

19. The Applicant proceeded to produce the documents he used in the acquisition of title No. South Teso/Amukura/1964. The documents include a green card for L.R No. 1542 which shows at:

(i) *Entry No. 2 a caution registered in favour of Leseo Emate.*

(ii) *Entry No. 3 mutation dated 19/4/1984 pending.*

(iii) *Entry No. 4 caution withdrawn on 19/9/2007.*

(iv) *Entry No. 5 on 30/6/2008 title was closed on sub-division see now Nos 1964 – 1965.*

(v) *Entry No. 6 on 15/6/2009, the mutation cancelled because the land owner was deceased.*

20. The plaintiff's complaint is that he was not notified by the Land Registrar prior to the cancellation of his title. The 3rd and 4th Respondents deponed that they cancelled the mutation on discovery that the registered owner was dead. Section 142(1)(b) of the Registered Land Act Cap 300 (repealed) which section is replicated in section 79 of Land Registration Act states thus;

“142(1) The Registrar may rectify the register or any instrument presented for registration in the following cases –

(b) in any case and at any time with the consent of all persons interested;

Section 143(2) Cap 300 (now replicated in section 80(2) of Land Registration Act No. 3 of 2012) also provides thus;

“143(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

21. The provisions of law cited requires the Registrar to notify any interested parties in the title to be cancelled before rectification of the Register is done. The rules of natural justice also require a party not to be condemned unheard. The Registrar had before him records and details of the creation of the numbers of 1964 and 1965. The 3rd defendant did not in his affidavit state any attempt made to notify the Applicant of the intended cancellation. The cancellation was thus irregular to the extent that the Applicant as the registered owner of the impugned title at the time was not notified and no evidence was laid to prove that he was a party to the fraud/irregularities if any complained of.

22. The defence raised to the cancellation is whether or not the plaintiff's title ought to have been cancelled. The Applicant explained that after the sub-division was carried out; Ekurut started dilly-dallying in signing documents to transfer the land to him. He therefore filed the suit BSA SRMCC No. 167 of 1992 which sought the following Orders prayed for in the plaint dated 21/8/1992;

(a) *Transfer of land parcel South Teso/Amukura/1964.*

(b) *Costs of the suit.*

(c) *Any other relief the court deems fit to grant.*

23. The deceased Ekurut entered appearance and filed a statement of admission on 8th December 1992. He pleaded *inter alia* at paragraph;

“3. The plaintiff brought the matter to court without consulting me”.

“4. I request the Honourable court to order the plaintiff to accompany me to the lands office to effect the transfer.”

24. The Applicant stated that upon receipt of the statement of admission, the deceased took him to the Land Control Board and obtained consent to transfer and he signed transfer documents. This evidence is corroborated by the letter of consent issued on 25/2/1994 and the evidence of PW2 who saw the Applicant and Ekurut appear before the board. The Applicant went on to explain that the transfer was not

registered because of a caution registered on the title No. 1542 by one Leseo Emate. DW1 confirmed that indeed there was a caution registered on the suit title by Leseo. The green card equally shows a caution registered on 20/6/1988 and withdrawn on 19/9/2007. The inference drawn from the evidence adduced is that by the time of death of Ekurut, he had shown an intention to transfer the sold portion to the Applicant. The delay in the Applicant acquiring his title was on account of a restriction placed by 3rd party other than the deceased.

25. Consequently, in my opinion and I so hold that unless there was proof that the consent to transfer was irregularly acquired and/or that the transfer instrument was forged there was nothing wrong in the Applicant getting his title after the demise of Ekurut Opili. Equitable doctrine of equity deems as done that which ought to have been done applies. The 1st and 2nd Respondents took up the issue on date of agreement (1985) to when the consent was issued (1994). In my view, the non-compliance with Section 6 of the Land Control Act was overtaken by events when the plaintiff filed the suit for specific performance.

26. The Court of Appeal in the Case of **Willy Kimutai Kitilit Vs Michael Kibet (2018) eKLR** discussed the application of equitable doctrines in our decisions. They stated thus at paragraph 25 & 26 of the Judgment;

*[25] The word **equity** broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:*

“1.

*---2. **The body of principles constituting what is fair and right.***

*3. **The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---***

*4. **The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”***

*Thus, since the current Constitution has by virtue of **Article 10(2) (b)** elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.*

*[26] For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the **Macharia Mwangi Maina decision** that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.”*

27. The second issue is whether or not the Applicant is entitled to the suit by way of adverse possession. According to him, he started cultivating the land in 1985 after purchasing it. The 1st Respondent denied ever seeing or knowing the plaintiff until this suit was filed and documents served on them. The Respondent submits that the running of time was interrupted in 2016 when the Applicant was stopped from using the land. The Respondents said nothing in their evidence concerning stopping the Applicant from using the land. The Applicant stated that he stopped using the land on advice from the chief for his own safety. From the chief's letter dated 17th May 2016, it appears it is the Applicant who lodged the complaint. I do find no evidence from the 1st & 2nd defendants to support their argument that time stopped running.

28. Secondly, the Applicant is claiming a defined portion of 1.1ha out of the total acreage of 2.2ha. The 1st Respondent in paragraph 8 of his witness statement stated thus;

“That I have stayed on the said land and occupied the same undisturbed until the 17th day of June, 2018, when I was served with court documents”.

while the 2nd Respondent in paragraph 6 of his statement said; *“that I was born on the said suit land, I have a home, children and grandchildren on the said land. I have occupied and utilized the same undisturbed without any interference until the 17th day of June, 2018 when I was served with court documents.”*

29. Their evidence did not specify whether they are using the entire land and none of them have denied that the Applicant's portion was defined. I am satisfied that the Applicant's evidence of peaceful and uninterrupted occupation has not been contradicted. Consequently, as at the time the 1st and 2nd Respondents were taking out the letters of administration, the deceased interest on the portion sold to the plaintiff had been extinguished and did not constitute part of his estate. The same could not be shared by his beneficiaries.

30. In light of the foregoing, I safely conclude that the plaintiff has proved his case. The 1st & 2nd Respondents submitted that the orders sought cannot be granted. I find they can because the cancellation of the Applicant's title was irregular and uncalled for. Therefore, I enter judgment for the plaintiff as follows;

(a) An Order declaring the Applicant's process or procedure in obtaining the Title deed for land parcel No. SOUTH TESO/AMUKURA/1964 was lawful and legal.

(b) An Order declaring that the Applicant had acquired the land parcel No. SOUTH TESO/AMUKURA/1964 and/or the portion of land measuring 1.1hectares out of the land parcel No. SOUTH TESO/AMUKURA/1542 by adverse possession.

(c) An Order directing the 3rd Respondent to reinstate the title deed for land parcel No. SOUTH TESO/AMUKURA/1964 and mutation form that gave rise to the said number and cancel any other number arising out of the land parcel No. SOUTH TESO/AMUKURA/1542.

(d) The costs of the suit awarded to the Applicant.

Dated, signed & delivered at BUSIA this 3rd day of March, 2021.

A. OMOLLO

JUDGE