



**Ikahu v Wambui (Environment & Land Case 380 of 2011)
[2023] KEELC 20389 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 380 OF 2011
AA OMOLLO, J
OCTOBER 5, 2023**

BETWEEN

ANTHONY NJOROGE IKAHU PLAINTIFF

AND

ROSEMARY JANET WAMBUI DEFENDANT

JUDGMENT

1. The plaintiff filed this suit on 1st August, 2011 and later amended the plaint on 8th February, 2023 and 21st September, 2023. He is seeking the following reliefs;
 - a. Permanent injunction to issue barring the Defendant from purporting to sell/alienate/transfer or dealing with any other way plot No. 1 of land parcel number 3411.
 - b. An order for transfer of plot No. 1 from land parcel number 3411 to the plaintiff.
 - b (i) A declaration that the plaintiff has acquired the suit property by way of adverse possession amended on 21/9/2023.
 - c. In the alternative to (a) and (b) above a refund of Kshs.400,000/= with interest at Court rates since 21st July, 1998 until payment in full.
 - d. Costs of this suit.
 - e. Interest of c and d and e above.
2. The plaintiff pleaded that he entered into a sale agreement with the Defendant for purchase of 0.100 ha to be excised out of L.R No. 3411 for a consideration of Kshs.400,000/=. The plaintiff stated that he paid the price in full and was granted vacant possession of the suit premises.
3. The plaintiff filed this suit after he learnt that the Defendant was trying to illegally sell the same portion to 3rd parties. He listed the particulars of fraud as;



- a. Purporting to put the suit land on sale twice.
 - b. Refusing to facilitate transfer of the suit land to the plaintiff
 - c. Working towards defeating the indefeasible right of ownership of the suit land by the plaintiff.
 - d. Attempting to unjustly enrich herself from the proceeds of the sale of the suit land which is the bonafide property of the plaintiff
 - e. Failing to recognize the rights conferred on the plaintiff after the sale of the suit premises.
4. The Defendant filed a defence and counter-claim on 19/6/2018 denying the plaintiff's claim. She pleaded that she had engaged Ms Savanna Land Surveyors to subdivide L.R 3411 situated in Kahawa Sukari into smaller portions of ¼ acre each and later on sell the plots on condition she received a deposit of Kshs. 3,000,000. That the said surveyors were to retain one plot to finance their costs.
 5. The Defendant averred that the surveyors did not carry out the survey exercise as agreed but instead Mr. F.M Kariuki on behalf of Ms. Savanna Land Surveyors approached her on 10/7/1998 to sign an agreement over plot 1 to safeguard his interests. She contended that Mr. Kariuki advised that the property be registered in the name of his relative who is the plaintiff herein. She stated that the said Mr. F. M. Kariuki unduly influenced her.
 6. The Defendant denied selling land to anybody save for the intended transfer to Ms. Savanna Land Surveyors upon completing the ground survey and which in her opinion they failed to do. In the counter-claim, the Defendant pleaded that Mr. F. M. Kariuki sold the suit plot to the plaintiff behind her back. She added that the plaintiff has been occupying and continues to occupy the suit property illegally and without any cause.
 7. She prayed for orders;
 - i. A permanent injunction to issue barring the plaintiff whether by himself, his agents, servants, employees and/or assigns from building, constructing, possessing, occupying, or in any way dealing on or carrying out any activity on all that property known as plot No. 1 (the suit property) within plot No. 3411.
 - ii. An eviction order directed at the plaintiff to vacate all that property known as plot No. 1 (the suit property) within plot No. 3411.
 - iii. Mesne profits from 21st July, 1998 when the plaintiff occupied the suit property till payment in full.
 - iv. Costs of the suit and of the Counterclaim together with interest thereon for such period and at such rate as this Honourable Court may deem appropriate.
 8. The Defendant also filed witness statement dated 12th June, 2018 and bundle of documents of even date containing 7 documents inter alia correspondences exchanged between the Defendant and Ms. Savanna Land Surveyors and a copy of receipt dated 10th July, 1998 issued by the Defendant to the plaintiff for the sum of Kshs.400,000/=.
 9. The matter was set down for hearing and when the parties appeared before Okong'o J. on 8th April, 2019, the court was informed that the Defendant had died on 1st December, 2018. The matter was taken out and the plaintiff started the journey of substituting the deceased Defendant.
 10. The plaintiff gave his testimony on 21st September, 2023. He produced an order issued to him on 3rd June, 2022 in Milimani HCC Succession Cause No. E778 of 2020 allowing him to petition for



letters of administration ad litem in respect of the deceased Rosemary Janet Wambui. He subsequently petitioned for letters of administration ad litem vide NBI H.C Succession Cause No. E1092 of 2022 and was issued with a limited grant on 12th August, 2022.

11. Now armed with letters of administration, he substituted the Defendant and proceeded to prosecute his claim. It is an interesting scenario because the plaintiff cannot oppose his own claim. This court however will analyse the pleadings filed by the Defendant and the evidence presented to ascertain what reliefs to grant.
12. The plaintiff's suit is premised on two facets, first that he purchased the suit plot paid the full consideration and took occupation. Secondly by virtue of his occupation for a period in excess of 12 years, he has acquired the plot under the doctrine of adverse possession.
13. In her statement of defence, the Defendant denied selling land to the plaintiff. However, in the plaintiff's bundle of documents filed on 1st August, 2011, item one is a sale agreement dated 21st July, 1998 executed between the plaintiff and the Defendant for purchase of plot No. 1 measuring 0.1 ha comprised in title No. 3411. The said agreement was annexed to a supporting affidavit sworn on 28th July, 2011 in support of an interlocutory application of the same date. The Defendant responded to the said application vide a replying affidavit sworn on 9th November, 2011.
14. At paragraph 8 and 10 of the replying affidavit, the Defendant stated thus;

“That as a result of the foregoing and based on the representations of Mr. F. N. Kariuki, I executed the Agreement dated 21st July, 1998 and issued receipt No. 1105 from Rosagric & General for an amount of Kshs.400,000.00 in the name of Mr. Anthony Njoroge Ikahu on the honest belief that one Mr. Anthony Njoroge Ikahu, the plaintiff herein was to hold the suit property on his behalf (Mr. F. N. Kariuki, the proprietor of M/s Savanna Land Surveyors). (Annexed and marked hereto as “RJW’2” is a copy of the receipt dated 10th July, 1998)

That M/s Savanna Land Surveyors only managed to do partial ground survey and submitted an incomplete plan to me. The said plan has never been submitted to the council for approval to date.”

15. Thus, the Defendant was aware of this agreement. Nowhere on the face of this agreement is it stated that the plaintiff is holding the plot on behalf of Mr. F. M. Kariuki. It listed the plaintiff as a purchaser and the consideration as Kshs.400,000 which was acknowledged as paid in full under clause 3 of the agreement. The Defendant even included a receipt issued to the plaintiff for the said sum of Kshs 400000 in her bundle. If the Defendant had any engagements with Ms. Savanna Surveyors as she pleaded, there is nothing linking the plaintiff to the said surveyors. The defendant did not bother to join the Savanna Land Surveyors nor Mr. F. M. Kariuki in her counter-claim to establish the link if any with the plaintiff.
16. The plaintiff has prayed to be declared as the owner of plot No. 1 by way of adverse possession. He stated that he built on the suit plot and lives on it is a member of the Kahawa Sukari estate welfare association, off Garissa Road. In paragraph 25 of the defence and counter-claim, the Defendant admitted occupation when she pleaded thus;

“The Defendant states that the Plaintiff has been occupying and continues to occupy the suit property illegally and without any justifiable reason knowing very well that he has no proprietary rights over the property. The Defendant is apprehensive that the plaintiff might



commence construction works on the suit property and/or carry out any activities on the suit property in complete disregard of the Defendant's Constitutional and Statutory right to property."

17. The period of occupation is further exhibited by the plaintiff's letter to the Defendant dated 28th January, 2011 which at 3rd last paragraph, the plaintiff's advocates Karanya Kangiri & Co. stated thus;

"We are instructed further that our client has been in occupation for the last 12 years since the purchase."

18. The Defendant – deceased through her advocates Kipkenda & Co. Advocates replied to the letter of 28th January, 2011 vide theirs of 18th March, 2011.

"Our client's instructions are that your client forthwith vacates the premises plot number one (1). We are further informed that your client habitually comes to the premises drunk and in the process makes a lot of noise to the occupants of neighbouring plots."

19. There is ample evidence in support of the plaintiff's interest in plot No. 1 comprised in L.R 3411 Kahawa Sukari. He has demonstrated how he got into possession of the suit property. He has further demonstrated that his occupation has been consistent and peaceful for a period in excess of 12 years. I find no reason to deny him the reliefs he is seeking.

20. Consequently, I dismiss the counter claim and instead enter judgment for the plaintiff. The court makes the following orders;

- a. Permanent injunction to issue barring the Defendant from purporting to sell/alienate/transfer or dealing with any other way plot No. 1 of land parcel number 3411.
- b. A declaration that the plaintiff has acquired the suit property by way of adverse possession.
- c. An order for transfer of plot No. 1 from land parcel number 3411 to the plaintiff's name.
- d. No costs is awarded on account of demise of the Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE

