



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT VIHIGA

ENVIRONMENT & LAND CASE NO. 02 OF 2021 (OS)

(FORMERLY KAKAMEGA ELC NO. 267 OF 2014)

ROSE AKELLO OTIENO.....PLAINTIFF

VERSUS

JOSEPH ODOTE.....1ST DEFENDANT

PETER ONYANGO ODOTE.....2ND DEFENDANT

JUDGEMENT

Introduction

1. This matter was commenced vide Originating Summons dated 8th October, 2012 stated to be brought pursuant to the provisions of Order 37, Rules 3 and 7 of the Civil Procedure Rules (Cap 21, Laws of Kenya) and the Registered Land Act No.3 of 2012 wherein the plaintiff sought the following relief;

- a) That the Respondents, their agent, representatives, employees, servants and/or assigns be restrained by a permanent order of injunction from interfering, alienating sub-dividing, evicting and or threatening the peaceful occupation of the Applicant's portion and or do anything whatsoever on a portion occupied by the Applicant on WEST BUNYORE/EKWANDA/1606 pending *inter partes* hearing.
- b) That the Respondents JOSEPH ODOTE and PETER ONYANGO ODOTE be ordered to execute all documents of transfer in respect of the said portion of land WEST BUNYORE/EKWANDA/1606 in favour of the Applicant failure to which authorize Court officer of the Honourable court empowered to execute the same in place of the Respondents.
- c) That the applicant be declared the absolute owner of that portion on piece of land known as WEST BUNYORE/EKWANDA/1606 which parcel she has cultivated and has been in actual possession of peacefully, openly and uninterrupted for a period of over 33 years since 1978.
- d) That the honourable court do issue preservatory order directing the District Land Registrar Vihiga to stop any dealing and/or transactions in the entries of the register relating to land parcel No. WEST BUNYORE/EKWANDA/1606.
- e) That the court do issue such further orders of relief it deems fit and just expedient.
- f) That the costs of the Application be awarded to the Applicant.

2. The Respondents, in reply to the Originating Summons, filed a Replying Affidavit sworn by the 2nd Respondent, PETER ONYANGO ODOTE on 26.11.2012, on his own behalf and on behalf of the 1st Respondent.

3. Directions on the Originating Summons pursuant to the provisions of Order 37 Rules 16, 17, 18 and 19 of Civil Procedure Rules, 2010 were taken on 13th October, 2014 that the Applicant be treated as the Plaintiff, the Respondents as the Defendants, the matter to proceed by way of oral evidence and that parties file witness statements, if necessary.

4. When the matter came up for hearing the Defendants, though properly served with notice of hearing, were absent and the matter proceeded *ex parte*.

The Plaintiff's case.

5. The plaintiff contends that she has acquired title to a portion of land parcel known as WEST BUNYORE/EKWANDA/1606(the suit land herein) by operation of the doctrine of adverse possession. Her case is contained in the Originating Summons, Affidavit in support of the Originating Summons sworn by the plaintiff on 8th October, 2012, her testimony in court and the testimony of PW 2. She claims that she bought a portion of the suit land from the 1st Defendant. That she has been in actual possession of the purchased portion since the year 1978 to date, cultivating the same uninterrupted and enjoying peaceful use thereof. That payment of the purchase price was made by the plaintiff and her late husband one GEORGE OTIENO. That the 1st Defendant who is the father of the 2nd Defendant secretly transferred the whole of the suit land to the 2nd Defendant without taking into account the Plaintiff's share. That the 2nd Defendant has refused to transfer the purchased portion to the Plaintiff and instead is threatening to forcefully evict the Plaintiff from the suit land. In court she testified that the portion she and her husband bought is described in the land sale agreement dated 11.1.1994. She produced an agreement dated 11.1.1994 written in dholuo language and its English translation as exhibit 1 (a) and 1 (b) respectively. She also produced a copy of the Green Card in respect of the suit land as exhibit 2. She testified that she obtained an order from Kakamega High Court against the Defendants. PW 2, a daughter of the Plaintiff, supported the Plaintiff's case and testified that the Defendants are her neighbors at home and that she grew up tilling a portion of the suit land. That the portion was bought by her late father from the 1st Defendant. That her mother later added the seller some money. She added that since December, 2012 to date it is Onyango who is using the land and she prayed that he be restrained.

The Defence case.

6. The Replying Affidavit sworn by the 2nd Defendant on 26th November, 2012 was vide the court directions taken on 13.10.2014, deemed to be the Defence.

On 8th of December 2021 when the matter came up for hearing, the Defendant and his Counsel were absent. Hearing notice had been served upon the Defendants' Advocates and Affidavit of Service sworn by one Paul Oketch on 7th December 2021, filed. The matter therefore proceeded *ex parte* under the provisions of Order. 12 Rule 2 and Order 17 Rules 3 and 4 Civil Procedure Rules, 2010. What then is the position of the Defence case?

In *Edward Muriga (through Stanley Muriga –vs- Nathaniel R Schutts Civil Appeal No. 23 of 1997*, the court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as the allegations in the Defence do not amount to evidence. Similarly in *Motex Knitwear Limited –vs- Gopites Knitwear Mills Limited [2009] eKLR*, the court observed that

“although the Defendant denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff stand unchallenged but also that the claims made by the defendant in his defence and counterclaim unsubstantiated.”

From the above cited authorities, it is clear that where a party files a defence but fails to adduce evidence to prove the allegations in the Defence, the defence filed remains a mere statement of unsubstantiated allegations.

Submissions

7. The Plaintiff through her advocates on record namely: Chitwah and company advocates filed written submissions dated 23rd February 2022. Relying on sections 7, 13 and 38 of the Limitation of Actions Act, Counsel for the Plaintiff submitted that the doctrine of adverse possession is one of the ways of land acquisition in Kenya. That the combined effect of those provisions of law is to extinguish the title of a proprietor of land in favour of the adverse possessor at the expiry of 12 years of occupation.

Counsel also relied on the provisions of section 28 of the Land Registration Act to demonstrate that adverse possession is an overriding interest. He further submitted that the key test is that the owner of the land must have been disposed or has discontinued possession of the property.

That the Plaintiff has acquired rights over the suit land because she has had possession of the same since the year 1978 to date with the full knowledge of the Defendant. Further that her evidence has not been rebutted.

The Plaintiff relied on the cases of *Kasuve vs Mwaani Investments Limited and 4 others 1 KLR 184*, *Kweyu vs Omuto CA Civil Appeal No. 8 f 1990*(unreported) and *Wilson Kazungu Katana & 101 Others vs Salim Abdalla Bakshwein & another [2015] eKLR* to support the submissions.

The Applicable law

8. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the Limitation of Actions Act. Section 7 provides that:

“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.”

Section 13 of the Limitation of Actions Act provides:

(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the Limitation of Actions Act and Order 37 of the Civil Procedure Rules, 2010

Section 38 (1) provides;

(1)Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land

(2)An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

And Order 37 Civil Procedure Rules provides

“(1) An Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons

(2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

Article 162(2) of the Constitution of Kenya 2010, Section 13 of the Environment and Land Court Act and Section 38 of the Limitation of actions Act confer jurisdiction on this court to handle claims premised on adverse possession.

Analysis and Determination

9. From the pleadings filed, evidence adduced and submissions made by and on behalf of the Plaintiff the issue that arises for this court’s determination is whether or not the Plaintiff has acquired title to the suit land by operation of the doctrine of adverse possession.

10. Where a Defendant fails to adduce evidence in support of the Defence and fails to attend court to prosecute the case, the Plaintiff’s evidence escapes the possibility of being controverted by defence evidence. It escapes the scrutiny of cross-examination by the Defendant. It therefore stands unchallenged and uncontroverted. However, the Plaintiff does not escape the burden and standard of proof which he has to satisfy and discharge in accordance with the law in order for his claim to succeed.

Section 107(1) of the Evidence Act provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

11. In the case of *Charter House Bank Limited (Under Statutory management –vs- Frank N. Kamau [2016] e KLR* the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“ we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the

defendant.

.....**The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified**”

12. In the present case, the plaintiff has the burden to adduce some credible and believable evidence to prove on a balance of probabilities, that she has acquired the prescriptive rights. That her possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In *Kimani Ruchure vs Swift Rutherford & Co. Ltd (1980)KLR 10* Kneller J held that **“the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)**

13. In the case of *Gabriel Mbui vs Mukindia Maranya [1993]eKLR* adverse possession was defined as

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

In the case of *Mtana Lewa –vs- Kahindi Ngala Mwaqandi [2015] e KLR* the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

14. The Plaintiff’s evidence is that she entered the suit land in the year 1978 after her and her husband purchased a portion of the suit land from the 1st Defendant. PW2, testified that her mother the plaintiff had been on the suit land since it was bought. Entry onto land by a purchaser on the basis of a land sale agreement can mature into adverse possession if the sale transaction is not completed. The Court of Appeal in *Kisumu App. No 82 of 2014 Wilfred Kegonye Babu vs Henry Mose Onuko [2019] eKLR* quoting from *Wambugu vs Njuguna [1983]KLR 172* held that

“ where the Claimant is a purchaser under a contract of sale of land.... The possession can only therefore become adverse once the contract is repudiated.”

The court further stated that

“where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The Claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”

In *Catthy Alucia Jebor Kiplagat vs Vincent Komen Krelnut [2018 eKLR]* the court held that Adverse possession can be claimed where registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land.

Also in *Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR* relied on in *Public Trustee vs Wanduru, 1984 KLR 314* the Court stated that

“adverse should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. A purchaser in possession of the land, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

15. The Plaintiff’s evidence was that upon entry onto the sold portion of the suit land she took possession and had been cultivating it peacefully and uninterrupted. PW2 testified that they have been tilling the portion of land since she was a child. The Plaintiff produced an agreement acknowledging receipt of payment as exhibit P 1(a) and its translation as exhibit P1(b). Though the same is dated 11.1.1994, it contains record of acknowledgement of further payments made on 24.2.1995 and 2.4.1995.

From exhibit P1 (a) and P1 (b), the last payment of the purchase price was done on 2. 4.1995. That is the date when time begun to run in favour of the Plaintiff. Since 2.4.1995 up to the time the suit was filed in the year 2012 a period of approximately 17 years had elapsed. The plaintiff’s occupation of the suit land satisfied the prescribed period of 12 years.

16. As concerns the size of the sold portion of land, courts have held that the land alleged to be the subject of adverse possession proceedings must be definitely identifiable. In the case of *Gatimu Kinguru vs Muya Gathangi [1976]KLR 253* the court observed that:

“the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”

The Plaintiff's claim is for the sold portion of the suit land which she was in occupation of. Her pleadings and exhibits do not however disclose the size of the portion. The parcel number of the suit land is disclosed in the pleadings and the green card produced as exhibit 2. In her testimony in court the Plaintiff stated that the sold portion is about $\frac{3}{4}$ of an acre. Disclosure and proof of the size of the disputed portion of land is important because the claim is not for the entire of the suit land. In the absence of other evidence to controvert the Plaintiff's evidence, the court believes the Plaintiff's evidence that the sold portion measures $\frac{3}{4}$ of an acre.

17. On occupation and possession of the sold portion, the Plaintiff states in her Affidavit in Support of Originating Summons that since she entered the suit land in the year 1978, she had had peaceful occupation and use thereof up to the time of filing suit. In court she stated that although the 1st Defendant refused to transfer the sold portion to her and instead transferred the whole of the suit land to the 2nd Defendant, she remained in occupation. That she used to plant maize on the sold portion of the suit land. The copy of register shows that the suit land was transferred in favour of the 2nd Defendant on 20.9.2011. In paragraphs 8 and 9 of the Affidavit in Support of Originating Summons she deponed that the 2nd Defendant had threatened actual physical violence towards her by intimidating her. That the Defendants had further threatened to evict her forcefully from her peaceful occupation of the portion. She testified that she obtained an order from Kakamega High Court against the Defendants. PW2 testified that the 2nd Defendant is occupying the land since 2012 and prayed that he may be restrained. The question is when and how did he enter the suit land yet there was a court order in place? Advocate Chitwah submitted that contemporaneous to the filing of the Originating Summons the plaintiff filed an application under certificate of urgency on which the court issued orders restraining the Defendants from dealing with the land until the suit is heard.

18. My perusal of the court file indeed reveals that alongside the Originating Summons, the Plaintiff filed a Notice of Motion Application dated 8. 10. 2012 seeking for injunctive and preservative orders. The record further shows that when the Notice of Motion came up for hearing *inter partes*, an Assistant Chief of the area where the land is situate was called by the court to clarify on the status quo then obtaining on the land. The court record shows further that on 17.12.2012, after hearing the said area Assistant Chief, the court made an order that:

“the status quo as per the report of the Assistant Chief to remain, pending hearing and determination of the application. That is, each party to continue occupying the portion of the land that they currently occupy as detailed assistant chief's report.”

As at the time this court order was issued the Plaintiff was in occupation. That is the status quo that the court preserved.

In *Githu vs Ndeete* [1994] KLR quoted by the Court of Appeal in *Kenya Commercial Bank (suing as Administrator of the Estate of Paul Njoroge Muchene) vs Sarah Njeri Muchene* the court held that:

“ time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of actions Act.

A title by adverse possession ca be acquired under the Limitation of actions Act to a part of the parcel of land to which the owner holds title.”

In the current case it cannot be said that the owner asserted his rights when there was a court order preserving the status quo.

19. As at the time of the Plaintiff's entry onto the suit land, the suit land was registered in the name of the 1st Defendant. The Plaintiff testified that her plea to the 1st Defendant to transfer to her the portion she had bought were futile and instead, the 1st Defendant secretly transferred the whole of the suit land to the 2nd Defendant with a view to denying the Plaintiff the sold portion. Perusal of exhibit 2, the copy of register, shows that the register in respect of the suit land was opened on 22.10.1970 in the name of ODOTÉ OCHIENG'. It shows further that on 1.8.2011 a change of name was registered from ODOTÉ OCHIENG' to JOSEPH ODOTÉ OCHIENG'. On 20.9.2011 the land was transferred in favour of the 2nd Defendant.

The court has already determined that time begun to run in favour of the Plaintiff in the year 1995 (see paragraph 15 hereinabove). This means that by the year 2011 when the land was transferred in favour of the 2nd Defendant, the Plaintiff had 16 years as an adverse possessor.

In *James Obande Wasui vs Jeremiah Ochwada Musumba* [2002]eKLR the court held that as an occupier's right, adverse possession runs with the land irrespective of change in proprietorship.

Under section 28 of the Land Registration Act, as at the time of transfer of the suit land to the 2nd Defendant, the land was subject to an overriding interest in the form of rights of adverse possession in favour of the Plaintiff. Section 28 provides:

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

a.

b.

c.

d.

e.

f.

g.

h. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.

The plaintiff's rights of adverse possession were not terminated by reason of transfer of the suit land from the original registered owner to the 2nd Defendant.

Costs

20. Although under section 27 of the Civil Procedure Act, costs of any action, cause or other matter, or issue shall follow the event, in the circumstances of this case namely that the parties are neighbours it is in the interest of justice that each party bears own costs.

Conclusion

21. From the above analysis, the court concludes that Plaintiff has proved firstly, that although she entered the suit land on the basis of a land sale agreement her continued stay on the land after the Seller, the 1st Defendant, failed to complete the sale transaction was open, actual peaceful, continuous and exclusive. The same was with the knowledge but without the consent or permission of the 1st defendant. Secondly, that transfer of the suit land in favour of the 2nd Defendant neither stopped time from running in favour of the Plaintiff nor extinguished rights of adverse possession already acquired by the Plaintiff. Thirdly that the 2nd Defendant's entry onto the suit land after court issued order preserving status quo did not have the effect of extinguishing the rights already acquired by the Plaintiff over the suit land. On the basis of these conclusions, I find that the Plaintiff has proved her case on a balance of probabilities. The sole issue for determination is answered in the positive. I therefore make the following orders;-

i. The Plaintiff is declared the absolute owner of a portion land measuring $\frac{3}{4}$ of an acre of land known as WEST BUNYORE/EKWANDA/1606 by virtue of having been in adverse possession thereof in excess of the prescribed period.

ii. The Plaintiff is ordered to be registered as the owner of a portion measuring $\frac{3}{4}$ of an acre of land parcel No WEST BUNYORE/EKWANDA/1606.

iii. The Defendants JOSEPH ODOTE and PETER ONYANGO ODOTE to execute all documents of transfer in respect of the portion measuring $\frac{3}{4}$ of an acre of land parcel WEST BUNYORE/EKWANDA/1606 in favour of the Plaintiff failure to which the Deputy Registrar of the Court to execute the requisite documents in place of the Defendants.

iv. An order is hereby issued restraining the Defendants by themselves, their agents, representatives, employees, servants and/or assigns from in any manner whatsoever interfering with the Plaintiff's possession or occupation of the portion measuring $\frac{3}{4}$ of an acre of land parcel number WEST BUNYORE/EKWANDA/1606.

v. Each party to bear its own costs.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 8TH DAY OF MARCH 2022.

E. ASATI,

JUDGE, ELC

In the presence of:

The Plaintiff in person

No appearance for the Defendants

Ajevi-- Court Assistant.