



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 352 OF 2011 (O.S)

ROSE WARUINU MUTHEMBA (Suing on behalf of and as an administrator of the estate of LOUIS JUGUNA MUTHEMBA - DECEASED).....PLAINTIFF

VERSUS

ROSALYNA DOLA OUKO.....1ST DEFENDANT

JOHN AARON TAFARI OUKO.....2ND DEFENDANT

ANDREW ATINDA OUKO (Sued on their own behalf and as administrators of the estate of JASON ATINDA OUKO – DECEASED).....3RD DEFENDANT

JUDGMENT

The plaintiff is a widow and an administrator of the estate of Louis Juguna Muthemba, deceased (hereinafter referred to only as “the deceased”). On 16th March, 1979, the deceased entered into an agreement for sale with Mr. & Mrs. Rodah Katheke Gicogo (hereinafter referred to only as “Rodah” where the context so permits) in respect of a parcel of land that was referred to in the said agreement as Plot No. E, L.R No. 3589/6 located at Langata. The deceased purchased the said parcel of land from Rodah at Kshs. 120,000/=. The parcel of land was described as residential empty plot measuring five (5) acres. Plot No. E, L.R No. 3589/6 was a portion of a larger parcel of land known as L.R No. 3589/6 owned by Jason Atinda Ouko, deceased (hereinafter referred to only as “Atinda”). The defendants are the administrators of the estate of Atinda. Plot No. E, L.R No. 3589/6 was given new land reference numbers namely, Plot No. 15 and subsequently Plot No. 44 following attempted subdivisions of LR No. 3589/6. The said parcel of land is now referred to as Plot No. 44, portion of L.R No. 3589/6, Langata Nairobi (hereinafter referred to only as “the suit property”).

The plaintiff brought this suit by way of Originating Summons dated 13th July, 2011 seeking the following reliefs:

1. A declaration that the plaintiff is entitled by adverse possession to all that parcel of land known as Plot No. 44 being a portion of all that piece of land known as L.R 3589/6 – Langata, Nairobi (the suit property).
2. This honourable court be pleased to issue a vesting order directed at the defendants to immediately transfer the suit property to the plaintiff’s name and in the alternative, the Deputy Registrar of this court be ordered to sign the transfer forms in favour of the plaintiff.
3. The costs of the proceedings to be borne by the defendants.

The Originating Summons was brought on the grounds set out in the supporting affidavit and supplementary affidavit sworn by the plaintiff on 13th July, 2011 and 18th September, 2013 respectively. In her affidavit, the plaintiff averred that the deceased purchased the suit property which was a portion of L.R No. 3589/6 then registered in the name of Atinda from Rodah at a price of Kshs. 120,000/=. The plaintiff averred that Rodah had initially purchased the suit property from Atinda and that the deceased refunded to her the payments she had made to Atinda for the suit property. The plaintiff averred that after paying the full purchase price to Rodah in accordance with the agreement for sale between them dated 6th March, 1979, the deceased was given vacant possession of the suit property and he occupied the same until his death in 1985.

The plaintiff averred that after the death of the deceased, she took over and continued with peaceful possession of the suit property as administrator of the estate of the deceased without any interruption or interference by anyone. The plaintiff averred that the deceased constructed semi-permanent houses on the suit property for rental. The plaintiff averred that the beneficiaries of the estate of the deceased continued to occupy the suit property after the death of the deceased on 14th October, 1985 as beneficial owners of the property pending the

transfer of the legal interest in the property to them. The plaintiff averred that she had over the years pursued the transfer of the suit property to the estate of the deceased initially with Atinda and after his death, with the defendants without success.

The plaintiff averred that she had been paying rates for the suit property to the City Council of Nairobi as part of the estate of the deceased. The plaintiff averred that it was brought to her attention that the defendants were planning to sell the entire land comprised in L.R No. 3589/6 which included the suit property. The plaintiff averred that the sale was likely to deprive the estate of the deceased of the suit property. The plaintiff averred that she should be registered as the owner of the suit property since the title of the registered owner of the property had been extinguished as a result of her adverse possession of the property. The plaintiff annexed several documents to her affidavit.

The plaintiff filed a supplementary affidavit on 18th September, 2013 sworn on the same date to which she annexed her earlier supplementary affidavit that she had sworn on 5th June, 2012. In the said supplementary affidavit sworn on 5th June, 2012, the plaintiff had stated that Atinda was represented by an advocate named Fackson Wainaina Kagwe in the transactions relating to L.R No. 3589/6. The plaintiff had stated further that the said advocate had communicated with her and other persons who had also purchased portions of L.R No. 3589/6 on the issues relating to the issuance of individual titles for the said portions of the said parcel of land. The plaintiff had stated further in the said affidavit that the said Fackson Wainaina Kagwe had sworn an affidavit in which he had deposed to facts pertaining to the plaintiff's interest in the suit property. The plaintiff had annexed to her said affidavit of 5th June, 2012, the said affidavit of Fackson Wainaina Kagwe.

The Originating Summons was opposed by the defendants through a replying affidavit and further affidavit sworn by the 2nd defendant, Aaron Tafari Ouko on 13th December, 2011 and 5th January, 2014 respectively. In his replying affidavit, the 2nd defendant stated that Atinda and after his death, his estate was at all material times registered as the owner of all that parcel of land known as L.R No. 3589/6, I.R 23229 (hereinafter referred to only as "L.R No. 3589/6"). The 2nd defendant averred that L.R No. 3589/6 had never been subdivided and as such the suit property claimed by the plaintiff was un-delineated, undefined and nonexistent. The 2nd defendant averred further that since the plaintiff claimed that the deceased's entry and occupation of the suit property and her continued occupation was with the consent of Atinda pursuant to a sale agreement, the plaintiff could not sustain a claim for adverse possession. The 2nd defendant averred that the plaintiff had never had exclusive physical use of the suit property and had also never expressed an intention to occupy the suit property adversely.

The 2nd defendant stated that Atinda had never abandoned the suit property and that he had been in touch with every person who was in occupation of L.R No. 3589/6 with his permission and that the defendants had done the same. The 2nd defendant averred that the plaintiff's Originating Summons was an abuse of the process of the court. The 2nd defendant averred that the plaintiff had not occupied the whole of the suit property. The 2nd defendant annexed to his affidavit a copy of the title for the suit property and photographs said to have been taken on the suit property.

In his further affidavit, the 2nd respondent contended that the plaintiff's claim over the suit property was unconstitutional and illegal as it offended the provisions of Article 40 of the Constitution of Kenya. The 2nd defendant contended further that the plaintiff's supplementary affidavit consisted of mere fabrications devoid of any merit and whose sole intention was to aid the plaintiff in her illegal attempt to acquire the suit property which belonged to Atinda.

At the trial, the plaintiff gave evidence and called one witness while the 2nd defendant gave evidence on behalf of all the defendants. The plaintiff's witness was Fackson Wainaina Kagwe (PW 1) who is an advocate of the High Court of Kenya. PW 1 acted for Atinda in the transactions relating to L.R No. 3589/6. He told the court that he had been requested by the plaintiff to swear an affidavit in relation to the work he did for Atinda with regard to L.R No. 3589/6 and that he swore the affidavit in support of the plaintiff's claim. PW 1 stated that the plaintiff was the beneficial owner of the suit property. He stated that he had attached to his affidavit that was attached to the plaintiff's supplementary affidavit sworn on 18th September, 2013, a list of the persons who had purchased portions of L.R No. 3589/6 that was given to him by Atinda and minutes of a meeting that was held in his office between Atinda and the said purchasers. He stated that he stopped acting for Atinda after his death in 1996. PW 1 stated that as at the time he stopped acting for Atinda, they were working on getting approval for the sub-division of L.R No. 3589/6. He stated that he wrote to the plaintiff a number of letters which are attached to his affidavit aforesaid. He stated that the suit property was not transferred to the plaintiff because of the delay in the approval of the sub-division scheme for L.R No. 3589/6 and the various encumbrances that had been registered against the title of the suit property.

On her part, the plaintiff (PW2) adopted her affidavit sworn on 13th July, 2011 and supplementary affidavit sworn on 18th September, 2013 in support of the Originating Summons together with the annexures thereto as her evidence in chief. The plaintiff stated that the deceased acquired the suit property in 1979 and paid the purchase price in full. She stated that she was taken to the suit property by the deceased in 1979 and found the same vacant. She stated that after taking possession, they put up a structure thereon for a caretaker and that the structure was still on the suit property and was still occupied by their caretaker. She said that the structure that they had put up could be seen in the photographs attached to her supplementary affidavit. She stated that they had also put up a barbed wire fence around the suit property and planted trees and flowers thereon. The plaintiff stated that they fenced the property in 1979 and that the fence was still in place. She stated further that deceased acquired the property from Rodah. The plaintiff stated that she had been paying rates for the suit property and the receipts were being issued in the name of Atinda as the registered owner of the property. The plaintiff stated that she was the rightful owner of the suit property.

The 2nd defendant Aaron Tafari Ouko (DW 1) relied on his replying affidavit and further affidavit sworn on 13th December, 2011 and 5th January, 2014 respectively as his evidence in chief. He told the court that he was the son of Atinda who owned L.R No. 3589/6 and was still the registered proprietor of the property. He stated that the property had not been subdivided. He stated that in 1979 when the deceased husband of the plaintiff is said to have acquired the suit property, L.R No. 3589/6 was virgin land that was bushy and unoccupied. He stated that he was not aware that Atinda had sold the suit property to the deceased or Rodah from whom the deceased claimed to have acquired the suit property. He stated that Atinda was not aware of the transaction between the deceased and Rodah. The 2nd defendant stated that the plaintiff had not been in occupation of the suit property. He stated that he was aware that there was a house on the suit property. He claimed however that it was a small hut that was occupied by the plaintiff's worker. He stated that apart from that house, there was no other activity

being undertaken by the plaintiff on the suit property. He stated that the house was at the corner of the plot and that the remainder of the suit property was an open field. He stated that the fence around the suit property was put up by Atinda. He stated that neither the plaintiff nor Rodah had made any payment to Atinda for the suit property. He stated that his brothers and he visited PW 1 who used to act for Atinda to get information from him on the status of L.R No. 3589/6. He stated that PW 1 advised them to write general letters and have them dropped on the portions of the said parcel of land that were occupied. He told the court that that explained the circumstances under which they wrote the letter dated 24th November, 2010 to the plaintiff and her response dated 3rd January, 2011. He stated that in their general letter, they asked for documents in support of each occupant's claim over L.R No. 3589/6. He stated that the plaintiff did not provide any document supporting her claim to the suit property and instead decided to file this suit. The 2nd defendant stated that the defendants had no objection to the plaintiff retaining the suit property if the plaintiff can either prove that the deceased paid for the suit property or pays up for the same.

After the close of the evidence the parties made closing submissions in writing. The plaintiff filed her submissions on 3rd May, 2019 while the defendants filed their submissions on 5th July, 2019. I have considered the Originating Summons together with the affidavits filed in support thereof. I have also considered the affidavits filed by the defendants in response thereto. Finally, I have considered the submissions by the respective advocates for the parties and the authorities cited in support thereto. Contrary to the submissions by the defendants' advocate, the plaintiff's claim over the suit property is not based on the agreement for sale dated 16th March, 1979 between her deceased husband Louis Juguna Muthemba (deceased) and Mrs. Rodah Katheke Gicogo (Rodah) but on adverse possession. This is clear from the provisions of the law under which the Originating Summons was brought and the reliefs sought. In my view, the agreement for sale dated 16th March, 1979 was relied on by the plaintiff to explain how the deceased entered and occupied the suit property.

As correctly submitted by the defendants, Jason Atinda Ouko (Atinda) was not a party to the said agreement for sale and as such the plaintiff could not enforce the same against him or his estate. I have found the evidence tendered and submissions made by the defendants contradictory. On the one hand, the defendants have contended that the deceased did not purchase the suit property from Atinda and that Atinda was not privy to the agreement for sale between the deceased and Rodah. On the other hand, the defendants have contended in their submissions that the deceased entered the suit property and occupied the same with the permission of Atinda pursuant to the said agreement for sale and as such the plaintiff who was a licensee on the suit property cannot maintain a claim for adverse possession.

I am in agreement with the submission by the plaintiff that a party to a suit cannot approbate and reprobate at the same time. The defendants' case as pleaded and presented to court through the evidence of the 2nd defendant was that the deceased did not purchase the suit property from Atinda and that Atinda was not privy to the agreement between the deceased and Rodah. I do not quite understand the defendants' submission that the plaintiff's case as presented in evidence and submissions departed from the plaintiff's pleadings. As I have already stated, there is no doubt from the Originating Summons that the plaintiff's claim is based on adverse possession. The evidence tendered by the plaintiff on the purchase of the suit property was meant to establish their entry into the property and the duration they had remained in occupation. I did not understand it that the plaintiff was trying to set up a new case from the one pleaded.

In Gabriel Mbui v Mukindia Maranya [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- 1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
- 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**
- 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
- 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**
- 6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.**
- 7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.**
- 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
- 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.**
- 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.**

From the evidence on record, I am satisfied that the plaintiff has established the elements of adverse possession set out in the above case on a

balance of probabilities. I am satisfied that the deceased took possession of the suit property in 1979 and remained in occupation until his death in 1985 when the plaintiff who is the deceased's wife and administrator of his estate took over possession of the property. The deceased did not live on the suit property but fenced the same, installed a gate and put up some structures thereon which have been occupied by their caretakers over the years. The deceased and the plaintiff also planted trees on the suit property. The plaintiff placed in evidence photographs taken on the suit property in which the fence, gate and structures on the suit property could be seen. The defendants also produced photographs showing a portion of the suit property under tree plantation. I am satisfied that the plaintiff had actual possession of the suit property for the statutory period of 12 years by the time she brought this suit in 2011.

I am also satisfied that when the deceased entered the suit property, he honestly believed that he had acquired a valid title over the same from Rodah who sold the property to him. The registered owner of the suit property however disowned the transaction between the deceased and Rodah leaving the deceased with no valid title over the property or prospects of getting the same. Although the defendants contended in their submission that the deceased entered and occupied the suit property with the permission of Atinda, this contention as I have stated earlier is contrary to the evidence that was adduced by the defendants and their pleadings. The defendants did not place any evidence before the court showing that the entry of the deceased into the suit property was with the permission of Atinda. The defendants' letter dated 24th November, 2010 to the deceased left no doubt that the defendants were not aware of the plaintiff's interest in the suit property. The defendants took the same position when this suit was filed. It is my finding therefore that the deceased and subsequently the plaintiff's occupation of the suit property was without the permission of the registered owner.

It is also my finding that the said possession was adverse to the interest of Atinda who was the registered owner of the suit property, exclusive and with the intention of excluding Atinda as well as other people from the property. After the deceased took possession of the suit property, he fenced the same and put up a gate at the entrance. He then put up structures thereon which have been occupied by their employees over the years. The deceased also planted a number of trees. All these can be seen in the photographs which were produced by both parties in evidence. The activities of the deceased and subsequently the plaintiff on the suit property were clearly adverse to the interest of Atinda. The same also left no doubt that possession by the deceased was exclusive and that the deceased intended to exclude Atinda from the property.

The evidence before the court also leaves no doubt that the deceased's possession of the suit property was visible, open and notorious. The evidence before the court shows that Atinda and the defendants were aware of the deceased's occupation of the suit property. The defendants admitted that the plaintiff was in occupation of the suit property and that they had dropped letters at the suit property for the plaintiff.

It was not contested that the deceased and subsequently, the plaintiff's occupation of the suit property was continuous, uninterrupted and unbroken from 1979 when the deceased took possession of the suit property until the plaintiff filed this suit. It was also not contested that for the duration of the deceased and subsequently the plaintiff's possession of the property, Atinda who held the title to the property had a right to enter and recover possession. There was no contention by the defendants that he was under any disability or legal impediment of any nature during the entire period. Since the registered owner of the suit property was aware of the deceased occupation on the suit property and his activities thereon which were all inconsistent with his interest in the property, he knew in my view that he had been dispossessed of the suit property.

The defendants had contended in their replying affidavit that the land that was claimed by the plaintiff was un-delineated, undefined and non-existent. I am not in agreement with this submission. The evidence on record shows that the suit property was purchased by the deceased after it had been delineated and its boundaries marked. The photographs produced by the parties show that the suit property had boundaries clearly marked by a fence. The defendants had also contended that the plaintiff was not occupying the entire land comprised in the suit property. The evidence before the court shows that the deceased purchased and occupied land measuring 5 acres. In my view, the fact that the deceased and the plaintiff have only developed a portion of the suit property does not disentitle them to the portion of the property which they have not developed but is in their effective control and use.

Conclusion.

In the final analysis and for the foregoing reasons, I am satisfied that the plaintiff has proved her claim against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendants on the following terms;

1. I declare that the plaintiff has acquired title to all that parcel of land known as Plot No. 44 being a portion of L.R No. 3589/6, Langata Nairobi by adverse possession.
2. The defendants shall transfer the said parcel of land (Plot No. 44 being a portion of L.R No. 3589/6) to the plaintiff after the subdivision of L.R No. 3589/6.
3. In the event that the defendants fail to transfer the said property to the plaintiff as aforesaid, the Deputy Registrar of this Court is authorised to sign all documents necessary for the effective transfer of the property to the plaintiff in accordance with the orders issued herein.
4. The plaintiff shall meet the statutory costs and other charges associated with the transfer.
5. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 5th Day of May 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Njenga for the Plaintiff

Ms. Gachomba for the Defendants

Ms. C. Nyokabi-Court Assistant