



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO 371 OF 2015

IN THE MATTER OF LIMITATION OF ACTION CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ADVERSE POSSESSION PURSUANT TO SECTION 38 OF THE LIMITATION OF ACTIONS ACT

DAVID ORINA SIBWOGA.....PLAINTIFF

VERSUS

SALOME KWAMBOKA OMENGE.....1ST DEFENDANT

MONICA BARONGO OSORO.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff commenced this suit by way of originating summons dated 31st July 2015, seeking a declaration that he has been in open, continuous and uninterrupted occupation of a portion of land measuring 58 by 118 square feet constituting title number WEST MUGIRANGO/NYAMAIYA/2180 (hereinafter referred to as the suit property) registered in the names of the Defendants having acquired it by way of adverse possession. He further prayed for the court to issue an order compelling the Defendants to subdivide the suit property for purposes of isolating his portion measuring 58 by 118 square feet from it. In the summons he also prayed for an order compelling the Defendants to execute all documents for purposes of transferring the foregoing portion of the suit property to his name.

2. In support of the summons, the Plaintiff swore a Supporting Affidavit on 31st July, 2020. In the said Affidavit the Plaintiff averred that on 6th October, 1993 he bought a portion of the suit property from the late Omenge Osoro, the original owner of the suit property who was the husband to the 1st Defendant and father to the 2nd Defendant respectively, for purposes of developing a commercial college. The Plaintiff averred that in 2001 he purchased additional portions measuring 18 by 100 feet and 8 by 100 feet from the late Omenge and the 1st Defendant and he has occupied both portions cumulatively measuring 58 by 118 for an uninterrupted period of 30 years and 14 years respectively. He further deponed that the late Omenge Osoro and the 1st Defendant stated in the sale agreement that the purchase price was to be in kind whereby the Plaintiff was to build rental houses on a portion of the suit property for the Defendants. He averred that he met his part of the bargain by constructing the rental houses as agreed.

3. Having built the rental houses as agreed by the Defendants, the Plaintiff deponed that he constructed two buildings on his portion of the suit property; one residential house and another one which was converted into shops. He averred that he has been occupying the two properties for a period in excess of 12 years. He also averred that the late Omenge who was the original owner of the property died long after vesting occupation of the portion of the property measuring 58 by 118 feet to him.

4. It is therefore his contention that the Defendants who are the registered owners of the suit property are holding the same in trust for Osoro's family and himself since he has a purchaser's interest in the portion of the property which he has occupied for a period of 12 years. He contended that he does not owe the Defendants or their predecessor in the title any money in respect of the purchase price.

5. In response to the Plaintiff's claim the Respondents filed separate Replying Affidavits. The 1st Respondent filed her Replying Affidavit on 7th September, 2015 while the 2nd Respondent filed hers on 21st August 2015.

6. In her Replying Affidavit, the 1st Defendant averred that the Plaintiff has never been in occupation or possession of a portion of the suit

property measuring 58 by 118 feet in any manner adverse to the rights and interests of the late Omenge Osoro or herself. She nevertheless acknowledged that she was aware that the Plaintiff had entered into a land sale agreement on 6th October, 1993 with her deceased husband whereby the deceased agreed to sell him a portion of the suit property measuring 50 feet by 100 feet.

7. She further acknowledged that in the said agreement, the Plaintiff agreed to construct permanent commercial business premises measuring 21 feet by 23 feet and another permanent structure running from the main road to the reverse side of the suit property. The Defendant averred that despite the Plaintiff being aware of the terms and nature of the agreement, he failed to adhere to them.

8. The 1st Defendant averred that despite the Plaintiff being notified to carryout renovations on the said structures he failed to do so and thus he failed to fulfill the terms of the agreement. It was the 1st Defendant's contention that since the terms of the agreement were not fulfilled the agreement collapsed.

9. It was also her contention that the Plaintiff only remained on the suit property by virtue of being a nephew of her deceased husband and not otherwise. It was therefore her desposition that the Plaintiff's occupation of the suit property after the collapse of the agreement was based on a license and the existing consanguinity between the Plaintiff and Omenge's family.

10. The 1st Defendant also averred that the late Omenge transferred the suit property to the Defendants on 2nd March, 2009 without providing for the Plaintiff's rights and interests therein. It was her belief that if at all the late Omenge had any intention of awarding any portion of the suit property to the Plaintiff, he would have done so during his lifetime. She contended that the Plaintiff was fully aware of the issues surrounding his occupation of the suit property and that is why he never pushed to acquire title over the property during the lifetime of her late husband. She averred that the Plaintiff's claim was born out of fraud or conspiracy with the 2nd Defendant to defraud her and other family members of the suit property.

11. In her Replying Affidavit, the 2nd Defendant supported the Plaintiff's claim. She averred that she was the first born daughter of the late Omenge Osoro and that the 1st Defendant was her mother. She averred that the Plaintiff had been their neighbour for a period of about 30 years and that he came into the suit property when she was already an adult.

12. She deponed that the Plaintiff built a school on the portion he occupies and the terms were agreed between him and the 2nd Defendant's late father. She further deponed that her mother and father requested the Plaintiff to convert the purchase price to the cost of constructing for them rental houses. By constructing the said houses, the Plaintiff's acquired ownership in a portion of the suit property which was coupled with his possession and occupation thereof. It was her contention that her late father never interfered with the Plaintiff's occupation of his portion of the suit property he purchased pending the issuance of a title in his favor. She averred that before her father's demise he transferred the suit property to her and her mother, the 1st Defendant to hold the same in trust for his children and the Plaintiff as he recognized the Plaintiff's interest in the suit property.

13. It was her contention that her late father never at any time disowned the Plaintiff's legitimate occupation of the suit property and thus her mother's latest behavior and conduct against the Plaintiff was strange and unjustified and only meant to undermine her father's intentions at the time he entered into a sale agreement with the Plaintiff.

14. She averred that her mother's actions were an afterthought which did not augur well, since the Plaintiff spent his money to develop rental units for the occupation and benefit of her family which money was never refunded. According to her the Plaintiff whether as a buyer or otherwise is entitled to title by virtue of long occupation of the suit property.

15. The case proceeded by way of viva voce evidence and both parties testified without calling any witnesses.

PLAINTIFF'S CASE

16. The Plaintiff during examination in chief chose to rely on his Supporting Affidavit sworn on 31st July, 2015. He produced two agreements dated 6th October, 1993 and 5th September, 2001 together with photos taken during the execution of the said agreement as plaintiff's exhibits 1, 2 and 3 respectively.

17. During cross examination he stated that the late Omenge was his uncle and that he sold to him a portion of land vide an agreement entered into in the year 1993. He told the court that before entering into the said agreement, he was staying in a house next to the suit property. He confirmed that the agreement did not state the purchase price since it was agreed that he would repair Omenge's houses. He however confirmed that he did not have any document to show that he carried out the repairs as agreed. He stated that he had stayed on the suit property though he did not have any documents to show his occupation. He denied the allegation that he was staying on the suit property solely as a relative of the omenge's family. He also denied teaming with 2nd Defendant with a view of grabbing the 1st Defendant's land. He denied that he stayed on the suit property by the permission of the deceased after he failed to carry out the repairs. With that the Plaintiff closed his case.

DEFFENDANT'S CASE

18. The 1st Defendant testified as DWI and stated that the Plaintiff was well known to her because he was a relative of her late husband. It was her testimony that the suit property originally belonged to her late husband before he transferred the same to her and the 2nd Defendant. She stated that the Plaintiff was authorized by her late husband to construct 3 houses on the suit property and the deceased showed him where to construct them. It was her testimony that the Plaintiff did construct the houses but the same were shoddily done since they were leaking. She further stated that when he was told to repair the houses he failed to do so. She relied on her list of documents and witness statement both dated 3rd September, 2015.

19. On cross-examination, the 1st Defendant affirmed that the Plaintiff did construct the three houses though not up to the required standards. She also confirmed that the Plaintiff stays on the suit property and had indeed constructed his own houses thereon. She further told the court that the Plaintiff started living on the suit property when her late husband was still alive but she could not remember when her husband died.

20. During re-examination, the 1st Defendant restated that the agreement was only for the construction of the houses and not for the sale of land. She reaffirmed that the Plaintiff was still staying on the suit property.

21. The court after hearing all parties, directed the parties to file their written submissions. The Plaintiff filed his submissions on 22nd April, 2021 while the 1st Defendant filed her submissions on 13th April, 2021.

ISSUES FOR DETERMINATION.

22. Having considered the pleadings, evidence on record and the submissions of the parties the sole issue for determination is whether the Plaintiff's claim for adverse possession is merited.

ANALYSIS AND DETERMINATION

23. The law on Adverse Possession is now well settled. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

24. It is the Plaintiff's case that he has been in continuous, notorious and uninterrupted occupation of a portion of the suit property described hereinabove for a period of more than 12 years. It is his contention that he purchased it from the Defendant's husband and father respectively on 6th October, 1993 and took possession of the same on 19th November, 1993. In support his claim, the Plaintiff alleges that he entered into two agreements with the 1st Defendant and her late husband. The 1st agreement was signed on 6th October, 1993 and the 2nd Agreement was signed in 2001. He argues that time began to run from the day when he signed the first agreement as this was the time he entered into the suit property.

25. **In Public Trustee v Wanduru Ndegwa Civil Appeal NO. 73 OF 1982 [1984] eKLR** Madan JA held;

“The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive (as the learned judge found it to be so in this case) 28 Halsbury 4th Edition paragraph 769. Under section 9 of the Act the right of action accrues on the date of dispossession or discontinuance”.

26. From the above authority is clear that time begins to run from the day the owner is dispossessed of his land. Thus the Plaintiff proved that he had been in occupation of the land for the requisite period of time since by the time he filed this suit on 31st July 2015, 22 years had elapsed from the time he took possession of the plot in 1993. There is no evidence to show that the Plaintiff's occupation of the aforesaid said portion of the suit property was disrupted. He rightly argues that the transmission of the land into the name of the Defendants in 2009 did not interfere with his adverse possession.

27. Learned counsel for the Respondent in his bid to negate the Plaintiff's claim for adverse possession submitted that the agreement entered between the Plaintiff and the 1st Defendant's husband stated that the Plaintiff was to develop rental units on the suit property to be used for family of his deceased uncle. He contended that the agreement merely granted the Plaintiff permission to construct and develop the rental units and said permission did not in law and in fact make the Plaintiff an adverse possessor to the rights over his uncle's interest in the suit property. However, a keen look at the Agreement dated 6th October, 1993 reveals a totally different position from the one held by the Plaintiff's counsel. The agreement which is in Kiswahili partly reads as follows;

“MAPATANO MAPYA YA UNUNUZI AU UMILIKAJI WA SHAMBA/ ENEO (50 FT X 100 FT)

Leo 6-10-93 bwana OMENGE OSORO ID 6959383/64 pamoja na bibi yangu SALOME KWAMBOKA OMENGE ID 1654565/64 tume kubalikumpatia bwana DAVID ORINA SIBWOGA ID 0326190/63 PLOT (50 FT X 100 FT) baada ya bwana ORINA kujengea bwana Omenge Omengeniyumbazamatofalikua anzi abarabakuukuelekea upandewanyuma.

Shamba la bwana Orina liko nyuma ya barabara kuu (100 ft) ya kutok akenyenya kuelekea Nyamira.....”

Bwana Orina hana deni lolotela bwana Omenge isipokua bwana Orina ameombwa arekebishe upya majengo aliyoyajengea bwana Omenge.

Bwana Omenge amempatia Bwana Omenge njia (5 ft) ya kutokea nje barabarani.

Bwana Omenge pamoja na familia yake wameambiwa kupatia bwana Orina ploti yake bila pingamizi wala masharti yoyote. Jamaa na marafiki kutoka pande zote walishuhudia na pia kuzungumzia kusudi kufikia suluhisho hili(emphasis mine).

28. It is crystal clear that the agreement was for the sale of the suit property to the Plaintiff after he had built houses for the late Omenge's family as opposed to the argument by counsel for the 1st Defendant that the agreement was solely meant for construction of houses. The last paragraph of the agreement as correctly submitted by the Plaintiff demonstrated that the late Omenge's family unconditionally surrendered vacant possession of the aforementioned portion of the suit property to the Plaintiff. From this observation, the argument that the Plaintiff's entry to the property was as a licensee in his capacity as the deceased's nephew is erroneous.

29. The question that arises is whether adverse possession can arise where the entry onto the suit property was consented to. *In the case of Public Trustee v Wanduru*, (supra) Madan, J.A. stated that "adverse possession 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 purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run".

30. The sale agreement clearly states that Orina is in no way indebted to Omenge, save that he has been requested to carry out some repairs to Omenge's houses. From the evidence on record, it would appear that the said repairs were not carried out though the 1st Defendant conceded that the Plaintiff built what she termed as sub-standard houses for the late Omenge's family. It is therefore the 1st Defendant's contention that the said agreement had collapsed. If indeed the agreement between the parties had collapsed as alluded to by the 1st Defendant, nothing stopped the deceased or indeed the 1st Defendant from taking steps to evict the Plaintiff. Instead, the 1st Defendant and her late husband went on to sign another agreement with the Plaintiff in 2001 for an additional parcel of land at a consideration of Kshs. 35,000/=.

31. I am not persuaded by the submission by counsel for the Defendants that the Plaintiff's continued occupation of the suit property after the collapse of the agreement is only based on the fact that he was a relative of her late husband. The evidence on record clearly shows that the Plaintiff entered the suit property pursuant to the agreement signed between him and the deceased in 1993.

32. Furthermore, the fact that the Plaintiff has extensively developed the portion of the suit property that he occupies is a demonstration of animus possidendi, (intention to possess) to the exclusion of the Defendants in whose favor the original owner, the late Omenge transferred the suit property. On this, I am guided by the case of **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others Civil Appeal No. 35 of 2002 [2004] eKLR** where the Court of Appeal held;

"A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see Githu v Ndeete [1984] KLR 776)".

33. In the instant suit the Plaintiff has been in continuous uninterrupted and open occupation of the suit property for a period in excess of 12 years. In **Mwangi & Another v Mwangi, (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse Possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership. Under section 28 (h) of the Land Registration Act the Plaintiff's rights are recognized as overriding interests that are attached to the land.

34. For the foregoing reasons, I find and hold that the Plaintiff has proved that he is entitled to a portion of the suit property measuring 58 feet by 118 feet by way of adverse possession. I therefore enter judgment for the Plaintiff and issue the following final orders;

- a) A declaration is hereby issued that Plaintiff has acquired by way of adverse possession, a portion measuring 58 feet by 118 of LR. No. WEST MUGIRANGO/NYAMAIYA/2180;
- b) The Defendants are hereby ordered to sub-divide LR. No. WEST MUGIRANGO/NYAMAIYA/2180 into two portions and the portion measuring 58 feet by 118 feet be registered in the name of the Plaintiff.
- c) The Defendants be and are hereby ordered to execute all documents and take steps necessary to effect transfer of the portion measuring 58 feet by 118 of LR. No. WEST MUGIRANGO/NYAMAIYA/2180 to the Plaintiff within 60 days from the date hereof.
- d) In default of c) above the said documents be executed by the Deputy Registrar of this Honourable Court;
- e) Each party shall bear their own costs.

Dated, signed and delivered at Kisii this 22nd day of July, 2021.

J.M. ONYANGO

JUDGE