



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 244 OF 2013

HENRY NYAWANDA OGUK

(Suing as the administrator of the estate of DISHON OGUK OSOO)....PLAINTIFF

VERSUS

JOHANNES JAGONGO OSIO.....DEFENDANT

JUDGEMENT

In a plaint dated 16/9/2015 and amended on 14/3/2014, Henry Nyawanda Oguk suing as the Administrator of the Estate of the late Dishon Oguk Osoo has come to court against Johannes Jagongo Osio claiming that the Defendant is the registered proprietor of land parcel KISUMU/RATA/616. On or about 4th September 1975 the deceased Dishon Oguk Osoo entered into a contractual arrangement with the Defendant which saw the deceased exchange his land parcel KISUMU/RATA/2646 with the Defendant's land parcel KISUMU/RATA/616.

Immediately the swap took place the Defendant proceeded to sell his new land parcel KISUMU/RATA/2646 to one Francis Otunga Nyamgero for a consideration of Kshs. 1,250/= which sum was paid in full settlement. However, when the deceased moved to seek the title transfer of KISUMU/RATA/616 into his name the Defendant played hide and seek until the untimely death of the deceased.

The Plaintiff who is the son to the deceased took up the matter and filed a complaint at the Kisumu District lands tribunal case no. 34 of 2007 where the tribunal awarded the portion of KISUMU/RATA/616 to the Plaintiff. The award was later read and adopted in Kisumu CMCC land case No. 60 of 2009.

The Defendant being dissatisfied with the award and adoption lodged an appeal at the Nyanza Provincial Lands Appeal Tribunal appeal no. 199 of 2009.

However, before the Appeals Tribunal could hear and determine the appeal the new constitution of Kenya 2010 was promulgated that repealed the lands Disputes Tribunal Act that effectively disbanded both the District Lands Dispute Tribunal and the provincial Lands Appeal Tribunal and the said appeal no. 199 of 2009 never saw the light of the day.

The Plaintiff thus avers that having exchanged his land parcel with the deceased, the Defendant ceased to have any right or title over KISUMU/RATA/616 and ought to surrender its ownership. That since the exchange took place in 1975 the Plaintiff and the deceased surviving family have been in constant occupation and tilling land parcel KISUMU/RATA/616 to the total exclusion of the Defendant.

The Plaintiff avers that the failure of the Defendant to honour the contract was in total breach of the same.

The Plaintiff's claim against the Defendant is for an order of specific performance to compel the Defendant to execute transfer instruments of KISUMU/RATA/616 in favour of the Plaintiff.

Alternatively and without prejudice to the aforesaid, the Plaintiff contends that the Defendant having swapped his parcel title No. KISUMU/RATA/616 with the Plaintiff's parcel title No. 2646 and the Plaintiff having taken open exclusive and uninterrupted possession of the said parcel title No. KISUMU/RATA/616 from September, 1975 to date, now a period of over 38 years, the Defendant's title to the said parcel was extinguished by way of prescription and the Defendant continues to be registered as the proprietor merely as a trustee for the Plaintiff.

The Plaintiff prays for an order of specific performance compelling the Defendant to execute transfer instruments of KISUMU/RATA/616 in favour of the Plaintiff. In default the same be executed by the Deputy Registrar or Executive Officers of this court. Moreover, a declaration that the Plaintiff is entitled to be registered as the proprietor of parcel title No. KISUMU/RATA/616

by way of adverse and/or prescription. Lastly, an order cancelling the name of the defendant as the proprietor of the parcel Title No. KISUMU/RATA/616 and replacing it with the name of the Plaintiff as the proprietor thereof. Costs of this suit and interests.

In his defence full of denials, the defendant states that the filing of the suit is premature misconceived and sub judice to Nyanza Provincial Land Appeal Tribunal no. 199 of 2009. The defendant states that if there was any agreement which is denied then the same was void.

When the matter came up for hearing the plaintiff stated that he was the son of Dishon Oguk Osoo (deceased). He is the administrator of the Estate of the deceased. The deceased and his father exchanged parcel number KISUMU/RATA 2646 with parcel number KISUMU/RATA 616 that belonged to the defendant. The Defendant was to transfer to the Plaintiff's father parcel KISUMU/RATA 616 and he would the latter was to transfer to the former KISUMU/RATA 2646 KISUMU/RATA.

After the exchange defendant sold parcel 2646 to Francis Otunga the same year 1976. The agreement between the plaintiff's father and defendant exchange the land was in writing. Defendant sold parcel 2646 to Francis at sh. 1250 and there was a written agreement.

After Francis had paid Defendant for the land KISUMU/RATA 2646 and Plaintiff's father took over parcel KISUMU/RATA 616. Francis Otunga took over parcel KISUMU/RATA 2646. Plaintiff's father and Defendant signed the transfer forms for the respective lands. However, plaintiff's father did not get the transfer of KISUMU/RATA 616 to his names and that is why the plaintiff has come to court. The Plaintiff produced a copy of title deed for parcel KISUMU/RATA 616 which is in the Defendant's list of documents and it is in the defendant's name. He also produced the green card for parcel KISUMU/RATA 2646 and shows his father was the first registered owner in 1980. It also shows that the land was transferred to Francis Otunga Nyangero on 17.10.1981. Francis Otunga is the one who bought that land from Defendant. He further stated that he had a sale agreement on the exchange and sale which are in vernacular which was not translated. He admitted that the Defendant was the one using land parcel KISUMU/RATA 616 after the chief allowed him. Before coming to court they had gone to Kisumu Land Dispute Tribunal and it directed the plaintiff gets half share of parcel KISUMU/RATA 616. That he was not satisfied and lodged an appeal before the Provincial Appeals Committee. That the appeals committee was disbanded before the appeal could be heard and thus he came to court. He prayed that parcel KISUMU/RATA 616 be registered into his names. On cross examination he states that he has filed the suit as an administrator of his father's estate. He stated that he had court papers authorising him to be the administrator of his father's estate but he did not produce them as exhibit in court.

He admitted that the green card for parcel KISUMU/RATA 2646 that he produced does not contain the Defendant's names as an owner. He averred that the money was given to the Defendant though he had not been registered as the owner. That his father transferred parcel KISUMU/RATA 2646 directly to Francis on request of Defendant. The exchange occurred in 1975 while exhibit 2 shows that the land was first registered in 1980. The land was demarcated in 1972 but he did not have any documentary proof. The plaintiff was not involved in the exchange of the land between his father and the defendant as he was working in Mombasa.

The Plaintiff called PW2, Francis Otunga Nyangweso a neighbour of both plaintiff and defendant. He purchased land parcel number KISUMU/RATA 2646 from the defendant in 1973. The land belonged to the plaintiff's father after exchange with parcel number KISUMU/RATA 616. The matter went to the Tribunal that granted the land to the plaintiff but the case is still pending before the appeals committee. The defendant testified that he was born in 1922 and that the plaintiff is a son of the late brother Oguk Osoo. He stated that he was exchanging land with Mr. Oguk. The notes in respect of the proceedings are missing.

I have considered the record before me and the testimony and documents produced by parties and do find that the plaintiff has proved on a balance of probabilities that there was an exchange agreement and that the plaintiffs father who is deceased and the defendant did swap parcels number KISUMU/RATA/2646 and KISUMU/RATA/616. Whereas the the defendant sold the parcel of land transferred to him being KISUMU/RATA/2646 to Francis Otunga Nyangweso the plaintiffs father did not get the swapped parcel number KISUMU/RATA/616 transferred to his name. There is no challenge to the plaintiff's statement that the family of the late Dishon Oguk Osoo has been in possession of the suit property for more than 12 years. I do find that the defendant has never interfered with the plaintiff's possession of the suit land for more than 12 years and that the plaintiff and his family have been in quiet possession of the suit property for more than 12 years.

The law in respect to Adverse Possession is now settled. For one to succeed in a claim of Adverse Possession, (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

“Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996** held that:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”

The onus is on the person or persons claiming Adverse Possession:

“.. 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 evasion). So the Plaintiff s must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

The main the elements of Adverse Possession that a claimant has to prove include:

i. actual,

ii. open,

iii. exclusive

iv. and hostile possession of the land claimed.

The plaintiff has demonstrated to this court that he has been in actual, open, exclusive and hostile possession of the suit property and therefore has established that he is entitled to a declaration that he is in adverse possession of the suit property. On the other hand, the defendant's testimony was full of denials and evasion on the issue of possession.

I do grant judgment in terms that the Defendant having swapped his parcel title No. KISUMU/RATA/616 with the Plaintiff's parcel title No. 2646 and the Plaintiff having taken open exclusive and uninterrupted possession of the said parcel title No. KISUMU/RATA/616 from September, 1975 to date, now a period of over 38 years, the Defendant's title to the said parcel was, and is hereby declared extinguished by way of prescription and the Defendant continues to be registered as the proprietor merely as a trustee for the Plaintiff. The defendant to transfer parcel number KISUMU/RATA/616 to the plaintiff failure of which the Deputy Registrar Environment and Land Court Kisumu to execute all necessary documents in the place of the defendant towards the transfer of the parcel of land to the plaintiff. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE