



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 95 OF 2015

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF L.R. NO. SOUTH TESO/ANGOROMO/902

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

BETWEEN

JENIPHER AKINYI OMONDI.....PLAINTIFF

VERSUS

ANDREW ANYIKO ASINDI.....DEFENDANT

J U D G M E N T

1. The plaintiff herein filed an Originating Summons taken out against the defendant seeking for orders of adverse possession under section 7 and 38 of the Limitation of Action and Order 37 Rule 7 of the Civil Procedure Rules 2010. The Summons prays for the determination the following questions in favour of the Plaintiff, namely;

- a) Whether the plaintiff has been in open and notorious possession of portion measuring 100 by 50m of L.R. NO. South Teso/Angoromo/902 for a period exceeding 12 years?
- b) Whether the defendant's title to the said portion becomes extinguished upon expiry of 12 years from the time the plaintiff went into possession of the land?
- c) Whether plaintiff has now acquired title to the said portion by rite of adverse possession?
- d) Whether the registration of defendant as owner of the whole L.R. NO. South Teso/Angoromo/902 should be cancelled?
- e) Who should pay costs of this case?

2. The applicant sought to be granted the following orders;

- i) That the defendant's right over a portion measuring 100 by 50ft of L.R. No. South Teso/ Angoromo/902 got extinguished by adverse possession upon expiry of the 12 years from the time the plaintiff came into possession in 2002.
- ii) That L.R. No. South Teso/ Angoromo/902 be ordered subdivided into 2 portions so that the plaintiff gets her portion measuring 100 by 50 metres
- iii) That the defendant be ordered to execute all the relevant statutory forms/documents required of him to facilitate the transfers of a portion measuring 100m by 50m out of the suit land into the names of the plaintiff and in default the Deputy Registrar of this court to execute the same in place of the defendant.

iv) That the defendant be permanently enjoined and or barred from taking, using, and/or interfering with the applicant's portion of suit land measuring 100 by 50 metres

v) Costs of this suit to be borne by the defendant

3. The Summons was supported by an affidavit in which the plaintiff claims that she has been in open and notorious possession of a portion of land measuring 100m by 50m of L.R SOUTH TESO/ANGOROMO/902 for a period exceeding 12 years from the year 2002. That she has been in possession of the suit portion vide an agreement dated 24/10/2002 between her and the defendant. She has been in possession of the portion since the purchase and has developed it and used it as her own land for the purpose of planting cash crops and trees.

4. The Respondent entered appearance and filed a Replying Affidavit on 4th November 2015 and deposed that the applicant's process is incompetent, premature and lacks merit. He deposed that the applicant has never paid the full purchase price and the agreed costs thus forcing him to withdraw from the transaction. The applicant has been a mere licensee and she is in clear and admitted breach of sale agreement. He deposed that the applicant has never been in physical occupation that would entitle her to institute the claim before court.

5. He further stated that he had a suit against the applicant to compel her to take her refund being BUSIA CMCC NO. 329 OF 2015. He deposed that the claim is an afterthought and the applicant had recently increased her cultivation activities on the suit land in a frantic effort of gathering facts relevant for her claim. The respondent had also filed a suit Busia CMCC No. 329 of 2015 against the applicant in the chief's magistrates court seeking to refund the applicant the purchase price for the sale of land as she had not honoured the agreement in paying the succession and survey fees.

6. The two suits were consolidated and the matter was set down for hearing on 21st September 2020 with the applicant, PW1, giving her evidence in chief. She testified that she bought the land from the defendant on 24/10/2002 and she paid the agreed purchase price. The respondent showed her the plot which measured 100 by 50 metres and she started farming it. The plot was still under succession and she wanted to get a title and asked the respondent to take her to the land control board as she also wanted to build on the land. That was in 2015 and the respondent chased her away with a panga. She registered a caution on the title in 2012 but later learnt in 2015 that he had removed the caution. She produced a green card as Pex 1 and sale agreement as Pex2. She prayed that the court gives her the plot as she owes the defendant nothing.

7. She was cross examined by Mr. Wanyama, learned counsel for the defendant. The plaintiff stated that the agreement of sale was made on 24/10/2002. When she was buying the land, it was registered in the name of the defendant's father Asindi Obora. She did not know the date of death of the defendant's father. She learnt that succession was done when she went to do the search at the land's office. As per the green card, the entry no.9 for 4/4/2011 was the one of succession. She was sold the land by the son. The writing at the back of agreement of sale shows that she was paying money for survey and succession and she gave him the said money. She signed that part on 25/3/2011. She had no evidence that she had paid the Kshs.21,900/= because she did not know the matter would end up in court. She used to farm on the land and when she went to build in 2012, the defendant refused. She planted trees on the land immediately in 2002 after buying it. She went to the land recently and found that he had cut the trees. She had no pictures to show the trees that were on the land. She did nothing on the land from 2012 when he stopped her up to the time she filed the case.

8. The defendant's case was set for hearing on 17/3/2021 when it proceeded with the defendant as the sole witness, testifying as DW1. He testified that he had an agreement with the plaintiff in 2002 for sale of land over the suit S. TESO/ANGOROMO/902. The land was registered in his father's name who had passed on in January 2000. The witness stated that he was to undertake succession to enable him to transfer the sold portion. That he received Kshs.50,000/= from the plaintiff and they agreed that they were to share the costs of survey and taking out letters of administration in respect of his late father's estate which cost was agreed at Kshs.21,900/= and which the plaintiff has not paid to date.

9. DW1 continued in evidence that he was selling 50ft by 100ft which measures approximately $\frac{3}{4}$ acre. He did not mark out the boundaries because the plaintiff did not pay the survey fees. According to DW1, the plaintiff has never used the land, not planted any trees or built anything on it. That he filed a suit seeking that he be allowed to refund her the purchase price. He denied chasing her workers with a panga and asked the court to dismiss the plaintiff's suit and be allowed to refund the plaintiff her money.

10. On cross-examination by the plaintiff, the witness stated that the plaintiff started paying the purchase price in instalments from 2002. That they drew an agreement in 2011 after she had paid the whole amount of Kshs.50,000/=. He denied that she had paid the purchase price in lump sum. He admitted that he signed the agreement dated 24/10/2002 stating that the whole amount was paid on that date. He denied that she paid Kshs.21,900/= for survey. On re-examination, the defendant reiterated that the Kshs.50,000/= was paid in instalments with the last instalment being paid in 2011. The plaintiff had suggested that they backdate the agreement.

11. The defendant closed their case and prayed for a date to file submissions while the plaintiff chose to rely on the evidence on record. The defendant filed their submissions on 15th April 2021 submitting first that the claim is incompetent and ought to be dismissed because when the plaintiff bought the suit land in 2002, the land was still registered in the name of the defendant's deceased father and as such the sale transaction was illegal and the defendant could not confer title to the plaintiff. He submitted that the registered owner's estate's land was succeeded in 2010 and that is when the said estate gained a legal representative against whom a time could run and that the suit was filed prematurely before the lapse of 12 years running from 2010.

12. The defendant further submitted that the claim for adverse possession was not proved as the plaintiff never went into physical occupation and the portion she bought had never been demarcated for her and her attempts to use any portion of the deceased's parcel of land was blocked. That the requisite elements of the claim were never established by the plaintiff. He further submitted that the sale of land agreement made in 2002 was an illegal contract in view of section 48 of the Law of Succession Act. Further that the parties never made any applications to the Land Control Board hence the agreement remained null and void save for the purposes of enforcing a refund. Lastly, he submitted that the defendant suit for refund of the purchase price is grounded on section 7 of the Land Control Act. He prayed that the plaintiff's suit be dismissed with costs and the defendant's suit for payment of refund be allowed with costs to the defendant.

13. The court has considered the evidence on record, submissions and the law applicable. The doctrine of adverse possession is enshrined in Section 7 and 13 of the Limitation of Actions Act;

Section 7: *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: *(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where undersections 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 ceases 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

14. **Section 38 of the Act** gives guidance on the procedure to be followed by a person claiming adverse possession. It is the Section under which the present suit has been filed:

“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 subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

15. The questions which this courts frames as arising for determination are;

a) *Whether or not the agreement between the parties herein is null and void for*

i) *Lack of land control board consent*

ii) *Lack of letters of administration of the estate of Asindi Obora-deceased.*

b) *Whether or not the plaintiff took possession in the year 2002 thus proof of claim for adverse possession alternatively,*

c) *Whether an order for refund of the purchase price accrue.*

16. The defendant admitted that he entered into a sale agreement to sell a portion of the suit land S.Teso/Angorom/902 to the plaintiff. However, he is asking the court to declare the agreement null and void because they never appeared before the Land Control Board for purposes of obtaining consent. The claim before the court is not for specific performance that would require the agreement to be valid or otherwise. It has been held that in a claim for adverse possession, the production of a sale agreement serves the purpose of disclosing the mode of entry into the suit land. The issue of whether the defendant had taken out letters of administration or not does affect the case of the plaintiff. Indeed, time starts running after the expiry of six (6) which is the time provided for the obtaining of letter of consent. In ***Public Trustee – v- Wanduru, (1984) KLR 314 at 320 and 326*** it is stated that the provisions of the **Land Control Act** have no application where the claim to title of agricultural land is by operation of law such as by adverse possession.

17. The second issue is whether or not the plaintiff took possession of the sold portion in 2002 or in 2012. The plaintiff's evidence is that she started ploughing the land in 2002 immediately after paying for it. The defendant denied that the purchase price was paid for at once instead stating that the payment was by instalments which was completed in the year 2011. The agreement between the parties speak for itself that the money was paid at once on 24th October 2002. The transaction on 25th March 2011 recorded at page two of the agreement was specific that it was for payment of survey fees and costs of taking out letters of administration.

18. In his replying affidavit at paragraph 5 thereof, the defendant deposes that the Plaintiff was a mere licensee who was in clear breach. Then at paragraph 6 he deposes that the Plaintiff has never taken possession of the suit land. The contradiction is not explained in the defendant's oral evidence since you cannot be a licensee unless you are using the land. The defendant further argues that the right of adverse possession could not accrue because the sold portion was not demarcated. The sold portion was clearly stated in the sale agreement to be 50 by 100 portion of the suit title which title measures 0.68ha. The defendant must have definitely pointed out this portion to the plaintiff to be able to sign the agreement that identified the size of the portion sold. The issue of not demarcating is an afterthought the defendant is taking up to defeat the plaintiff's claim. I am persuaded to believe the plaintiff's version that she took possession from the date of sale.

19. For a party to claim adverse possession of land, they must prove that their occupation or possession has been open, peaceful and continuous. The applicant stated that she has been in occupation of the suit plot since she bought it in the year 2002 but in 2012 when she wanted to build a house on the plot the respondent chased her away and she has not used the plot until she filed the suit. The respondent has however denied that he chased the plaintiff away as alleged. Therefore, if the defendant did not chase away the plaintiff then her occupation of has not been interrupted. And even if he chased her away, that did not constitute dispossession as the plaintiff stated that she had trees on the suit portion.

20. The respondent submitted that he got registered as the proprietor of the suit plot in 2011 as per entry 9 in the green card produced as Pex 1 which according to him is the period against which a claim for adverse possession could start running. First, it is the defendant who put plaintiff into possession. Secondly, the defendant is described as the son of the deceased who held the title and in paragraph 3 of his plaint in

the suit seeking an order to refund he described himself as the beneficial owner of the suit parcel S.Teso/Angorom/902 which required succession. There was no doubt of his interest in the suit land which made the occupation of the sold portion adverse to his interests. The defence of being registered in 2011 did not stop time from running in favour of the plaintiff. One of the important lessons to be drawn from the Court of Appeal's decision in **Githu vs. Ndeete** (1984) KLR 776 is that;

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession”.

21. The defendant urged the court to make order allowing him to refund the money on the basis that the plaintiff was in breach of the sale agreement. The reason he pleaded as constituting breach was the failure by the plaintiff to pay the sum of Kshs.21,900 that was meant for survey and succession proceedings charges. The defendant alleged that he served the plaintiff with the letter dated 8th August 2015 repudiating the sale but which letter was not tendered in evidence. I have perused inside both files and could not find it. Whether the letter was served or not, the defendant had an obligation to prove his case concerning the alleged breach.

22. The defendant stated that they agreed to share the costs of survey and succession. The plaintiff claims she paid her part but did not ask the defendant to sign because she did not anticipate the turnaround. The defendant did not produce before this court receipt of payment of this services so as to accuse the plaintiff of default. He who comes to equity must do equity and must come with clean hands. Since there is no evidence shown of such payment by the defendant then both of them were at default and as such, the defendant cannot take the advantage to take away the rights of the plaintiff. I am therefore not convinced with the explanation for the breach and find the defendant's claim as not proved.

23. In light of the foregoing analysis, it is my considered opinion and I so hold that the plaintiff has proved her case and is entitled to the orders sought. This finding determines that the defendant's claim vide the plaint dated 3rd Sept. 2015 in CMCC No. 329 of 2015 and consolidated with this O.S. lacks merit and is hereby ordered dismissed. Consequently, I enter judgement for the plaintiff herein in the following terms:

i) That the defendant's right over a portion measuring 100ft by 50ft comprised in the title South Teso/ Angoromo/902 got extinguished by adverse possession upon expiry of the 12 years from the time the plaintiff came into possession in 2002.

ii) That L.R. No. South Teso/ Angoromo/902 be ordered subdivided into 2 portions so that the plaintiff gets her portion measuring 100 by 50 feet and the plaintiff shall meet the cost of such subdivision.

iii) That the defendant be ordered to execute all the relevant statutory forms/documents required of him to facilitate the transfers of the portion measuring 100ft by 50ft out of the suit land into the names of the plaintiff and in default the Deputy Registrar of this court to execute the same in place of the defendant.

iv) That the defendant be permanently enjoined and or barred from taking, using, and/or interfering with the applicant's portion of suit land measuring 100ft by 50ft

v) Costs of this suit as consolidated with CMCC no 329 of 2015 awarded to the plaintiff.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF SEPTEMBER, 2021.

A. OMOLLO

JUDGE