



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL CASE 321 OF 2011 (OS)**

**MICHAEL MUTURI KARANJA.....PLAINTIFF**

**VERSUS**

**ROSELYNE DOLA OUKO**

**AARON TAFARI OUKO**

**ANDREW ATINDA OUKO(Being the Administrators of the Estate of the**

**Late Jason Atinda Ouko).....DEFENDANTS**

**JUDGMENT**

**Back Ground and Introduction**

1. By an amended originating summons dated 22<sup>nd</sup> July, 2011, the Plaintiff sought the following reliefs:-

- 1) That the Applicant be declared to have acquired title over Plot No.3589/6/T (now known as 3589/36) measuring two and half acres (2.5) acres being a portion of title L.R. 3589/6- Lang'ata by adverse possession.
- 2) That in the alternative, this Honourable Court do issue a declaration that Defendants jointly and severally or otherwise as the Administrators of the estate of the late Jason Atinda Ouko are the constructive trustees over Plot No.3589/6/T (Now known as 3589/36) measuring two and half acres (2.5) acres being a portion of title L.R. 3589/6/Lang'ata for the benefit of the Plaintiff together with his wife, Rebecca Njeri Karanja.
- 3) That the Defendants, jointly and/or severally, be ordered and directed to immediately execute all such documents and to do all such acts as are necessary to ensure the full and effective Transfer of Plot No.3589/6/T (now known as 3589/36) measuring two and half acres (2.5) acres being a portion of title L.R.3589/6-lang'ata to Rebecca Njeri Karanja and the Plaintiff
- 4) That the Defendant cease to be the registered as the proprietors of Plot No.3589/6/T (Now known as 3589/36) measuring two and half(2.5) acres being a portion of title L.R. 3589/6-Lang'ata and instead, Rebecca Njeri Karanja and the Plaintiff/Applicant be registered as the proprietors thereof.
- 5) That the Defendants be permanently restrained from entering upon the said area measuring two and half acres (2.5) which is known as Plot No.3589/6/T (Now known as L.R. No. 3589/36) being portion of title L.R. No.3589/6-Lang'ata.
- 6) That costs of this application be provided for.

2. The Defendants are the administrators of the estate of the late Jason Atinda Ouko (Deceased) who is the registered owner of LR NO.3589/6 measuring 87.5 acres (suit property). The deceased had intended to sell a portion of the suit property measuring 2½ acres to Joseph Bernard Ndung'u. The said Joseph Bernard Ndung'u was unable to raise the purchase price of Kshs.300,000/=.

3. The said Joseph Bernard Ndung'u then entered into a sale agreement with the Plaintiff and his wife Rebecca Njeri Karanja in which he agreed to sell the land at a consideration of Kshs.350,000/=. The sale was subject to the terms and conditions set out in the agreement which the Deceased and Joseph Bernard Ndung'u had signed.

4. The agreement between the Plaintiff and Joseph Bernard Ndung'u contained special conditions which provided that the Plaintiff was to pay stamp duty, land rent and rates to the local authority and any other charges which would reasonable be demanded from the parties. The

agreement further stipulated that Joseph Bernard Ndung'u was to deliver a copy of the agreement signed between him and the Plaintiff to the deceased. The agreement further provided that the Plaintiff was to obtain all the necessary consents and clearance certificates with the assistance of the deceased for purposes of transfer of the purchased plot.

5. The deceased passed on 2<sup>nd</sup> February, 1996. The Deceased's family applied for grant of letters of administration vide Nairobi High Court Succession Cause No.353 of 1997. The grant of letters of administration was issued to the Defendants on 22<sup>nd</sup> May, 2006. In or around November 2010, the Defendants in their capacity as administrators of the estate of the deceased wrote to all persons who were claiming to have purchased portions of the suit property to come forward with evidence of purchase. In the instant case a letter dated 27<sup>th</sup> November, 2010 was addressed to Joseph Bernard Ndung'u. The Plaintiff responded to the letter of 27<sup>th</sup> November, 2010 which had been forwarded to him vide his letter of 16<sup>th</sup> December, 2010 in which he stated that he had purchased a portion of the suit property identified as plot No.3589/36 from Joseph Bernard Ndung'u on 6<sup>th</sup> December, 1988 and that the deceased was aware of the sale.

#### **Plaintiff's Case**

6. It is the Plaintiff's case that on 6<sup>th</sup> December, 1988 he purchased plot No.3589/36 from Joseph Bernard Ndung'u at a consideration of Kshs.350,000/= which was paid to the said Joseph Bernard Ndung'u by banker's cheque upon execution of the sale agreement. The plot measured 2 ½ acres. The Plaintiff then took possession awaiting the processing of title. He proceeded to construct a permanent house which he completed in the month of July 1991. He then started staying in the house he had constructed.

7. The Plaintiff went ahead to plant trees and grass on the portion not covered by the house. It is his evidence that he filed this suit seeking to be declared as owner thereof on account of having acquired it through adverse possession. It is his evidence that the defendants on learning of the case he filed, they started threatening him with eviction and demolition of his houses. He further states that the Defendants have refused to execute transfer documents into his name and that of his wife.

#### **Defendant's Case**

8. The evidence of the Defendants was given by Aaron Tafari Ouko one of the administrators of the estate of the Deceased. He testified that the deceased had intended to sell a portion of the suit property identified as plot No.3589/36 to Joseph Bernard Ndung'u at a consideration of Kshs.300,000/=. The said Joseph Bernard Ndung'u was unable to raise the purchase price. He then introduced the Plaintiff as the one who was to purchase the 2 ½ acres. It is the Defendants' evidence that the Plaintiff was allowed to occupy a portion of the 2 ½ acres on the understanding that he was to pay for the 2 ½ acres. It is the Defendant's evidence that the Plaintiff has never paid any money to either the deceased or the administrators. The Defendant state that the Plaintiff has been utilizing a small portion of the 2 ½ acres and that they are the ones utilizing over 1 ½ of the 2 ½ acres.

9. When the deceased died on 2<sup>nd</sup> February, 1996 they embarked on the process of succession. After grant of letters of administration were given to them, they asked all those who were claiming to have purchased portions of the suit property to provide any evidence of payment of the purchase price. What the Plaintiff instead brought up is an agreement in which he paid Kshs.350,000/= to Joseph Bernard Ndung'u.

10. The said Joseph Bernard Ndung'u did not provide any evidence to show that he had paid the Kshs.300,000/= for him to sell the 2 ½ acres to the Plaintiff and his wife. The Defendants therefore argue that unless the Plaintiff can show that he paid the entire purchase price to the deceased, his claim for adverse possession or specific performance has no basis.

#### **Analysis of evidence and issues for determination**

11. The Plaintiff filed submissions dated 15<sup>th</sup> February, 2021. The Defendants filed their submissions dated 17<sup>th</sup> March, 2021. I have carefully considered the evidence adduced by the Plaintiff as well as the evidence adduced by the Defendants. I have also considered the submissions filed by the parties. The issues which emerge for determination are firstly whether the Plaintiff is entitled to possession of the 2 ½ acres through adverse possession. Secondly, whether the Plaintiff is entitled to an order of specific performance. Thirdly, whether the Defendants are holding the 2 ½ acres in trust for the Plaintiff. Fourthly, who should bear the costs of this suit.

#### **Whether the Plaintiff is entitled to the 2½ Acres through adverse possession**

12. There is no contention that the deceased is the registered owner of LR No.3589/6. There is also no contention that the deceased had intended to sell the 2 ½ acres to Joseph Bernard Ndung'u from whom the Plaintiff purchased. The portion is clearly identified as Plot 3589/36 which is 2 ½ acres. This portion is out of the larger portion which is 87.5 acres. It is generally agreed that though there were intentions to subdivide the suit property, this intention was never carried through.

13. There is no evidence which was adduced regarding the agreement signed between Joseph Bernard Ndung'u and the deceased. The only evidence which alluded to the agreement is a memorandum of acknowledgement signed by Joseph Bernard Ndung'u on 7<sup>th</sup> July, 2011 in which he states that he was unable to trace the agreement he signed between himself and the deceased. He only states that the said agreement was entered into sometime in 1978.

14. It is important to note that when the Plaintiff purchased the 2 ½ acres on 6<sup>th</sup> December, 1988, this agreement was made subject to the terms and conditions in the agreement which Joseph Bernard Ndung'u and deceased signed. The date of agreement which Joseph Bernard Ndung'u allegedly signed was not even referred to in the agreement of 6<sup>th</sup> December, 1988. The task of delivering the agreement of 6<sup>th</sup> December, 1988 to the deceased was given to Joseph Bernard Ndung'u.

15. If indeed Joseph Bernard Ndung'u had signed the alleged agreement and had paid the deceased the entire purchase price, he would have

no issue in delivering the agreement of 6<sup>th</sup> December, 1988 to the deceased. If this agreement indeed existed, it would have made things easier by being expressly incorporated into the one of 6<sup>th</sup> December, 1988 to show that Joseph Bernard Ndung'u had indeed met his obligations and was at liberty to sell the 2 ½ acres to the Plaintiff and his wife. The Plaintiff should have even insisted to have a copy of the said agreement. Without this evidence, it is safe to conclude that no such agreement existed and that the Plaintiff did not make any payment to the deceased.

16. The said Joseph Bernard Ndung'u may have pulled a fast one against the Plaintiff who was paid Kshs.350,000/= without any evidence to show that he had paid the deceased for the 2 ½ acres. The Plaintiff is on the 2 ½ acres based on the purchase of the 2 ½ acres which agreement was made subject to the terms of the alleged agreement between Joseph Bernard Ndung'u and the deceased. If this be the case, the Plaintiff cannot seek to be registered as owner of the 2 ½ acres by way of adverse possession.

17. In the case of **Michanga Investments Ltd =vs= Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** the Court of Appeal quoted from the case of **Samwel Miki Waweru =vs= Jane Njeri Richu CA.No 122 of 2001 (UR)**

where it was stated as follows:-

***“it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise. Further as the High Court correctly held in JANDU =V= KILIPAL [1975]EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of SISTO WAMBUGU =vs= KAMAU NJUGUNA [1982-880 1 KLR -217 relied on by Mr. Gitonga, learned counsel for the appellant seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of a licence or possession of such land only after the period of validity of the contract unless and until the contract of sale, has first been repudiated as required by the parties in which case adverse possession starts from the date of the termination of the contract.”***

18. There is no evidence that the sale agreement between the deceased and Joseph Bernard Ndung'u or the one between the Plaintiff and Joseph Bernard Ndung'u were repudiated. In fact the agreement between the Plaintiff and Joseph Bernard Ndung'u was subject to the terms of the one between the deceased and Joseph Bernard Ndung'u. This goes to confirm the fact that the two agreements subsisted side by side and neither the deceased nor the Defendants repudiated the same. This is why after the demise of the deceased, the administrators who are the Defendants in this case called upon those who were in the suit property to come forward and prove that they purchased the portion occupied by them.

19. Instead of the Plaintiff coming forward with evidence of purchase he moved to court and filed this suit claiming adverse possession. In the case of **Peter Mbiri Michuki =vs= Samuel Mugo Michuki [2014] eKLR** the Court of Appeal referred to the case of **Public Trustee =vs= Wanduru [1984] eKLR at 319** where Madan J A stated as follows:-

***“.....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 land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.***

20. It is clear from the case of **Peter Mbiri Michuki (Supra)** that the period of limitation could not start running in favour of the Plaintiff as he did not pay the full purchase price to the deceased. What the Plaintiff stated is that he paid Kshs.350,000/= to Joseph Bernard Ndung'u and as per evidence on record, this payment was subject to the conditions of the agreement between the deceased and Joseph Bernard Ndung'u. This agreement was not produced and there is no way the Plaintiff can use the payment to Joseph Bernard Ndung'u to claim adverse possession against the estate of the deceased.

21. In the case of **Gabriel Mbui =vs= Mukinda Maranya [1993] eKLR, Justice Kuloba** stated as follows:-

***“Normally, a person claiming adverse possession is allowed in possession as a purchaser pending completion of the purchase price, or if he has already paid in full, then pending compliance with the requisite statutory formalities, and he is allowed to stay because he is a purchaser, and not a mere trespasser. the vendor decides by accident or design to allow matters to drift on without taking steps to evict the purchaser from the land after the contract fails on account of non-completing, late performance, or non-compliance with legal requirements, relying on the belief that the purchaser will get out on his own, or on the hope that it will all turn out right in the end. Both the vendor and the purchaser may be ignorant of the legal consequences. The purchaser believes he is in possession as a purchaser, and wishes to remain there and found his title on contract.***

When things come to a head, the purchaser says in retrospect, that although he looked and acted like a purchaser in possession, but the vendor did not evict him, and although he did not say he no longer relied on the contract and did not repudiate it, and the vendor was still entitled to look on him as a purchaser and he did not realize it and it might not have suited the purchaser for the vendor to regard him otherwise than as purchaser, the purchaser was in fact a person in adverse possession, quietly picking up the years which are necessary to elapse to bar the owner's title. *The obvious rule against this unconscionable approach of the purchaser should naturally be, that the purchaser having been able to go in and stay under the contract, cannot be allowed to repudiate the contract with the hindsight and claim adverse possession.*

If, however, at any time, the purchaser made it clear that he was no longer bound by the contract, or that despite the contract becoming null and void he is retaining possession under some other colour of right independently or the land sale contract, then different considerations would apply. For it is only upon making that fact clear, that the vendor can take action against him.

Accordingly, the rule should be, that where it is only the fact that a squatter is in possession as a purchaser under a contract which has become in operative, null and void/ or unperformed by him, and which has enabled him to claim title by adverse possession, the position is that although the full period required by the statute has elapsed, the squatter's possession remains consensual and does not found a claim of being in adverse possession”.

### **Whether the Plaintiff is entitled of an Order of Specific Performance**

22. In the alternative, the Plaintiff is seeking for an order of specific performance. For an order of specific performance to be granted, the Plaintiff must show that he has met his part of the bargain and that it is the Defendant who has not. In the instant case, the evidence shows that it is the Plaintiff who has not met his part of the bargain. The amount of purchase price was not paid to the deceased. The evidence shows that the contract between the Plaintiff and Joseph Bernard Ndung’u was subject to the terms of the one between the deceased and Joseph Bernard Ndung’u. This contract was not produced in evidence. The Plaintiff cannot therefore be heard to argue that he met his part of the bargain.

23. In the case of **Reliable Electrical Engineers (K) Ltd =vs= Martrac Kenya Ltd [2006] eKLR** Justice Maraga (as he then was) stated as follows:-

*“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.*

*The jurisdiction of specific performance is based on th existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with a formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant”.*

24. The Plaintiff did not make any payment to the deceased. He therefore has no basis upon which he can claim the remedy of specific performance. In the case of **William Kazungu Karisa =vs= Cosmas A. Ngore Chanzera [2006] eKLR** it was held as follows;-

*“The basic rule of the law of contract is that the parties must perform their respective obligations in accordance with the terms of the contract executed by them”*

25. As I have said herein above, the Plaintiff did not adduce evidence of the agreement between the deceased and Joseph Bernard Ndung’u. The agreement between the Plaintiff and Joseph Bernard Ndung’u was subject to the terms of the one between the deceased and Joseph Bernard Ndung’u which agreement was not produced.

### **Whether the Estate of the Deceased is holding the 2 ½ Acres in Trust for the Plaintiff**

26. The issue of trust is a matter of evidence. There is no evidence which was adduced on which the court would make a finding that the Defendants are holding the 2 ½ acres in trust for the Plaintiff. This being the case, I find that the Defendants are not holding the land in trust for the Plaintiff.

### **Disposition**

27. From the above analysis, it is clear that the Plaintiff has failed in his claim for adverse possession, specific performance or even trust. The Plaintiff’s suit is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF OCTOBER, 2021.

**E.O. OBAGA**

**JUDGE**

In the virtual presence of;-

Mr.Onyango for Defendants

M/S.Matasi for Plaintiff

Court Assistant – Mercy

**E.O. OBAGA**

**JUDGE**