



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 46 OF 2018 (OS)

KANO KAJULU FARMERS COOPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

COUNTY LAND REGISTRAR, KISUMU.....1ST DEFENDANT

MARY AKEY OGENDO 2ND DEFENDANT

JUDGMENT

The Plaintiff brought this suit by way of Originating Summons seeking determination of the following questions:

1. Whether the Plaintiff is entitled to the whole land parcel No. KISUMU/KOCHIENG'/2836 measuring or estimated to measure 0.30 Ha or thereabouts by reason of his adverse possession of the same for a period exceeding 12 years.
2. Whether the 2nd Defendant's proprietary interest in the suit parcel has been extinguished by virtue of the Plaintiff's adverse possession and whether the 2nd Defendant is now holding the title for the parcel in trust for the Plaintiff.
3. Whether the transfer of the suit parcel from Onyango Oyoo (deceased) to the 2nd Defendant was irregular and fraudulent, and therefore null and void.
4. Whether the 2nd Defendant's title to and proprietary interest in the whole of the suit parcel has been extinguished by operation of the law by virtue of adverse possession and whether the whether the 2nd Defendant is now holding the title for whole the parcel in trust for the Plaintiff.
5. Whether the title deed issued in the name of the 2nd Defendant as proprietor of the whole of the suit parcel should now be cancelled and the whole of it transferred and registered in the name of the Plaintiff.
6. Whether the Respondents should be ordered to pay the costs of this summons to the Plaintiff.

The Originating summons is founded on the Supporting affidavit of the Charles Ayub Owane, the Chairman of the Plaintiff Society, dated 11th September 2018. The Chairman stated that the suit parcel was first registered in the name of Onyango Oyoo, also known as Gabriel Onyango Oyoo (deceased). That the 2nd Defendant was the daughter-in-law of the said Onyango Oyoo.

That by an agreement for sale of land dated 18th April 1977, Onyango Oyoo sold the whole of the suit parcel to the Plaintiff and the purchase price was paid to him in full. The sale agreement was attached to the affidavit. That upon purchase the Plaintiff immediately took possession and fenced the parcel with cedar posts and barbed wire, and constructed a huge store and office block.

That the Plaintiff has continued to occupy the suit parcel undisturbed and without interference from anyone for a period exceeding 41 years to date. That they discovered that he 1st Defendant caused the parcel to be transferred from the deceased's name to the 2nd Defendant's name on 19th February 2013, yet the 2nd Defendant had never applied nor obtained letters of administration of the deceased's estate and therefore did not have the capacity to transfer the suit parcel to herself. That on the face of it, the transfer was irregular and fraudulent and therefore null and void.

That the Plaintiff complained about the transfer, as evidenced by the attached correspondence, but had not been able to correct the anomaly. That the transfer arbitrarily deprived them of their right over the suit parcel in breach of Article 40 of the Constitution.

That the 2nd Defendant has refused to transfer the parcel to the Plaintiff and has threatened to evict the Plaintiff and has been locking the premises on the suit parcel, thereby disrupting the Plaintiff's peaceful business operations.

That upon payment and taking continuous, peaceful and exclusive possession for over 41 years, the Plaintiff's possession became adverse to the estate of the deceased. That in all those years, the 2nd Defendant has never used the suit parcel nor received profits from the land, and that the Plaintiff has completely excluded her and the deceased's family.

No Response from Defendants

Despite being properly served, the Defendants neither filed a response nor tendered evidence at the hearing. The suit proceeded by way of written submissions.

Plaintiff's Submissions

Counsel for the Plaintiff submitted that the transaction between the deceased and the Plaintiff took place on 18th April, 1977 but consent of the land control board was not obtained before or on October 1977, rendering the transaction void. That the possession of the Plaintiff became adverse and time started to run from that date, that is when the contract was repudiated, was terminated or became void by operation of the law under the Land Control Act. Counsel cited the cases of *Edward Wanjala v Fredrick Philip Khayo* and *Samuel Miki Waweru v Jane Njeri Richu*.

Counsel submitted that the deceased title had been extinguished by the end of 1989, 12 years after the date the Plaintiffs took adverse possession, and therefore the subsequent transfer to the 2nd Defendant meant that the 2nd Defendant was also merely holding the title in trust for the Plaintiff and did not interrupt the Plaintiff's adverse possession. Counsel cited the case of *Samwel Nyakenogo v Samwel Orucho Onyaru* to affirm this position.

Issues for Determination

1. Whether the Plaintiff has proved its case

On whether a purchaser of land in a controlled transaction can lay claim to the land by way of adverse possession, the Court of Appeal in *SAMUEL MIKI WAWERU v JANE NJERI RICHU Civil Appeal No. 122 of 2001 [2007] eKLR* held:

“In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

The Plaintiff established that it occupied the suit parcel by virtue of a sale agreement in 1977 which has not been challenged by the Defendant. That, on the balance of probabilities, consent of the Land Control Board was not obtained within six months of making the agreement as required under Sections 6 (1) and 8 (1) of the Land Control Act, rendering the transaction void. The Plaintiff's adverse possession of the property began on October 1977 or thereabouts to date and it is therefore properly placed to claim the suit parcel by virtue of adverse possession.

Claims under adverse possession are set out in several provisions of the Limitation of Actions Act. Section 7 places a bar on actions to recover land after 12 years from the date on which the right accrued. Section 13 provides adverse possession as the exception to this limitation:

“(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 under sections 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.

Section 38 of the Act provides that:

“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. Relevant Orders

The plaintiff has proved his case on a balance of probabilities and therefore entitled to the following orders which are hereby granted.

1. The Plaintiff is entitled to the whole land parcel no. KISUMU/KOCHIENG/2836 measuring or estimated to measure 0.30 Ha or thereabouts by reason of his adverse possession of the same for a period exceeding 12 years.
2. The 2nd Defendant's proprietary interest in the suit parcel has been extinguished by virtue of the Plaintiff's adverse possession

and whether the 2nd Defendant is now holding the title for the parcel in trust for the Plaintiff.

3. The transfer of the suit parcel from Onyango Oyoo (deceased) to the 2nd Defendant was irregular and fraudulent, and therefore null and void.

4. The 2nd Defendant's title to and proprietary interest in the whole of the suit parcel has been extinguished by operation of the law by virtue of adverse possession and whether the whether the 2nd Defendant is now holding the title for whole the parcel in trust for the Plaintiff.

5. The title deed issued in the name of the 2nd Defendant as proprietor of the whole of the suit parcel is hereby cancelled and the whole of it transferred and registered in the name of the Plaintiff. The deputy registrar to sign all relevant documents.

6. The Respondents to pay the costs of this summons to the Plaintiff.

DATED, DELIVERED AND SIGNED THIS 27th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE