



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC 27 OF 2017 (O.S)

IN THE MATTER OF THE LAND REGISTRATION ACT 2012 (CAP 284) LAWS OF KENYA

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22) LAWS OF KENYA

BETWEEN

JUDITH OLANGA OKINDA.....PLAINTIFF

VERSUS

MARY JANE MALANGA.....1ST DEFENDANT

MARY JANE MALANGA (Sued in her capacity as the Administration of the Estate of

JOSEPH HABWE OWANGE (DECEASED)

JOSEPH HABWE OWANGE (DECEASED).....2ND DEFENDANT

KENNEDY J. MUSUMBA NAMBUTE.....3RD DEFENDANT

LAWI OTIENDE.....4TH DEFENDANT

JUDGEMENT

Plaintiffs case

The Plaintiff, Judith Olang Okinda filed the originating summons herein against the defendants on 3/11/2017 under Order 37 Rule 7 Su-rule 1,2,3 of the Civil Procedure Rules 2010 and Section 28 of the Land Registration Act of 2012 and Section 1A and B of the Civil Procedure Act claiming to be in adverse possession of L.P. NO. K/M/4092 and KISUMU/MARERA/4093. He prays for determination of the following issues.

- 1) Whether the Plaintiff's deceased husband one Johnstone Okinda Ochola purchased a portion of land parcel known as KISUMU/MARERA/2399 on 20.3.1968 through his mother one Ruth Musumba Ochola from Jeremiah Owange Wayodi who was the father in-law of the defendants herein.
- 2) Whether the said parcel of land was subdivided to form Land Parcel Nos. KISUMU/MARERA/3762, KISUMU/MARERA/4093 and KISUMU/MARERA/4094.
- 3) Whether the plaintiff had an overriding interest under section 28 (h) and (j) of the Land Registration Act, 2012 (Cap 284) Laws of Kenya of her portion of land parcel know as KISUMU/MARERA/2399 before its subdivision to create land parcels KISUMU/MARERA/3762, KISUMU/MARERA/4092, KISUMU/MARERA/4093 and KISUMU/MARERA/4094.
- 4) Whether the plaintiff now has overriding interest under section 28(h) and (j) of Land Registration Act, 2012 (Cap 284) Laws of Kenya the of the new land parcel KISUMU/MARERA/4092 and KSIUMU/MARERA/4093.
- 5) Whether the plaintiff is an adverse possessor of the parcels of land known as KISUMU/MARERA/4092 and

KISUMU/MARERA/4093.

- 6) Whether the Honourable court ought to vest the suit land KISUMU/MARERA/4092 and KISUMU/MARERA/4093 and the plaintiff.
- 7) If (1,2,3 &4) above are in affirmative, whether the Kisumu District Land Registrar should be directed to register the rights and interests to the plaintiff upon KISUMU/MARERA/4092 and KISUMU/MARERA/4093.
- 8) Whether the plaintiff is entitled to costs of this application.

The application is based on grounds that the suit parcels of land belonged to the plaintiff's deceased husband who purchased them through his mother way back in 1968. At the time of the said purchase, the suit parcels of land were not in existence and the said parcel of land was known as KISUMU/MARERA/2399. The plaintiff has been in constant occupation of the suit parcels of land without force, secrecy, permission and interruption since 1985. The plaintiff has continued to benefit from the same without interruptions for 32 years.

The subsequent subdivision of KISUMU/MARERA/2399 into KISUMU/MARERA/3762, KISUMU/MARERA/4092, KISUMU/MARERA/4093 and KISUMU/MARERA/4094 and transfers did not extinguish the plaintiff's overriding interests under section 28 (h) and (j) of the Land Registration Act.

In the supporting affidavit, the plaintiff states that on the 20.3.1968, her deceased husband, one Johnstone Okinda Ochola purchased a portion of parcel of land known as Kisumu/Marera/2399 through his mother one Ruth Musumba Ochola from Jeremiah Owange Wayodi who was the father-in-law of the 1st defendant. That in 1970, she got married to her deceased husband and found her mother-in-law cultivating on the suit parcel of land.

She states that in the year 1985, the plaintiff and her deceased husband took possession of their portion in the suit parcel of land and used it for agricultural purposes without any interruption and that when they took possession of the suit parcel, it was registered in the name of Jeremiah Owange wayodi as the sole proprietor.

Unfortunately the said Jeremiah Owange Wayodi passed away on 2.2.1987 before transfer could be executed in favour of her deceased husband and that after his death, they started having wrangles with his son one Joseph Habwe Owange (now deceased) who filed a case against her deceased husband at the Kisumu District Tribunal which case was determined in favour of her deceased husband. The said Joseph Habwe Owange appealed against the Award to the Provincial Appeals Tribunal but unfortunately passed away on 4.3.2003 before the matter could be determined and that upon the demise of the said Joseph Habwe Owange, the defendant herein transferred all that parcel of land known as Kisumu/Marera/2399 into her own name on the 15.1.2009.

When her son one Shadrack Charles Ocholla visited their home, he was informed by a friend that the 1st defendant had already sold part of the portion of the suit parcel that her deceased husband had bought back in the year 1968. After receiving this information, her son rushed to the chambers of her advocate on record to inform him of the 1st defendant's acts and the advocate on record advised him to conduct a search in respect of the suit parcel of land for purposes of establishing the registered proprietors of the said portion.

On 19.10.2016, her son conducted a search at the Kisumu Land Registry and the Certificate of Official Search showed that parcel of land known as Kisumu/Marera/2399 had already been subdivided to Kisumu/Marera/3759 which was further subdivided to Kisumu/Marera/4092 and Kisumu/Marera/4093.

The Certificate of Official Search further showed that Kisumu/Marera/4092 and Kisumu/Marera/4093 had been sold to the 3rd and 4th Defendants respectively and Title Deeds were issued to them on 1.12.2015 and 1.2.2016 respectively before the determination of the appeal case filed by her deceased husband.

They decided to visit the chambers of their advocate on record and informed him on what they had discovered with regard to parcel of land known as Kisumu/Marera/2399.

That from the above illustration, it is evident that the 1st defendant herein wants to evict them from the suit parcels of land which they have been occupying openly and without secrecy, without force, secrecy, permission and interruption for a period of 32 years.

On cross examination by Mr Odongo learned counsel for the 1st and 2nd defendants, she states that she has no house on the land but her husband was given the land by the tribunal. She has her home on parcel number 2149. The 1st defendant was not married when they bought the whole land number 2399.

On cross examination by Mr Getanda learned counsel for the 3rd and 4th defendants, she states that Kennedy J Nambute the 3rd defendant has never stepped on the land. She entered the land in 1985 and the first case before the Kisumu District Land Disputes Tribunal was in 2002. She has lived on the land for 17 years.

DEFENDANTS' CASE

In the replying affidavit couched like submissions, the 1st Defendant states that adverse possession pre-supposes that there has been no interruption by the owner as against the adverse possessor which situation is not the case as she has not only interrupted the purported "possession" but most importantly she has been in possession of the land and the issue of adverse possession cannot therefore arise and

consequently, the application is not only misplaced but also misguided.

She states that plaintiffs'/applicants' claim for adverse possession of Kisumu/Marera/4092 and Kisumu/Marera/4093 does not lie for the reasons that these two parcels were created in 2015. Kisumu/Marera/4092 was subsequently registered in favour of the 3rd defendant. Kisumu/Marera/4093 was registered in favour of the 3rd defendant. Such registration having taken place only two (2) years prior to the filing of these proceedings, the claim for adverse possession and this claim is a non-starter.

The 1st respondent denies the alleged purchase of a portion of land parcel known as Kisumu/Marera/2399 by one Johnstone Okinda Ochola from Jeremiah Owange Watodi.

The plaintiff has conveniently waited until her husband (Jeremiah Oange Watudi) has died to now claim that her husband sold to her husband the land.

The wrangles alluded to by the applicant does lend credence to her earlier assertion that it is strange that the Applicant would wait almost twenty (20) years after the purported sale to assert his "claim" over the 1st respondents land and conveniently after the registered owner has passed on. That Joseph Habwe Owange did prefer an Appeal against the decision of the Land Disputes Tribunal.

She confirms that she secured registration of land parcel number KISUMU/MARERA/2399 into her name and indeed subdivided it and gave portions thereof being KISUMU/MARERA/4092 and KISUMU/MARERA/4093 to the 3rd and 4th defendants respectively as they are relatives being related to her deceased husband.

The assertion by the plaintiff that her occupation has been open and without interruption is absolutely untrue and this fact is evidently demonstrated by her own documents which does show that there has been numerous judicial proceedings touching on that land.

Ultimately, the plaintiff's claim for adverse possession is thus misplaced and cannot thus be declared as an adverse possession as it is not one.

On cross examination by Mr Getanda, she states that she was married in 1993 and knows the plaintiffs land to be 2149 Marera where they have built. The plaintiff entered the suit land in 2009 and not 1985. The chief stopped them in 2002. The 1st defendant claimed to be ploughing 4092 and 4093.

On cross examination by Imbaya learned counsel for the plaintiff she states that she has known the plaintiff since she was married in 1993 and that she was not married during the transactions. She does not know what happened before she got married. The 3rd and 4th defendants know that she utilises the land. She has once ploughed the land but stopped ploughing in the year 2009 when she was verbally stopped by the chief. She has never used the land since it went to Lawi Otiende the 4th defendant in 2016. She is not in possession of the land. On re-examination by Mr Odongo, she states that she was utilising the land before the plaintiff encroached in 2002

3RD DEFENDANTS CASE

Kennedy J. Musumba Nambute states that both the plaintiff/Applicant and the 1st Defendant are persons well known to him. He is aware that Johnstone Okinda Ochola bought a piece of land from Jeremiah Owange Wayodi who is the father to the husband of the 1st Defendant/Respondent herein. A dispute arose between Joseph Habwe and Johnston Okinda concerning the interests of Johnson Okinda on land parcel known as KISUMU/MARERA.2399 upon which the Kisumu District Lands Dispute Tribunal award, awarding Johnstone Okinda a portion on parcel Kisumu/Marera/2399 was adopted. Plaintiff therein Joseph Habwe Owange being dissatisfied by the decision appealed to the Provincial Appeal Committee which in turn set aside the District Tribunals decision and the court adopted the orders of the Nyanza Land Dispute Appeals Committee.

Upon settlement of the said issues between the administrator of the estate of the late Joseph Habwe (the defendant therein) and the husband of the plaintiff the said parcel KISUMU/MARERA/2399 and 2149 were successfully registered in the names of the 1st defendant. The 1st defendant sub-divided both parcel KSIUMU/MARERA/2399 & 2149 allocated all beneficiaries and other purchasers including the plaintiff their rightful shares.

The plaintiff interest is in respect of parcel known as KISUMU/MARERA/2149 where she and other buyers have been allocated their respective portions upon sub-divisions and the plaintiff peacefully resides there. Parcel know as Kisumu/Marera/2399 was sub-divided into further portions giving rise to parcels No. Kisumu/Marera 3759 to 3762. Further the 1st defendant sub-divided the said new parcels of land known as KISUMU/MARERA/3759 into three protons whereby he was allocated his portion measuring 0.25Ha as a gift.

The plaintiff's interest has never been with respect to land parcel Kisumu/Marera/2399 but Kisumu/Marera/2149. The plaintiff has never resided on the original parcel No. Kisumu/Marera/2399 nor utilized the said piece of land. The plaintiff resided on a portion which is neighbouring the original land parcel Kisumu/Marera/2399 and she has even built on it and no one is disturbing her and her family. The plaintiff is not entitled to the reliefs sought in the originating Summons before this court.

On cross examination by M/S Imbaya for the plaintiff, he states that his parcel of land is 4092 and that he has a title deed. He was gifted the land by the Uncle Joseph Habwe before he died. He has not done anything on the land as it is under the care of the 1st defendant. On re-examination by Mr Getanda he states that he has never utilised the land.

4TH DEFENDANTS CASE

Lawi Otiende in his affidavit states that that the plaintiff, 1, 2nd and 3rd Defendants are persons well known to him as they both reside in the same local area. He is the registered proprietor of land parcel He was gifted parcel KISUMU/MARERA/4093 by his late uncle the 2nd defendant herein which the said land parcel was later transferred to him by the 1st defendant in her capacity as an administrator of the estate of his late uncle.

That during the lifetime of his uncle the 2nd defendant herein, no one occupied nor utilized the original land parcel KISUMU/MARERA/2399 which gave rise to KISUMU/MARERA/3759 and later on parcels KISUMU/MARERA/4092, 4093 and 4094.

That even in the year 2002 when his uncle the 2nd defendant herein (deceased) showed him the portions he wished him to occupy, no one moved in to either occupy or utilize but the same was left untouched and bushy.

That it is only in the year 2016 that he started utilizing his respective parcel of land after the same was transferred to him by the 1st defendant herein whom by then was the registered proprietor after succeeding her late husband's estate.

That the 1st defendants parcel of land, KISUMU/MARERA/4091 borders the plaintiff's land parcel KISUMU/MARERA/2296 which she occupies and utilizes without any interruptions and it is a different sub-division from the original land parcel KISUMU/MARERA/2149.

That originally land parcel KSIUMU/MARERA/2149 bordered with original land parcel KSIUMU/MARERA/2399 which were two distinct parcels of land and the plaintiff was only occupying a portion of land on L.R. KISUMU/MARERA/2149 now closed and her portion is still there which she occupies and allocated LR. KISUMU/MARERA/3396.

The plaintiff has never occupied nor used any portion of land arising from sub-division of the original L.R. KISUMU/MARERA/2300 such as KISUMU/MARERA/3759, 3760, 3761 AND 3762.

That parcel number KISUMU/MARERA/4093 which is his portion is a sub-division of L.R. KISUMU/MARERA/3759 and borders L.R. KISUMU/MARERA/3396 which belongs to the plaintiff where she has lived all along.

The plaintiff's claim has never been with respect to the former land parcel KISUMU/MARERA/3759 since the portion she has been occupying is KISUMU/MARERA/3396 is sub-division of land parcel KISUMU/MARERA/2149.

The plaintiff's claim of adverse position is misplaced and bad in law because no one ever occupied or utilized the former land parcel KISUMU/MARERA/2399 which was later subdivided to create land parcel KISUMU/MARERA/3759 and it is until land parcels KISUMU/MARERA/4092 and 4093 were created that the registered owners took possession and started utilizing the same.

On cross examination by Imbaya, he states that 4093 was registered in his name in 2016 and that he has never utilised it. There are trees on the land

ANALYSIS AND CONSIDERATION

I have considered the evidence on record, submissions by counsel and I do find that by the time the 1st defendant's husband went to the Tribunal to complain on the plaintiff's husband occupation of the suit parcel of land in 2002, the plaintiff and her husband were in possession of the suit land. In the proceedings of 3rd April 2002, Joseph Habwe Owange the 1st defendants husband filed a claim before the Kisumu District Land Disputes Tribunal complaining that the plaintiffs husband was in occupation of the parcel number Kisumu Marera 2399 .The period is not ascertained in the proceedings. The plaintiff testified that she got married to her husband in 1970 and moved to the land with the husband in 1985. The defendants on their part were evasive on the issue of possession .The 1st defendant in the replying affidavit blows hot and cold especially in paragraph 4 where she states that:-

“ I'm informed by my advocate that adverse possession pre-supposes that there has been no interruption by the owner as against the adverse possessor (Applicant) which situation is not the case as she has not only interrupted the purported “possession” but most importantly she has been in possession of the land and the issue of adverse possession cannot therefore arise and consequently, the application is not only misplaced but also misguided.”

The 1st defendant is clearly evasive as she claims to have interfered with the possession of the plaintiff and again that she has been in possession and therefore the issue of possession cannot arise. The 1st defendant appeared not to be truthful by stating that the plaintiff entered in 2009 but later changed to 2002 a period of 7 years. Moreover, by stating that she is utilising the land currently by ploughing and growing trees and has been in possession since she was married was a lie as the husband could not have gone to the tribunal if she was utilizing the land. When the husband went to the tribunal he accused the plaintiffs' husband of having entered his land. The 3rd and 4th defendants are beneficiaries of the parcel of land through the process of succession but have never lived on the land. Their replying affidavits and statements contradict their evidence on oath as in the statements and affidavits they claim to have taken possession in 2016 but in the statements they have never utilised the land or taken possession.

The law on Adverse Possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by the courts.

In Wambugu –v- Njuguna (1983) KLR 173, the Court of Appeal held that Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his Possession for the statutory period, and not whether or not the claimant has proved that he or she has been in Possession for the requisite number of years.

10. The requirements for Adverse Possession in Kenya has also been set out in the case of Mbira –v- Gachuhi (2002) IEALR 137 in which the court held that:

“ a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption. . . . ”

Likewise, in Jandu –v- Kirplal & Another (1975)EA 225, it was held:

“ to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”

The ingredients were recently discussed by the court of Appeal in the case of Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

I do find that the plaintiff has proved on a balance of probabilities that she was in possession of the suit properties from the year 1985 to 2002 without any interruption which is a period of 17 years. The proceedings before the tribunal, appeals’ committee did not interfere with the applicants possession and she continues to be in possession to date.. Further I do find that the trees on the suit land were planted by the plaintiff

However no evidence on how the land was purchased in 1968 was availed to this court and therefore I decline to find that The Plaintiff’s deceased husband one Johnstone Okinda Ochola purchased a portion of land parcel known as KISUMU/MARERA/2399 on 20.3.1968 through his mother one Ruth Musumba Ochola from Jeremiah Owange Wayodi who was the father in-law of the defendants herein.

The evidence on record demonstrates that the said parcel of land was subdivided to form Land Parcel Nos. KISUMU/MARERA/3762, KISUMU/MARERA /4092, KISUMU/MARERA/4093 and KISUMU/MARERA/4094.

The plaintiff had an overriding interest under section 28 (h) and (j) of the Land Registration Act, 2012 (Cap 284) Laws of Kenya of her portion of land on parcel known as KISUMU/MARERA/2399 before its subdivision to create land parcels KISUMU/MARERA/3762, KISUMU/MARERA/4092, KISUMU/MARERA/4093 and KISUMU/MARERA/4094.

I do find that the plaintiff has proved her case on a balance of probabilities and I do grant orders that:

The plaintiff now has overriding interest under section 28(h) and (j) of Land Registration Act, 2012 (Cap 284) Laws of Kenya the of the new land parcel KISUMU/MARERA/4092 and KSIUMU/MARERA/4093 which she occupies.

The plaintiff is in adverse possession of the parcels of land known as KISUMU/MARERA/4092 and KISUMU/MARERA/4093.

This court does hereby vest the suit land KISUMU/MARERA/4092 and KISUMU/MARERA/4093 to the plaintiff.

The Kisumu District Land Registrar is hereby directed to register the rights and interests to the plaintiff upon KISUMU/MARERA/4092 and KISUMU/MARERA/4093. The defendants to pay the plaintiff costs of the suit. Costs of the suit to the plaintiff. Orders accordingly.

DATED AT KISUMU THIS 12TH DAY OF MAY 2020

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties 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