



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 220 OF 2013**

**JANE AWUOR ONDIEGE.....1<sup>ST</sup> PLAINTIFF**

**SAMUEL ANTHONY ONDIEGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ALI YUSUF MALUMBO.....1<sup>ST</sup> DEFENDANT**

**OMAR YUSUF.....2<sup>ND</sup> DEFENDANT**

**MARURU YUSUF.....3<sup>RD</sup> DEFENDANT**

**ATHUMAN MOHAMED MWACHEGA.....4<sup>TH</sup> DEFENDANT**

**KENYA POWER & LIGHTING CO. LTD.....5<sup>TH</sup> DEFENDANT**

**AND**

**RURAL ELECTRIFICATION AUTHORITY.....THIRD PARTY**

**JUDGMENT**

*(Plaintiffs filing suit in the year 2013 claiming that they are in possession of land purchased by the 1<sup>st</sup> plaintiff's deceased husband in the year 1983 from the 1<sup>st</sup> – 3<sup>rd</sup> defendants; plaintiffs suing to enforce the sale agreement and alternatively claiming the suit land by way of adverse possession; plaintiffs further suing the 5<sup>th</sup> defendant, for compensation for cutting down trees on the land to erect a power line; land sold by the 1<sup>st</sup> – 3<sup>rd</sup> defendants in the year 1996 and title transferred to the 4<sup>th</sup> defendant; plaintiffs having no locus to enforce the sale agreement as they did not file suit for and on behalf of the estate of the deceased; sale agreement disputed and no witness being brought forth to confirm that the sale agreement was duly executed by the deceased and the 1<sup>st</sup> – 3<sup>rd</sup> defendants; no consent of the Land Control Board to the sale agreement despite the provisions of the Land Control Act; plaintiffs cannot succeed in their attempt to enforce the sale agreement; claim for adverse possession not proved; no evidence tabled on when the plaintiffs took possession of the land; no tangible evidence presented on the nature of occupation that the plaintiffs have in the land; no proof of quiet possession as there being evidence that the 4<sup>th</sup> defendant had tried to sue them before the Land Dispute Tribunal; claim for adverse possession dismissed; claim for the trees could only succeed if claim for the land had succeeded; in any event no proof of what was cut and what their values is; wrong party also sued as the trees were not cut by the 5<sup>th</sup> defendant but by the Third Party; plaintiffs suit dismissed with costs)*

**PART A : INTRODUCTION AND PLEADINGS**

1. This suit was commenced through a plaint which was filed on 30 September 2013. In their plaint, the plaintiffs pleaded that they are the beneficial owners of the land parcel Kwale/Mabokoni/353 (the suit land) being the personal representatives of the estate of Anthony Ondiege Eden (the deceased) who died on 18 April 2005. It is averred that on 19 June 1983, the deceased bought the suit land from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants at KShs. 7,000/= which he paid in instalments to completion but transfer was not effected. It is pleaded that the deceased nonetheless took possession of the suit land, built on it, and settled his family members, and that they have been on the suit land for 30 years. The plaintiffs have pleaded that during their lengthy period of occupation they have planted trees of substantial value. It is pleaded that at an unknown period, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants purportedly sold the suit land to the 4<sup>th</sup> defendant, which the plaintiffs aver to have been done fraudulently, inter alia because the property was not available for sale having previously been sold to the deceased. It is pleaded that the 4<sup>th</sup> defendant ignored to carry out due diligence and paid the purchase price without establishing the plaintiffs' interest in the suit land and

processed title in utter disregard to the plaintiffs' long occupation and physical presence on the land. The plaintiffs aver that they reported to Diani Police Station but no action has been taken. They have pleaded that in September 2013, the 4<sup>th</sup> defendant pursuant to a way-leave contract, authorised the 5<sup>th</sup> defendant to cut down mature trees growing on the suit land, and as a result, more than 300 mature casuarina and mango trees were cut.

2. In the suit, the plaintiffs seek the following orders :-

- (a) A declaration that the plaintiffs are beneficial owners of the suit land with better title through adverse possession and purchase.
- (b) Revocation of the 4<sup>th</sup> defendant's title.
- (c) A permanent injunction restraining the defendants from trespassing upon the suit land and cutting and/or removing trees thereon and or evicting the plaintiffs from the suit land.
- (d) Costs of the trees cut to be assessed.
- (e) Costs of this suit.
- (f) Any other relief which the court may deem fit to grant.

3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a joint statement of defence. They basically denied all the averments in the plaint. It was also pleaded that the plaintiffs lack the legal capacity and *locus standi* to bring the subject suit. It was further pleaded that the case is time barred and incurably defective. Subsequently, the 1<sup>st</sup> – 4<sup>th</sup> defendants made an application to strike out the suit, inter alia because a claim for adverse possession cannot be brought by way of plaint, but the application was dismissed, the court (Omolo J) holding that this is a mere technicality.

4. In her defence filed on 12 July 2017, the 5<sup>th</sup> defendant pleaded inter alia that it never executed any way-leave contract with the 4<sup>th</sup> defendant, and that if there was any, the same was executed by Rural Electrification Authority (REA) who were involved in constructing a power line. It pleaded to be a total stranger to the pleadings in the plaint. Subsequently, the 5<sup>th</sup> defendant issued a Third Party Notice to Rural Electrification Authority and the latter were enjoined as Third Party to the suit.

5. The Third Party filed defence vide which she pleaded that she is the entity responsible for electrification of facilities in rural areas through connection to the grid run by the 5<sup>th</sup> defendant. It pleaded that save in exceptional circumstances, electricity lines are constructed on road reserves. It pleaded that upon constructing electricity lines, the same are handed over to the 5<sup>th</sup> defendant which takes charge of billing and maintenance of the line thereafter. It denied that there was any question of liability to be tried between herself and the 5<sup>th</sup> defendant. On the subject line, it pleaded that it got a way-leave consent dated 28 March 2013 from the 4<sup>th</sup> defendant allowing the Third Party to construct an electricity supply line on the suit property. The electricity line was thereafter handed over to the 5<sup>th</sup> defendant.

## **PART B : EVIDENCE OF THE PARTIES**

6. PW-1 was Jane Awuor Ndiege the first plaintiff. She testified that she obtained a grant of letters of administration in respect of the estate of the deceased to file this suit which she produced as an exhibit. She stated that the deceased was her husband and that he purchased the suit land from the 1<sup>st</sup> – 3<sup>rd</sup> defendants in the year 1983. She testified that she married the deceased in the year 1974 and they got 5 children together and she is step mother to another three. She stated that they live on the land and do farming on it. She testified that she was a witness to the sale agreement which she produced as an exhibit. She testified that the purchase price was KShs. 7,000/= and she produced some vouchers to demonstrate payment. She averred that problems began in the year 2008 after her husband had died as apparently the land had been sold to the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant lodged a complaint that they are on his land and that is how they came to know that the 4<sup>th</sup> defendant had title to the suit land. She conducted a search in the year 2012 which she produced as an exhibit. She also complained to the police. She stated that she sued the 5<sup>th</sup> defendant for cutting down their trees on the suit land and that the 5<sup>th</sup> defendant refused to compensate them as they did not have title.

7. Cross-examined, she asserted that she lives on the suit land but had nothing tangible to back that up. She was cross-examined on the sale agreement, and she reversed her evidence that she was a witness thereto, and now stated that she did not sign as a witness. She acknowledged not having title to the suit land and she did not have any Occurrence Book (OB) record for the complaint that she claims to have made to the police. She could not recall when the trees on the land were cut (for purposes of the power line). She stated that it was within her knowledge that it was the 5<sup>th</sup> defendant who cut the trees. She claimed to have written a letter to the 5<sup>th</sup> defendant but she did not have a copy of it. She was challenged to show proof that there were trees and that they were cut but she did not have any.

8. With the above evidence, the plaintiffs closed their case.

9. DW-1 was Athman Mohamed Mwache, the 4<sup>th</sup> defendant. He testified that he bought the suit land from the 1<sup>st</sup> – 3<sup>rd</sup> defendants at KShs. 70,000/- and title was subsequently processed in his name. He testified that the land was vacant when he purchased it and he used the same land to obtain a loan from Kenya Commercial Bank (KCB). He stated that there were only mangoes and coconut trees on the land. He stated that apart from him, no other person is using the land.

10. Cross-examined, he testified that he met the 1<sup>st</sup> – 3<sup>rd</sup> defendants in the year 1996 and they never informed him that another person had bought the land in the year 1983. He stated that he bought the land for KShs. 70,000/- though his witness statement gave the figure of KShs.

40,000/=. He paid for it in instalments. He got his title deed in the year 1996 and later completed payment in the year 2010. He did find mangoes and coconut trees on the land. He testified that the plaintiffs have land about 200 metres from the suit land. He acknowledged giving the Third Party a way-leave on the land.

11. DW-2 was the 2<sup>nd</sup> defendant (the 1<sup>st</sup> defendant died in the course of the proceedings and he was never substituted). He testified that he knows the plaintiffs as his neighbours. He acknowledged that they claim to have purchased the suit land from him but he asserted that this is not true. He explained that they were unable to meet the purchase as they did not make payment. When they were unable to pay, the land was sold to the 4<sup>th</sup> defendant. Cross-examined by counsel for the plaintiffs, he testified that it is true that in the year 1983 they intended to sell land to the deceased. The land was ancestral land from their grandfather who had died and his father had also died. He stated that no written agreement was made with the deceased. He denied signing the sale agreement exhibited by the plaintiffs. He explained that the relationship that they had with the plaintiffs was one which he described to be a "rahani" (in his words, a situation where money is lent and a person is allowed to use land pending its repayment, and that the land can be used for 21 years). He could not recall when the "rahani" started running but acknowledged that they have not refunded the plaintiffs the money. He mentioned that the land was sold to the 4<sup>th</sup> defendant in the year 1996 for KShs. 80,000/=. He testified that at the moment, it is the plaintiffs who use the land to plant maize and other crops, but live on neighbouring land.

12. DW-3 was Paul Nyamai Musau, who testified on behalf of the 5<sup>th</sup> defendant. He is an engineer with the 5<sup>th</sup> defendant based in Ukunda. He stated that the 5<sup>th</sup> defendant (Kenya Power & Lighting Company or KPLC) was not involved in the construction of the electricity line on the disputed land and that the same was constructed by the Third Party, Rural Electrification Authority (REA) (now renamed Rural Electrification and Renewal Energy Corporation). The line was to serve the Kwale campus of Technical University of Mombasa and other public institutions. He testified that the role of KPLC was only to inspect the line to ensure that it conforms to standards and to commission it. He was personally involved in the inspection and commissioning of the line. He testified that if any trees were cut this was done by REA and it is also REA which is responsible for any compensation. The inspection was done in the year 2015. Cross-examined, he stated that when they did the inspection, which involved a physical presence on the land, nobody came to stop them and they received no complaint.

13. The Third Party had no witness in court and I was not persuaded to adjourn. The case of the Third Party was therefore closed without a witness being called. I invited counsel to file submissions and counsel for the 1<sup>st</sup> -4<sup>th</sup> defendants, counsel for the 5<sup>th</sup> defendant and counsel for the Third Party did file their respective submissions. No submissions were forthcoming from counsel for the plaintiff. I have considered these submissions before arriving at my decision.

#### **PART C : ANALYSIS AND FINAL FINDINGS**

14. I think the following issues are for determination :-

- (i) *Whether the plaintiffs have proved that they (or the deceased) purchased the suit land*
- (ii) *Whether such purchase (if proved) is enforceable*
- (iii) *Whether the plaintiffs have proved a case of adverse possession*
- (iv) *Whether the plaintiffs have proved a case for compensation for the cut trees and if so, against which party.*

15. But before I even delve into the above issues, one germane and seminal point, that I need to be clear on, is that I do not think that this suit is brought, for and on behalf, of the estate of the late Anthony Ondiege Eden (deceased), in as much as the plaintiffs did adduce in evidence a limited grant of letters of administration *ad litem* in respect of the estate of the deceased. The title/heading of this case does not suggest that the case is brought for and on behalf of the estate of the deceased, and I have seen nowhere in the body of the plaint where the plaintiffs state that they have filed this suit, for and on behalf of the estate of the deceased. Neither is there any prayer in the plaint seeking a declaration for the benefit of the estate of the deceased. It should be clear from the outset that I will approach this case as one brought by the plaintiffs on their own behalf and not a suit on behalf of the estate of the deceased.

16. On the first issue, that is whether the plaintiffs deserve a declaration that they are beneficial owners through purchase, and picking up from my introduction above, the plaintiffs do not claim to have been the ones who purchased the suit land. Their claim is that the suit land was purchased by the deceased. It follows that if they wished to enforce the alleged contract of sale, then they needed to file suit for and on behalf of the estate of the deceased, and I have already held above that I will not consider this case as one filed on behalf of the estate of the deceased. This automatically knocks out the case of the plaintiffs, in the event that it was their desire to enforce the sale agreement.

17. The above aside, there is serious dispute as to whether or not there was ever a sale agreement between the deceased and the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The plaintiffs did produce in evidence what they claimed to be the sale agreement, but this was disputed by the 1<sup>st</sup> - 3<sup>rd</sup> defendants, the alleged vendors. In the face of that denial, what the plaintiff needed to do was to prove that the sale agreement was actually signed by the 1<sup>st</sup> - 3<sup>rd</sup> defendants, as vendors, following the provisions of Section 70 of the Evidence Act, Cap 80, Laws of Kenya, which provides as follows :-

##### *S. 70 Proof of allegation that person signed or wrote a document*

*If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.*

The plaintiff could have done this by calling any of the persons who may have witnessed the execution of the document but she did not do

so. Although PW-1 in her evidence in chief claimed to have witnessed the sale agreement, she did concede, during cross-examination, that she in fact did not witness the sale agreement. PW-1 was the only witness called to testify on behalf of the plaintiffs, and given that she did not witness the sale agreement, and did not demonstrate that she is familiar with the handwriting or signature of any of the persons noted to be vendors in the sale agreement, it is my holding that the existence of a sale agreement was never proved to the required standard. I do note that one of the persons that the plaintiffs intended to call as a witness was a Mr. Philip Aseka Oluchina, who was said to have been a witness to the sale agreement. He was however never called by the plaintiffs, who closed their case on the sole evidence of the 1<sup>st</sup> plaintiff. I do not see how this court can come to the holding that there is a sale agreement which has been proved to the required standard. There is therefore no proof of purchase by the deceased, or the plaintiffs, of the suit land, and that being the position, I cannot hold that the plaintiffs are entitled to be considered as beneficial owners of the suit land by way of a purchase, either by themselves, or the deceased.

18. Moreover, if ever there was such a purchase, that purchase cannot be enforced for two other reasons, the first being the lack of consent of the Land Control Board, and secondly, limitation. The land in issue appears to be agricultural land, and if there was any sale to the deceased, this needed the consent of the Land Control Board, under the Land Control Act, Cap 302, Laws of Kenya. There is no evidence of the consent of the Land Control Board having been applied for or obtained. Secondly, if there was any sale agreement, this was one entered into in the year 1983. Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, gives 12 years for the enforcement of an interest in land. It means that a suit for the enforcement of the sale agreement ought to have been filed at the latest in the year 1995. This suit was filed in the year 2013 and if the intention was to enforce a 1983 sale agreement, then the suit is clearly time barred. Whichever way you look at it, the plaintiffs cannot succeed in their suit through an alleged claim for purchase.

19. I will now turn to whether the plaintiffs have proved a case for the land through the doctrine of adverse possession. It is trite, and I need not cite any authority, that to sustain a claim for adverse possession, one needs to demonstrate open, quiet, peaceful, and continuous possession of land for an uninterrupted period of 12 years. This can only be proved through cogent and clear evidence for these are issues of fact. I have gone through the evidence of PW-1. It is not clear when, if at all, she and her co-plaintiff entered the land and took possession of it. This was a very critical piece of evidence that was never adduced, for you will start calculating time from when possession is taken. All that PW-1 said was that she is in possession of the land, but she never stated when exactly she took possession of it. There is in fact doubt as to the nature of possession, if at all, that the plaintiffs have in the land. PW-1 said that they live on the land and do farming. She did not produce any evidence of any residence on the land. She was challenged to produce photographs or other tangible evidence of her occupation and she could produce none. She had no report or any corroborating evidence of her occupation of the land. In the face of the denial by the defendants that she is in possession of the land, she would have been safer if she adduced additional evidence to demonstrate her actual possession of the land. The plaintiffs needed to display the full ingredients required to support a case of adverse possession. The burden of proof was upon the plaintiffs to show exactly when they took possession, and further show that their possession has been quiet and continuous for at least 12 years, without interruption. My assessment of the evidence is that this has not been proved to the required standard. In fact, one of the documents in the plaintiffs' bundle of documents appears to be a dispute lodged by the 4<sup>th</sup> defendant at the Land Disputes Tribunal against her in the year 2008. I do not know what happened to this case, but whatever the position, in the face of that, it is difficult to argue that the possession of the plaintiffs was quiet prior to this suit being filed. One cannot be facing litigation and in the same breadth claim to have peaceful and quiet possession of land. There is also no evidence of the plaintiffs' possession when the inspection of the line was being done. DW-3 testified that when they erected the power lines, nobody came forward to make any complaint. I find the approach of the plaintiffs to their suit for adverse possession to have been too casual. The plaintiffs ought not to imagine that all they needed to do, given the denial by the defendants, was simply say that they are in possession and trust that the court will find in their favour on a claim for adverse possession. To be successful, they needed to demonstrate that they have satisfied all the ingredients required to sustain a suit of adverse possession which the plaintiffs have hopelessly failed to do so. Their claim for adverse possession therefore cannot succeed and is dismissed.

20. The final issue is whether the plaintiffs have proved a suit for compensation for the cut trees. The plaintiffs could only succeed on this claim if I held that they deserve the land. I have already dismissed their case for the land and it follows that the suit for compensation for the trees must fail, for trees form part and parcel of the land following the principle of *quicquid plantatur solo solo cedit*. But even if I had held that they were entitled to the land, I would have dismissed their claim for the trees. First, there was never any evidence of exactly how many trees were cut. Neither was their value ever given. What then would I have awarded as compensation? That aside, it is also apparent, that in so far as compensation for the trees is concerned, the plaintiffs sued the wrong party. It was not KPLC who cut down the trees but REA. The plaintiffs did not sue REA and did not take the cue to amend their plaint despite the defence of the 5<sup>th</sup> defendant. REA, as Third Party, would only have been responsible if I had held that KPLC are liable, of which I have not. The plaintiffs have not sustained any case against the 5<sup>th</sup> defendant for compensation and their suit for compensation is hereby dismissed.

21. From my above discourse, it will be seen that I see no substance in the suit of the plaintiffs. It is hereby dismissed with costs to the defendants. In respect of the Third Party suit, the same is also dismissed, but on this, I make no orders as to costs.

Judgment accordingly.

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF JUNE 2020.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**