



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 131 OF 2010 (OS)

IN THE MATTER OF LAND PARCEL KISUMU/WANG'AYA 1/4560

AND IN THE MATTER OF

THE LIMITATION OF ACTIONS ACT

(CHAPTER 22 OF THE LAWS OF KENYA)

BETWEEN

BEATRICE APONDI NJOGAPLAINTIFF

AND

AKELLO OMORE

RICHARD OGENDO NORMAN DEFENDANT

JUDGMENT

1. The plaintiff is the administrator of the estate of her deceased husband, Valentine B'Pek Njoga ("Njoga"). She took out an Originating Summons dated 8th April, 2010, claiming adverse possession against the defendant in relation to **KISUMU/ WANGAYA 1/4560** ("the suit property"). She sought orders that the defendant's title to the suit property be extinguished by adverse possession and the land be registered in her favour as the proprietor.

2. The plaintiff's case is set out in her supporting affidavit sworn on 2nd April 2010. Her case is that by an agreement dated 2nd August 1989, Njoga purchased the suit property from the original owner, John Owame Ajuok ("Owame") for Kshs. 10,840/-. Njoga took possession of the land and continued to cultivate it extensively. She realized that the defendant was claiming ownership of the suit property and after she conducted a search at the land registry on 1st February 2000 and found that the defendant was the registered owner. She stated that she did not know how the defendant became the registered owner when she has been in uninterrupted occupation of the suit property from 1989 without the permission of the defendant.

3. Paul Omore (PW 2) recalled that when he was purchasing the suit property from the Owame, Njoga sought his assistance in planting sisal to demarcate the boundaries. PW 2 also recalled that in 1990 he started cotton farming and continued to work on the land on behalf of Njoga until his death. PW 2 further

testified that after Njoga's, the plaintiff took over the land and planted napier grass.

4. Njoga's brother, Francis Ongondo Nyabende (PW 3), confirmed that Njoga purchased land from Owame but in 1999 there was a dispute over the suit property as the defendant was also claiming ownership. Njoga took the matter before the District Adjudication Board who decided in favour the plaintiff. The Nyando District Land Adjudication officer, Benjamin Atieno Oduge (PW 5), who produced a letter dated 9th January 2001 from the Provincial Land Adjudication and Settlement Officer Nyanza indicating that the defendant was to relinquish the land to the plaintiff and in return he would be allocated a different piece of land by Owame's widow, Franciska Owame ("Franciska").

5. The defendant opposed the suit through his replying affidavit sworn on 19th May 2010 in which he stated that he was the registered proprietor of the suit property after purchasing it from Kennedy Ochieng Owame, Owame's son, by an agreement dated 18th September 1999 for Kshs. 60,000/-. He stated he purchased the suit property while it was under adjudication in Owame's name but after the adjudication was finalized he was issued with a title deed.

6. The defendant also stated that at the time he was purchasing the suit property, Franciska, informed him that the Njoga had leased the land from her late husband for Kshs. 2,000/- and a bicycle. He further stated that at the time he purchased the land, it was fallow and no other activities were taking place on it. In his oral evidence, the defendant added that it is only after he had bought the land and was ready to begin cultivating, he realized that there was napier grass growing on the land. Upon inquiry, he was informed that the land had been sold to Prof. Margaret Ogada.

7. Isaiah Onyango Owando (DW 2) testified that he is one who informed the defendant that Franciska was selling land. After confirming that the land was adjudicated under the Owame's name and that it was fallow, he confirmed to the defendant that he could purchase it. On cross-examination DW 2 stated that there were some activities on the land after the purchase. The area Chief, Joseph Ogalo Ambira (DW 3) confirmed that he witnessed Franciska and her son Kennedy Ochieng Owame sell the land to the defendant and that the former area chief is the one who prepared the sale agreement.

8. The parties filed written submissions at the close of the hearing. The plaintiff's case is that she had acquired title to the suit property by adverse possession. She submitted that she has been using the suit property exclusively and uninterruptedly and the defendant has never made any attempt to stop her from using the said land.

9. The defendant submitted Njoga's entry on the land was permissive and that for adverse possession to take place, the he ought to have entered onto the land as a trespasser. The defendant contended that the plaintiff did not have open, actual and exclusive possession which is an ingredient of adverse possession and that from her testimony, the plaintiff never occupied the land since the defendant bought the land when it was fallow.

10. The main issue for determination in this suit is whether the plaintiff has established a case for adverse possession against the defendant. A claim for adverse possession is made pursuant to **Section 7** of the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)** which provides:

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.

11. In **Kimani Ruchire v Swift Rutherfords & Co. Ltd [1980] KLR 10** the Court summarized the elements to be proved by the applicant who seek land by way of adverse possession as follows:

The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes

or any endeavours to interrupt it by way of recurrent consideration.

Likewise in the case of **Samuel Miki Waweru v Jane Njeri Richu [2004]eKLR** the court said:

*It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in **Jandu vs Kirpal [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 – 88]1 KLR 172** seems to be that a purchaser of land under a contract of sale in possession of the land with the permission of the vendor (can lay a claim for possession of such land) only after the period of the validity of the contract unless and until the contract has been repudiated...adverse possession starts from the date of the termination of the contract.*

12. I find and hold that Njoga purchased the suit property by the agreement dated 2nd August 1989 which was produced in evidence. I reject the suggestion made by the defendant that Njoga had acquired a leasehold interest for Kshs. 2000/- and a bicycle. It is common ground the Land Control Board consent was not obtained hence the agreement became null and void after the time for applying for consent expired after 6 months. Since the transaction became void on 2nd February 1990, the deceased's occupation became adverse and for purposes of the law of limitation, the time is to be reckoned from that day (see **Joseph Mutafari Situma v Nicholas Cherongo CA Civil Appeal No. 251 of 2002 [2007]eKLR**).

13. The deceased took possession of the land and demarcated it by planting sisal. The fact that sisal was planted is also confirmed by DW 3. When the defendant bought the land from Owame's wife and son in 1999, the plaintiff was still in possession of the same and although a dispute ensued and was purportedly resolved by the Land Adjudication Office, the plaintiff's occupation remained uninterrupted. It is important to point out that at that time, the defendant knew that the plaintiff was in possession of the land and did not take any step to evict her or take possession of the suit property. The defendant argued he was a bona fide purchaser without notice. The argument that ownership of the suit property changed thereby interrupting possession was dealt with by the Court of Appeal in the case of **Mwangi Githu v Livingstone Ndeete NRB CA Civil Appeal No. 29 of 1979 [1980]eKLR** where it stated;

Firstly, he submitted that change of ownership interrupts adverse possession, and that accordingly time did not begin to run against the appellant until he was registered as proprietor of the land in 1966. The answer to this submission is that immediately before the appellant became the registered proprietor in 1966 the respondents were in the course of acquiring rights under section 7 of the Limitation of Actions Act, cap 22, and by virtue of section 30 (f) of the Registered Land Act, cap 300, those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters.

14. As to whether there was exclusive possession, the evidence is that Njoga took possession of the suit property demarcated it with sisal plants and according to PW 2, cultivated cotton on the land until the death of the plaintiff's husband in 2000. When questioned by the court, she stated that she was still cultivating napier grass. The defendant, on his part confirmed that suit property was fenced and that when he purchased it he found napier grass. DW 2 and DW 2 also testified that the land was being cultivated by one Margaret Ogada.

15. The totality of the evidence is that the plaintiff had exclusive possession of the land which she was cultivating. The fact that she did not construct a house thereon does not negate her possession. In **Mwangi Githu v Livingstone Ndeete (Supra)**, the court observed that;

*The case of **Gatimu Kinguru v Muya Gathangi High Court Civil Case No 176 of 1973**, is an example of an adverse possessor obtaining title by adverse possession to an identifiable portion of*

an owner's land. It is stated in volume 24 of Halsbury's Laws of England, 3rd edition, at page 252:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

16. I find and hold that the plaintiff established on the balance of probabilities that she was in open, exclusive and continuous possession of the suit property. Conversely, the defendant did not do anything to take possession of the suit property from the time he knew that the plaintiff had asserted ownership and possession following the disputes that had ensued between the plaintiff and Owame's family in relation to the sale to him. Apart from obtaining the title, he was content to wait and defend this case by which time the plaintiff's right to obtain the suit property by adverse possession had crystallised.

17. The Originating Summons is allowed and I consequently enter judgment as follows;

(a) The Plaintiff be and is hereby declared the owner of **KISUMU/WANGAYA I/4560** by adverse possession and shall be registered as proprietor thereof.

(b) The defendant shall bear the costs of the suit.

DATED and DELIVERED at KISUMU on this 14th day of November 2016

D. S. MAJANJA

JUDGE

Mr Onyango instructed by P. D. Onyango and Company Advocates for the plaintiff.

Mr Mwesigwa instructed by Behan Okero and Advocates for the defendant.