



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 349 OF 2015 (OS)

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF SECTION 7, 17 AND 38 OF THE LIMITATION OF ACTIONS ACT, CAP. 22

AND

IN THE MATTER OF AN APPLICATION TO BE REGISTERED BY ADVERSE POSSESSION

JOSEPH OTIENO OYUGI.....PLAINTIFF

VERSUS

BONFACE NYIMBI ODERO.....1ST DEFENDANT

NYIMBI KISIRA ODERO.....2ND DEFENDANT

JUDGMENT

1. **Joseph Otieno Yugi**, the Plaintiff, filed the originating summons dated 14th December, 2015 on the 17th December, 2015 against **Boniface Nyimbi Odero** and **Nyimbi Kisira Odero**, the 1st and 2nd Defendants respectively, seeking for the following determinations;

(a) Whether the Plaintiff is entitled to land parcel Kisumu/Kanyawegi/4454, the suit property measuring 0.6 hectares by reason of adverse possession.

(b) Whether the Defendants' proprietary interests in the said suit property has been extinguished by the Plaintiff's adverse possession.

(c) Whether the 2nd Defendant is now holding the title to the suit property in trust for the Plaintiff.

(d) Whether the title to the suit property issued to the 2nd Defendant should be revoked, and a fresh one issued to the Plaintiff or alternatively an order do issue for the 2nd Defendant to transfer the title to the Plaintiff, and in default the Deputy Registrar be directed to execute the necessary documents to facilitate the transfer of the suit property to the Plaintiff. The Plaintiff also seeks for costs.

That filed with the originating summons is the supporting affidavit sworn by the Plaintiff on the 14th December, 2015 in which he among others deponed to the following;

· That in June, 1990 or thereabouts, his neighbor **Elisha Otiende Achola** the Vendor, sold to him a parcel of land measuring one and half acre for Kshs.10,000. That the Vendor informed him that the parcel he was selling to him was Plot No. 6063 at Kanyawegi Adjudication Section whose title deed had not been issued.

· That on the 5th June, 1990 the Vendor, and the Plaintiff, accompanied by their witnesses went to **Zachariah O. Araya**, the then Assistant Chief, Osiri sub-location to prepare and witness the sale agreement. That thereafter, the Plaintiff continued making the payment and finished in January, 1991.

· That upon completing the payments, the Vendor placed the Plaintiff in possession of the land. That the Plaintiff, and his family

members continued farming on it without any interference from the Vendor, who passed on in 2005 or his family members.

· That in late 2013, he informed one **Jane Oduol** that he intended to sell the suit property. That in early 2014, Jane Oduol informed him that the 1st Defendant, who is her brother-in-law, was interested in the suit land or any other parcel in the neighbourhood.

· That after Jane Oduol introduced the 1st Defendant to him, he took him to the suit property in the presence of **Isdor Okoth**, but their discussion did not result to any agreement.

· That later, he was shocked to learn that the suit land had been transferred to the 1st Defendant, and thereafter, to the 2nd Defendant as land parcel Kisumu/Kanyawegi/4454. That upon obtaining an extract of the register, he found out that the land he had bought and utilized since 1991 had been registered as Kisumu/Kanyawegi/4454 in the name of the late Elisha Otiende Achola, on the 17th February, 2005, and transferred to 1st Defendant on the 4th July, 2011 and thereafter to 2nd Defendant on the 1st July, 2013. That no Land Control Board Consents were obtained to validate the said transfers, and the first registered proprietor had passed on in 2005.

· That the registration of the suit land with the Defendants was subject to his right of interests over the same land as he has been in continuous, open and peaceful possession since 1991 to date.

2. The originating summons is opposed by the Defendants through the Replying affidavit sworn by Boniface Nyimbi Odero, the 1st Defendant, on 29th January, 2018 in which he deponed to the following among others;

· That the Defendants, who are father and son, approached **Jenifer Akinyi Ajowi**, the widow of Elisha Otiende Achola, and negotiated for the purchase of land parcel Kisumu/Kanyawegi/4454, the suit property. That they had conducted a search on the title and confirmed it was in the name of the late husband to Jenifer Akinyi Ajowi. That the Assistant Chief also did a letter to the Land Registrar confirming that fact, and thereafter they entered into a sale agreement over the suit property for KShs.518,000 on 17th May, 2011.

· That the land was then transferred to the 1st Defendant on 4th July, 2011, and to the 2nd Defendant on the 1st July, 2013.

· That at the time of the sale transaction, the Defendants were persuaded that the suit land was vacant and under the occupation, and care of the widow of the late Elisha Otiende Achola. That the 1st Defendant has actively cultivated on it without anybody stopping him.

· That the parcel the Plaintiff had bought was Kisumu/Kanyawegi/6063, and therefore different from their parcel Kisumu/Kanyawegi/4454.

· That the 1st Defendant had not approached the Plaintiff to buy the suit land in 2014 as the said land was his from 2011.

· That the transfers of the suit land to the 1st Defendant, and thereafter the 2nd Defendant were lawfully done.

· That the Plaintiff has never had physical possession of the suit land before or after 2011 when the Defendants acquired it.

3. The Plaintiff testified as **PW1** and called one **Zakaria Okumu**, who testified as **PW2**. It is the Plaintiff's case that Elisha Otiende Achola, now deceased, sold to him land described in their sale agreement as Plot 6063 for KShs.10,000 on the 5th June, 1990. That he paid the purchase price in instalments as confirmed by PW2, who was then the area Assistant Chief. That the Plaintiff took possession of the land, and continued using it even after one **Moses Owino**, a relative to the Vendor, asked him to stop using it in 2006. That after conducting a Search in the Lands Office, he discovered the land he had known as number 6063 had been registered as Kisumu/Kanyawegi/4454 on 17th February, 2005, and transferred to the 1st Defendant on the 4th July, 2011 before being transferred to the 2nd Defendant on 1st July, 2013. That the transfer of the suit land to the 1st Defendant could not have been done by the Elisha Otiende Achola in 2011 as he had passed on in the 1990s. That he had obtained the consent of the Land Control Board, and given it to his mother who has passed on, as he did not know it should have been presented to the Land Registrar. That Elisha Otiende Achola had stayed with Jenifer as spouses for about ten years, and sired only daughters who have passed on. That Jenifer was later divorced. That the land parcel Elisha Otiende Achola sold to him, and pointed it for him is on the same spot now registered as Kisumu/Kanyawegi/4454. PW2 confirmed knowing of the sale agreement between Elisha Otiende Achola and the Plaintiff over parcel 6063. That the Plaintiff had taken possession of the land and was growing crops. That in 2017, he learnt that the land had been transferred to other persons, and he advised the Plaintiff to report to then Assistant Chief. That the Plaintiff was in America during the transaction and his mother was the one using the land.

4. The 1st Defendant testified as **DW1** on behalf of himself, and the 2nd Defendant. He told the Court that he was the one in possession of the suit land since purchasing it, through the sale agreement between him and Moses Oyier Owino. That he had bought the land from Jenifer Akinyi Ajowi, though it was then registered with the deceased, Otiende Achola. That the Assistant Chief had appointed Moses Oyier Owino as the administrator, as Jenifer could not write. That Moses Oyier Owino did not however, show him a grant of letters of administration for the estate of Elisha Otiende Achola. That he had given the documents to his advocates who later gave him the title deed in his name. That he did not have a copy of the transfer form used to transfer the land to his name. That he had applied for the consent of the Land Control Board, and the application and letter of consent were with his advocates. That though he paid the stamp duty, and fees for the transfer, he did not have the receipts. He agreed meeting the Plaintiff near Osili where the suit land is situated, but upon conducting Searches on the parcels of land the Plaintiff had given him, he found out that none was in his name. That it was thereafter that he met Moses Oyier Owino who showed him the suit land that was then vacant. That he transferred the land to the 2nd Defendant as he had bought it for him.

5. The learned Counsel for the Plaintiff and Defendants filed their written submissions dated the 31st October, 2019 and 12th February, 2020 respectively. The Deputy Registrar, Environment & Land Court, Kisumu then directed that the file be forwarded to this Court for judgment writing on the 16th September, 2020.

6. The following are the issues for the Court's determinations;

(a) Whether the Plaintiff has been in possession of the suit land for 12 years and if so, whether the possession has been adverse to the title of the registered proprietor(s).

(b) Who pays the costs of the suit?

7. The Court has carefully considered the pleadings, oral and documentary evidence tendered, the learned Counsel's written submissions, the superior courts' decisions cited thereon, and come to the following determinations;

(a) That from the copies of the official search, and register of land parcel Kisumu/Kanyawegi/4454 produced as exhibit, the land was first registered on the 17th February, 2005 in the name of Elisha Otiende Achola. That the title deed was subsequently issued on the 30th July, 2007. That at paragraph 6 of the supporting affidavit to the originating summons, the Plaintiff had deponed that **"Elisha Otiende Achola died in the year 2005 or thereabouts..."** That when the Plaintiff testified in Court, he changed that position in his evidence in chief, and during cross-examination to state that Elisha Otiende Achola, had died in the 1990s. That the Defendants had through the replying affidavit sworn by 1st Defendant on the 29th January, 2018 and in his oral testimony in Court confirmed that the person registered with land parcel Kisumu/Kanyawegi/4454, that he entered into a land sale agreement over, was deceased. That further, the letter by the Assistant Chief dated the 17th May, 2011 addressed to the Land Registrar, that the Defendants produced as exhibit, had at paragraph 1 confirmed the registered proprietor's death in the following words **"...the proprietorship of Elisha Otiende Achola who is now deceased vide attached copy of certificate of death number 073713"**. That however, the said certificate of death was not attached or availed by any of the parties, and the court is therefore unable to make a finding on the exact date, month or year of the death of Elisha Otiende Achola.

(b) That in case Elisha Otiende Achola passed on in the 1990s as the Plaintiff insisted, then it follows that the registration of the suit land, Kisumu/Kanyawegi/4454 on 17th February, 2005 and the issuance of the title deed on the 30th July, 2007 was processed not by Elisha Otiende Achola but some undisclosed person or persons. That the title deed could not have been issued to, and received by Elisha Otiende Achola as he had passed on years before the registration.

(c) That flowing from (b) above, it follows that Elisha Otiende Achola was not definitely the one who transferred land parcel Kisumu/Kanyawegi/4454 to the 1st Defendant on the 4th July, 2011 as he was long dead having passed on years ago either in the 1990s or 2005. That the person named Moses Oyier Owino who had been reportedly appointed by the **"immediate beneficiaries of the estate of the deceased"** as per the Assistant Chief's letter dated 17th May, 2011 is the one who allegedly entered into the sale agreement with 1st Defendant dated the 17th May, 2011, and signed the transfer documents in favour of the 1st Defendant. That the Court is using the term **"allegedly"** as the said Moses Oyier Owino was not availed as a witness to confirm that testimony by the 1st Defendant, and further no copies of the transfer documents were availed to the court.

(d) That though the Plaintiff's claim is based on adverse possession, and did not need to challenge the legality of the Defendants' title to succeed, the Defendants must have known that their title to the suit land was under attack through these proceedings. That this is especially so as under **Article 40(6) of the Constitution**, as read with **Section 26 of Land Registration Act No. 3 of 2012**, parties to a suit are enjoined to prove that they lawfully and procedurally acquired the land in dispute so as to have legal protection, otherwise their title is liable to be impugned through a legal process.

(e) That the evidence tendered by the Plaintiff (PW1), and his witness (PW2), who was then the assistant chief of the area where the suit land is situated and now retired, is that the late Elisha Otiende Achola sold land parcel number 6063 to the Plaintiff. That the land was then adjudicated but not registered, and therefore title documents had not been issued. That both the PW1 and PW2 confirmed that the ground position where the late Elisha Otiende Achola had pointed as parcel 6063, is the same ground position that land parcel Kisumu/Kanyawegi/4454 is now situated. That the Plaintiff did not avail any document issued by the adjudication office to confirm that indeed, parcel 6063 existed, and was to be registered in the name of the late Elisha Otiende Achola. That however, as confirmed by PW2, the Plaintiff took possession of the one and half acre land, and continued using it for cultivation throughout the life of the deceased, and even after Moses Oyier Owino asked him to stop.

(f) That though Moses Oyier Owino signed the sale agreement with 1st Defendant dated the 17th May, 2011, there is no documentary evidence availed to confirm that he was the legal representative or executor or administrator of the estate of the late Elisha Otiende Achola, deceased, authorized under the **Law of Succession Act Chapter 160 of Laws of Kenya** to distribute or transfer the immovable property of the said estate, including Kisumu/Kanyawegi/4454. That the transactions over the said land between Moses Oyier Owino and 1st Defendant, most probably amounted to intermeddling with the property of a deceased person contrary to **Section 45 of the said Act**.

(g) That further to the finding in (e) above that the ground position of Kisumu/Kanyawegi/4454 is indisputably the same as that of the one and half acre plot described as parcel 6063, that the late Elisha Otiende Achola had shown the Plaintiff following their sale agreement of 5th June, 1990, and in the absence of evidence that the transaction received the consent of the Land Control Board within six months from the date of last payment of 25th March, 1991 as required by **Section 6 of the Land Control Act Chapter 302 of Laws of Kenya**, the agreement obviously became void on or about 25th September, 1991. The Court of Appeal in the case of **Albert Fred Ekirapa Vs Nyongesa Sirari and 5 Others [2017] eKLR**, has restated that position. That it follows that from the 26th

September, 1991 or thereabout, the Plaintiff's continued possession of the suit land was not with the permission or licence of Elisha Otiende Achola, but was adverse to his title. That the land the late Elisha Otiende Achola had told the Plaintiff was parcel 6063, has now been established or confirmed to be Kisumu/Kanyawegi/4454. That land was not registered until 17th February, 2005. That as adverse possession applies only to registered land, the period the Plaintiff was in possession of the said land before its registration cannot be counted in favour of the Plaintiff. That from 17th February, 2005 to 17th December, 2015 when this suit was filed, only about ten (10) years and ten (10) months had lapsed. That the period is short by about one year two months to make the twelve (12) years prescribed for adverse possession to set in.

(h) That the said Moses Oyier Owino, who had acted allegedly under the mandate of undisclosed beneficiaries to the estate of Elisha Otiende Achola, on appointment of the Assistant Chief and who reportedly signed the sale agreement and transfer form in favour of 1st Defendant had no powers in law to alienate or distribute the properties of the deceased in view of the provisions of **Sections 2(1), 45, and 82 of the Law of Succession Act**. The sale agreement and transfer form he signed in favour of the 1st Defendant were legally void ab initio and therefore nullities.

(i) That the fact that the 1st Defendant appear to have known that the person named Moses Oyier Owino, with whom he entered into a sale agreement on the 17th May, 2011 was not the registered proprietor or the legal administrator of the late registered owner's estate leads the Court to conclude that the transaction was unprocedural and unlawful. That it is surprising that the Land Registrar's office went ahead to process the transfer of the suit land from the name of the deceased, Elisha Otiende Achola, to the 1st Defendant without a confirmed grant of letters of administration issued by the Succession Grant. That a letter from the Assistant Chief cannot be taken as a confirmed Grant of Letters of Administration required under **Section 80 of the Law of Succession**. That it follows therefore, the 1st Defendant did not acquire a good title capable of being transferred to the 2nd Defendant, his son, on 1st July, 2013. That the 1st Defendant was therefore not a bona fide purchaser of the suit land for value, and his title is not protected by the law.

(j) That as the Plaintiff lodged his adverse possession claim over the suit land before expiry of twelve (12) years required under the law, his claim against the Defendants must fail.

(k) That having found that the Defendants' title over the suit land were uprocedurally and irregularly obtained, the court cannot allow it to subsist. That it is only fair and just that the transfers of the suit lands to the 1st and 2nd Defendants on 4th July, 2011 and 1st July 2013 respectively, be cancelled and the land ownership to revert to the name of Elisha Otiende Achola, deceased, to be administrated as per the law. That will give both the Plaintiff and Defendants the opportunity to pursue their interest with the person or persons to be appointed as administrators of the deceased's estate by the Succession Court.

(l) That the registration of the 1st and 2nd Defendants as proprietors of the said land on the 4th July, 2011 and 1st July, 2013 respectively, without a confirmed Grant of Letters of Administration having been obtained in respect of the late Elisha Otiende Achola estate, and without consent of the Land Control Board were therefore unprocedural, irregular and unlawful as it contravenes the mandatory provisions of the **Law of Succession and the Land Control Act**.

(m) That the registrations of 1st and 2nd Defendants with the suit land on the 4th July, 2011 and 1st July, 2013 respectively is hereby revoked and cancelled and the title deed issued thereof should be returned to the Land Registrar.

8. That in view of the foregoing, the Court finds that the Plaintiff has not proved his case against both Defendants to the standard required of balance of probabilities. The Court orders as follows;

(a) That the Plaintiff's claim is therefore dismissed and each party bears his own costs.

(b) That the Land Registrar is hereby directed to cancel all the entries on the register of Kisumu/Kanyawegi/4454, except entry number (1), so as to revert the said parcel's registration to Elisha Otiende Achola, deceased, to enable those interested with it to move the Succession Court as appropriate.

Orders accordingly.

Dated and signed at Eldoret this 11th day of November, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 25th day of November, 2020.

A. OMBWAYO

JUDGE