



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

ELC APPLICATION NO. 44 OF 2018 (OS)

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

MANASON OGENDO AFWANDA.....PLAINTIFF

VERSUS

ALICE AWITI ORENDE.....1ST DEFENDANT

MARK ATAGA AGUTU.....2ND DEFENDANT

JUDGMENT

By an Originating Summons dated 3rd September 2018 the plaintiff herein sought the determination of the following issues:

1. Whether the plaintiff purchased a portion of land parcel **KISUMU/KAPUONJA/313** measuring 0.80 Ha from ALICE OWITI ORENDE the 1st defendant herein which upon subdivision was created to form land parcel **KISUMU/KAPUONJA /3764**.
2. Whether the plaintiff had an overriding interest under Section 28 (c) (e) and (j) of the Land Registration Act of the land parcel known as **KISUMU/KAPUONJA /3764**.
3. Whether the plaintiff is an adverse possessor of the parcel of land known as **KISUMU/KAPUONJA /3764** measuring 0.80Ha originally being a portion of **KISUMU/KAPUONJA/313**.
4. Whether the Honourable court should direct the Kisumu County Land Registrar to cancel the transfer of **KISUMU/KAPUONJA /3764** to 2nd defendant.
5. Whether the Honourable court to vest the suit land **KISUMU/KAPUONJA /3764** to the plaintiff.
6. If 1,2,3 &4 above are in the affirmative, whether the Kisumu County Land Registrar should be directed to register the rights and interests to the plaintiff upon **KISUMU/KAPUONJA/3764**.
7. Whether the plaintiff is entitled to costs.

PLAINTIFF'S CASE

PW 1 testified that he bought a portion of land measuring 0.8 hectares of the original land parcel Kisumu / Kapuonja / 313 on 10th July, 2002 whereby he took possession and built a house and resided therein for five (5) years and planted trees.

It was PW1's evidence that after five (5) years, he later moved houses to another land but retained this one where he continued using the same for farming and growing trees which he harvested periodically and has continued working on the land to date.

PW1 stated that the 1st Defendant later subdivided the original land parcel **KISUMU/KAPUONJA/313** creating seven parcels Nos.**KISUMU / KAPUONJA / 3764, 3765, 3766, 3767, 3768, 3769 and 3770**. T PW1 also testified that the portion that he purchased acquired a new number being **KISUMU/KAPUONJA/3764**:

PW1 further stated that the 1st Defendant neither alerted him of the transfer nor the sale of the suit land to the 2nd defendant. It was PW1's evidence that he only came to learn of this development in the year 2018 when he did a routine search at the Lands office.

PW1 produced a sale agreement dated 10th July 2002 as well as well as an official search and a photograph of a section of the suit land.

On cross examination PW1 confirmed that the suit land was in the name of Orende Aduodi at the time he purchased the same from the 1st Defendant and further stated that he did not know when the registered owner Orende Aduodi died.

PW1 also stated that the 1st Defendant was aware of his entry to the parcel of land and reiterated that he planted trees more particularly blue gum trees which he testified that he had harvested ten times. He therefore urged the court to grant the orders as prayed.

PW2 Michael Ochieng testified that he was the one who wrote the agreement between the Plaintiff and the 1st Defendant in his position as an Assistant Chief South Kapuonja. He further testified that the purchase price was paid in full and that the Plaintiff thereafter took possession of the parcel within two months.

On cross examination PW2 confirmed that he authored the agreement and that further the deceased husband of the 1st Defendant was the registered owner of the land.

PW3 as Mark Agen'go Oriedo adopted his statement dated 16th August 2018 which confirmed that he was a witness to the sale and that the plaintiff took possession and built a house.

DEFENDANTS' CASE

DW1 and DW2 relied on their replying affidavits where they do not dispute the fact that the Plaintiff had purchased and moved into the suit property. They are however disputing the claim by the Plaintiff that his possession has been in excess of 12 years.

DW1 further disputed having received the full purchase price from the Plaintiff and stated that that the Plaintiff after purchasing the property was required to undertake succession and sub divide the land which he did not.

It was DW1's evidence that she got another purchaser the 2nd defendant whom she sold to the suit land at a consideration of Kshs. 800,000/ and paid a deposit of Kshs. 300,000/ which helped her file the succession Cause. DW1 therefore prayed that the case be dismissed with costs.

DW2 stated that he purchased the suit land from the 1st defendant at a consideration of Kshs. 800,000/ in 2013. He further testified that the land was vacant when the 1st defendant approached him to buy and that the suit land was still registered in the name of the 1st defendant's deceased husband.

PLAINTIFF'S SUBMISSION

Counsel for the plaintiff filed submissions and listed the following issues for determination:

- a) Whether the Plaintiff lawfully purchased the suit properties from the 1st Defendant.
- b) Whether the Plaintiff has been in constant possession and use of the suit parcels of land without force, without secrecy, without permission and without interruption for a period more than 12 years.
- c) Whether the Plaintiff is entitled to the orders sought for in the Originating Summons.

On the first issue whether the Plaintiff lawfully purchased the suit property from the 1st Defendant counsel submitted that the plaintiff testified that he purchased the suit property from the 1st Defendant on 10th July, 2002 and produced a sale agreement to that effect which was not disputed by the defendant.

Counsel submitted that it was not a term of the agreement that the plaintiff assists with the filling of a Succession Cause and subdivided the land. That the agreement clearly stipulates that the purchase price of the land was Ksh. 25, 000 / = which sum had been paid in full at the time of execution of the sale agreement.

It was counsel's submission that the fact that Plaintiff immediately moved into the land and resided therein without the 1st Defendant raising any issues clearly demonstrates that the land belonged to the Plaintiff and the 1st Defendant did not have any pending claims against the Plaintiff.

On the second issue as to whether the plaintiff has been in continuous occupation without interruption for a period of more than 12 years, counsel submitted that upon purchase of the suit land the plaintiff took occupation immediately and has been in such occupation for a period

of more than 18 years.

Further that the plaintiff is not claiming specific performance of the agreement but using it as evidence to prove the date he took possession of the suit land to enable the court compute whether such possession is within the prescribed time for adverse possession.

Counsel relied on the case of **Public Trustee -vs- Wanduru (1984) KLR** and the case of **Richard Satia & Partners and Another -vs- Samson Sichangi C.A Nakuru Civil Appeal No. 164 of 1995** where the learned Judges of Appeal held that a contract for sale can be used as evidence of possession of a suit property. Counsel also cited the following cases where a contract for sale of land was relied on as evidence of possession

- a) Kisumu Hcc No. 177 of 2009 Ghazi Abdul Hamad -vs- George Awiti Omoro;
- b) Kisumu ELC Hcc Misc No. 212 of 2012 Zaida Begum Shaffir Rai -vs- Caleb Otieno Orwa & 2 others.
- c) Kisumu ELC No. 32 of 2017 Aloys Odiango Olande -vs- Samuel Amon Sijaji.

Counsel submitted that the 2nd Defendant who purportedly bought the suit property from the 1st Defendant has no defence as it was held in the case of **Public Trustee -vs- Wanduru (1984) KLR** that a purchaser's title is subject to an adverse possessor overriding interest. Counsel further submitted that it was held in the case of **Peter Thuo Kairu -vs- Kuria Gacheru (1988) 2KLR and in Samuel Miki Waweru -vs- Jane Njeri Richu Nairobi C.A 122 of 2001** that the law relating to prescription affect not only present holders of title but their predecessors.

It was counsel's submission that the 2nd Defendant was to blame as he admitted during cross examination that he undertook due diligence before buying the land where he was informed by the 1st Defendant and her family members that the suit property belonged to the Plaintiff. The 2nd Defendant also visited the suit property and identified tree stumps and some sprouts indicating that someone has been working on the land through growing of trees and harvesting the same.

On the third issue on whether the plaintiff is entitled to the orders sought, counsel submitted that the Plaintiff has demonstrated that he has been in constant and uninterrupted possession of the same two portions of land for over 18 years and therefore entitled to the orders sought in the Originating Summons. Counsel therefore urged the court to grant the orders as prayed with costs

1ST & 2ND DEFENDANT'S SUBMISSIONS

Counsel reiterated the evidence of the parties and submitted two issues for determination by the court as, whether the agreement dated 10th July 2002 was lawful and whether the Plaintiff has provided the essential ingredients of a claim of adverse possession.

On the first issue on the legality of the agreement dated 10th July 2002, counsel submitted that the Plaintiff admitted on cross-examination that the registered owner of the parcel of land was Orende Aduodi hence he did not demonstrate that the 1st Defendant was the registered owner of KISUMU/KAPUONJA/313 at the material time by either attaching a green card or title to the land. That the 1st Defendant who was a widow to the registered owner of all that parcel of land then known as KISUMU /KAPUONJA/313 did not succeed the estate of her late husband until the year 2016.

Counsel therefore submitted that by the year 2002 when the purported sale was entered into, the 1st Defendant did not have the locus standi to enter into such an agreement.

On the second issue as to whether the Plaintiff has proved the essential ingredients of a claim of adverse possession, counsel cited the provisions of Section 7 of the Limitation of Actions Act which provides that:

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 same person through whom he claims, to that person"

Section 17 of the same Act provides that:

"subject to Section 18 of this Act at the expiration of the period prescribed by this Act to bring on action to recover land (including redemption action, the title of that person to the land is extinguished"

Mr Indimuli submitted that the Plaintiff has to prove that he has used this land which he claims as of right: *Nec Vi, nec clam, nec precario* (no force, no seeing, no evasion) that the Defendants had knowledge (or the means of knowing, actual or constructive) of the possession or occupation and that the possession must be continuous and uninterrupted .

Counsel submitted that the agreement produced by the plaintiff did not refer to a specific interest more particularly the acreage of 0.8Ha that the Plaintiff is claiming as the agreement referred to land parcel No. 313 in its entirety.

Mr Indimuli also submitted that the Plaintiff in his supporting affidavit deponed that he stayed on the parcel of land for 5 years before moving to another parcel of land and that before he moved, he planted eucalyptus trees which he Intended to cut and sell once the said trees had matured. That the Plaintiff in his pleadings did not state that he had harvested trees form the disputed parcel of land.

Counsel therefore submitted that the Plaintiff entered the disputed land through a void agreement dated 10th July 2002 as a licensee even though his interests were inimical to the estate of the late Wilson Orende Aduodi alias Orende Aduodi who was the registered owner of all that parcel of land known as KISUMU/KAPUONJA/313 at the material Counsel relied on the case of **Nairobi Court of Appeal Civil Appeal No. 52 of 2012 Patrick Magu Mwangi, Kamanga —vs Joreth Limited** when the Learned Judges were expounding an earlier case of **Daniel Kimani Ruchine & Others -vs- Swift, Rutherford co. Ltd & ANOTHER [1977] eKLR** on the issue of possession. Counsel further stated that the 2nd Defendant was registered as the owner of all that parcel of land known as KISUMU/KAPUONJA/3764 on or about the 19th January 2018 and cited the case of **Titus Kiguru Munyi vs Peter Mburu Kimani** that the limitation period for purposes of adverse possession only starts to run after registration of land in the name of the Respondent.

Counsel therefore submitted that the Plaintiff never contracted with the registered owner of the parcel of land which situation would have put the 1st Defendant a constructive trustee of the wishes of her deceased husband, hence the claim should have been instituted against the estate of the late Wilson Orende Aduodi as was stated in **Nairobi ELC 155 OF 2019. David Mbuvi Kathitu & 14 Others —vs City Council of Nairobi & 4 others** where Okongo J stated that in a claim involving an estate, the Plaintiffs adverse possession claim could only lie as against the deceased who was the registered owner of the suit property. The fact that the parcel of land the subject matter herein was never registered in the name of the 1st Defendant means that no overriding interest can accrue to the Plaintiff through the 1st Defendant and as was held in the case of **Titus Kigoro Mungi vs Peter Mburu Kimani** time for adverse possession cannot run against a person who has no proprietary interest in the suit property.

Counsel therefore urged the court to dismiss the case with costs to the defendants.

ANALYSIS AND DETERMINATION

This is a suit where the plaintiff is claiming to have acquired the suit land by way of adverse possession. The issues for determination is as to whether there was a valid agreement between the plaintiff and the 1st defendant and whether the plaintiff has met the threshold for adverse possession

On the 1st issue as to whether the sale agreement was valid, the plaintiff gave evidence and produced a sale agreement which indicated the purchase price and that the same was paid in full upon execution of the agreement. This agreement was not disputed by the defendant. The only issue that the 1st defendant had with the plaintiff was that she has required him to assist with the subdivision of the suit and succession process which she stated that it was done by the 2nd defendant.

Further the sale agreement was in writing and signed by the parties to the transaction together with witnesses which was in line with the requirement under the provisions of Section 3(3) of the Law of Contract Act which states that:

No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it ...

The plaintiff complied with this provision.

On the second issue as to whether the plaintiff has proved adverse possession, the ingredients of adverse possession which must be proved are as per the case of **Tabitha Waitherero Kimani v Joshua Ng'ang'a [2017] eKLR, Ombwayo J** enumerated the ingredients to be satisfied in a claim of adverse possession as follows:

“(A) OPEN AND NOTORIOUS USE OF THE PROPERTY. *For this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.*

(B) CONTINUOUS USE OF THE PROPERTY – *The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.*

(C) EXCLUSIVE USE OF THE PROPERTY – *The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.*

(D) ACTUAL POSSESSION OF THE PROPERTY – *The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”*

If an applicant meets the five ingredients, then he or she can be declared an adverse possessor.

Further in the case of **Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)** approved the decision of the High Court in the case of **Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR** where Kneller J. held that:

“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.”

It was the plaintiff’s evidence that he took possession upon the purchase of the suit land and planted trees which he has harvested more than ten times. He also stated that he had built structures on the suit land, stayed on the suit land for 5 years, planted trees, built terraces to prevent soil erosion. It is also evident that the possession was actual, physical and continuous with the knowledge of the defendant who neither attempted to re-enter nor enter the suit land to break the continuous possession by the plaintiff. The 1st defendant entered into a second sale agreement with the 2nd defendant without disclosing to him that the land had been sold to the 1st defendant and that he was in actual occupation. This second sale did not amount to the interruption of the occupation of the plaintiff.

The period for computing adverse possession is when the plaintiff entered into an agreement for sale and when he took possession of the suit land in July 2002. This makes it 16 years as at the time the suit was filed but 18 years as at the time the suit was heard and determined in 2020. This is way above the 12-year threshold for adverse possession. The evidence on record shows that the plaintiff was in actual and or constructive possession of the suit property; that the possession by the plaintiff was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value. From whichever year adverse possession is computed, as at the time of filing the Originating Summons in 2018 twelve (12) years had lapsed and the plaintiff’s right and claim based on adverse possession had arisen, accrued and vested.

In the case of **Public Trustee vs. Wanduru, Madan J A** stated as follows; -

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

It should also be noted that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights as was held in the case of **Mwangi & Another –v – Mwangi, (1986) KLR 328**.

The evidence on record points towards the plaintiff’s fulfilment of the ingredients of adverse possession. I have considered the pleadings, the affidavits in support and in opposition of the originating Summons, the submissions by counsel together with the relevant authorities and come to the conclusion that the plaintiff has proved adverse possession against the 1st defendant with costs and therefore entitled to the orders.

DATED and DELIVERED at ELDORET this 18th DAY OF DECEMBER, 2020

M. A. ODENY

JUDGE