



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 193 OF 2015

MARIKO GUYA.....PLAINTIFF

VERSUS

JAGONGO OSIO.....1ST DEFENDANT

JAMES OTIENO.....2ND DEFENDANT

J U D G M E N T

By an Originating Summons dated 28th July 2015 and filed on 30th July 2015, the plaintiff sought the Court's determination of the following questions:-

1. Whether the plaintiff bought from the 1st defendant an identified portion of land measuring 1 ½ acres out of land parcel **NO. KISUMU/RATTA/285** in 1977 vide an agreement dated 3rd August 1977.
2. Whether the defendants later sub-divided the said parcel **NO. KISUMU/RATTA/285** into 9 portions and the land which the plaintiff has possession is now **KISUMU/RATTA/2923** but is since 29th April 2015 registered in the names of **JAMES OTIENO** the 2nd defendant and who was the 1st plaintiff witness in the said agreement.
3. Whether the plaintiff immediately took possession of the said 1 ½ acres now known as **KISUMU/RATTA/2923** and has since 1977 occupied the said portion openly and as of right continuously and without any interruption by any person for now a period of 38 years.
4. Whether the plaintiff has acquired an overriding interest under **section 28 (4) of the Land Registration Act 2012** on the portion of land parcel now known as **KISUMU/RATTA/2923**.
5. Whether by the time the 2nd defendant was registered as proprietor of the suit land, the 1st defendant's title had long been extinguished by adverse possession and/or prescription and held the same only as trustee for the plaintiff and incapable of transferring it.
6. Whether the plaintiff has in the circumstances acquired title to the ½ acres in **KISUMU/RATTA/2923** by way of adverse possession.
7. Whether the Honorable Court ought to order for the registration of the plaintiff as the proprietor of the 1 ½ acres in **KISUMU/RATTA/2923**
8. Whether the plaintiff is entitled to costs of this suit.

The Originating Summons was accompanied with the following documents:-

- (a) A Sale agreement dated 3rd August 1977 between the plaintiff and 1st defendant in respect to plot no. 285.
- (b) Proceedings between the plaintiff (as Claimant) and 1st defendant (as Objector) in the **KISUMU WEST DISTRICT LAND DISPUTE TRIBUNAL CASE NO. 4 OF 2011** in relation to parcel **NO. KISUMU/RATTA/285**
- (c) Green Card for parcel **NO. KISUMU/RATTA/285** in names of 1st defendant and closed on 31st March 2011.

(d) Drawing showing the location of parcel No. 2923.

(e) Certificate of Search in respect to land parcel **NO. KISUMU/RATTA/2923** in the names of the 2nd defendant.

(f) Photographs showing a crop of bananas – **annexture MGS 1 to 6** respectively.

In his supporting affidavit, the plaintiff has deponed, inter alia, that on 3rd August 1977 he purchased from the 1st defendant a portion measuring 1 ½ acres from land parcel **NO. KISUMU/RATTA/285** as per the copy of agreement (**annexture MGS – 1**) and immediately went into occupation of the said portion which is demarcated using Euphobia and has been in possession thereof without force, secrecy, permission or interruption. However the 1st defendant has been reluctant to obtain the consent of the Land Control Board and so the plaintiff sued him at the **KISUMU WEST DISTRICT LAND DISPUTE TRIBUNAL** which ruled in his favour (**annexture MGS – 2**). The 1st defendant is still reluctant to transfer the portion sold to the plaintiff who occupies the same. The 1st defendant has now sub-divided the parcel **NO. KISUMU/RATTA/285** into nine (9) portions and the plaintiff occupies the portion designated as **KISUMU/RATTA/2923** which has now been registered in the names of the 2nd defendant who was in fact a witness for the 1st defendant during the agreement dated 3rd August 1977 9 (**annexture MGS – 5**)

Both defendants resisted the plaintiff's claim through replying affidavits.

In his replying affidavit, the 1st defendant denied having sold a portion of his land parcel **NO. KISUMU/RATTA/285** to the plaintiff or that the plaintiff occupies the same. He added that the developments thereon are his and that the plaintiff's suit is actuated by utter greed. He deponed further that there have been various suits between him and the plaintiff over the same subject matter and this suit is therefore res – judicata.

On his part, the 2nd defendant denied having been a witness to the agreement dated 3rd August 1977 and that the signature thereon attributed to him is a forgery. He added that the parcel **NO. KISUMU/RATTA/2923** is registered in his names and the trees growing thereon were planted by the 1st defendant who is his father and not by the plaintiff who has never entered or used the land. That it is in fact the 2nd defendant who utilizes the land in dispute.

The suit was placed before me for hearing on 29th October 2018 during the service week at the **KISUMU ENVIRONMENT AND LAND COURT** and the plaintiff and the two defendants were the only witnesses to their respective cases. The plaintiff adopted as his evidence the supporting affidavit and the documents marked **MGS 1 to 6**. The defendants also adopted their respective replying affidavits as their evidence.

Submissions were thereafter filed both on **MR. B ODENY** Counsel for the plaintiff and **MR. KO'OWINOH** Counsel for the defendants.

I have considered the evidence by both parties and the submissions by counsel.

In paragraphs 7 and 8 of his replying affidavit, the 1st defendant has deponed that this suit is res judicata as there have been several suits involving him and the plaintiff over the same subject matter. That should be the first issue to determine because if this suit is indeed res judicata, then that would be a complete bar to any proceedings.

Res judicata is provided for in **section 7 of the Civil Procedure Act** in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of their claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

MR KO'OWINOH for the defendants has submitted that the plaintiff having sued the 1st defendant in **KISUMU WEST DISTRICT LAND DISPUTE TRIBUNAL CASE NO 4 OF 2011**, he is barred from suing the defendants in this case which is therefore res – judicata. It is not in dispute that indeed the plaintiff sued the 1st defendant in **KISUMU WEST DISTRICT LAND DISPUTE TRIBUNAL CASE NO 4 OF 2011** which was determined in favour of the plaintiff. The Tribunal in its findings ruled that indeed the 1st defendant sold a portion of his land parcel **NO KISUMU/RATTA/285** to the plaintiff and directed that the parties should go to the Land Control Board to have the said portion surveyed and transferred. From the plaintiff's evidence however, the 1st defendant refused to comply with that order. The plaintiff had the right to appeal against the Tribunal's judgment but appears not to have done so. However, before res judicata can be successfully pleaded as a bar to any suit, the following must be shown to exist:-

- 1. The issue in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit where the plea of res judicata has been pleaded.**
- 2. The former suit must have been between the same parties or those under whom they or any of their claim litigating under the same title.**
- 3. The former suit must have been heard and finally determined.**
- 4. The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA V A – G & ANOTHER 2005 I E.A 83.**

See also **KAMUNGE & OTHERS .V. PIONEER GENERAL ASSURANCE SOCIETY LTD 1971 E.A 263.**

The dispute between the plaintiff and 1st defendant which was determined by the **DISPUTE TRIBUNAL in case NO. 4 of 2011** was in respect to a claim of ownership of a portion of land parcel **NO KISUMU/RATTA/285** which was registered in the names of the 1st defendant. It is now well settled that a Land Dispute Tribunal exercising its jurisdiction under the now repealed **LAND DISPUTES TRIBUNAL ACT (CHAPTER 303 A LAWS OF KENYA)** had no jurisdiction to determine a dispute concerning ownership of registered land – **JOTHAM AMUNAVI V THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO. 256 OF 2002.** Although the **KISUMU LAND DISPUTES TRIBUNAL** ruled in favour of the plaintiff, its judgment was arrived at in excess of jurisdiction. An order or judgment of a Court or Tribunal without jurisdiction cannot operate as res judicata. In **MULLA, THE CODE OF CIVIL PROCEDURE 18TH EDITION of page 285,** the authors state:

“A Judgment delivered by a Court not competent to deliver it cannot operate as res judicata since such a judgment is not of any effect. It is well settled position in law that if a decision has been rendered between the same parties in a Court which had no jurisdiction to entertain and decide the suit, it does not operate as re judicata between the same parties in subsequent proceedings”.

As the **KISUMU WEST DISTRICT LAND DISPUTES TRIBUNAL** had no jurisdiction to determine the dispute between the plaintiff and the 1st defendant which was about ownership of registered land, its judgment cannot act as a bar to this suit on the basis of the doctrine of res judicata.

Secondly, the plaintiff’s claim herein is premised on adverse possession. The **KISUMU WEST DISTRICT LAND DISPUTES TRIBUNAL** would not have had the jurisdiction to determine a claim based on adverse possession because it’s powers were limited by Section 3 of the repealed Land Dispute Tribunal to dispute concerning:-

(a) **Division or determination of boundaries to land.**

(b) **Claim to occupy or work land.**

(c) **Trespass to land.**

The jurisdiction to determine disputes over land based on a claim for adverse possession are a preserve of this Court by virtue of **Section 38 of the Limitation of Actions Act** and therefore the plaintiff’s claim which is based on adverse possession was not and could not have been determined by the said Tribunal. The plea of res judicata is not well founded. I dismiss it.

Having determined that issue, I will now consider the merits on otherwise of the plaintiff’s claim.

The plaintiff’s claim is that he is entitled to be registered as the owner of land parcel **NO KISUMU/RATTA/2923** (the suit land) by way of adverse possession having been in possession and occupation thereof from 3rd April 1977 openly and without any interruption.

In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 I K.L.R 184,** The Court of Appeal stated the following about what a party claiming land by adverse possession must prove:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

It is common ground that the suit land is now registered in the names of the 2nd defendant. It was originally part of land parcel **No. KISUMU/RATTA/285** which was previously registered in the names of the 1st defendant before that title was closed on 31st March 2011 following its sub-division into parcels **NO. KISUMU/RATTA 2915, 2916, 2917, 2918, 2919, 2020, 2012, 2922 and 2023.** This is evident from the Green Card annexed by the plaintiff. It is the plaintiff’s case that by an agreement dated 3rd August 1977, the 1st defendant agreed to sell to him a portion of land parcel **NO. KISUMU/RATTA/285** at a consideration of Kshs. 2,000 which he fully paid but the defendant had refused to apply for the necessary transfer of the Land Control Board. This is what he said when cross – examined by **MR. KO’OWINOH:-**

“The plot I bought was No. 285 as per the agreement. The purchase price was Kshs. 2,200/=. I paid Kshs. 1,800/= leaving a balance of Kshs 1,400/= which I paid on 5th October 1977 I entered the land on 3rd April, 1977 when the agreement was signed”.

The 1st defendant has deponed that the agreement is un-known to him and that he never sold land parcel **NO KISUMU/RATTA/285** or a portion thereof to the plaintiff. The 2nd plaintiff has similarly denied any knowledge of that agreement. The said agreement contains not only the Identity Card Number of both the plaintiff and 1st defendant but also their respective thumb prints. I did not hear the 1st defendant say that the Identity Card Number appearing on the said sale agreement was not his at least at the time the agreement was signed in 1977. I have also looked at the proceedings before the **KISUMU WEST LAND DISPUTES TRIBUNAL** in case No 4 of 2011 and in his evidence in chief, the 1st defendant said as follows:-

“I come from North Ratta, Otwenya Location Moreno Division, Kisumu West District – ID NO 6481296. I accept that I went to Guya Colla I had a problem of paying dowry for my son who got married at that time. I told him that I had a plot to sell. We talked and agreed on the amount to pay. It was Kshs 102,200/= and not 2,200/= as Guya is saying. He paid me 2,200/= and remained with 100,000/=. This is the money that I am waiting from him and then sub-divide the land to him.”

So, when he was before the Tribunal, the 1st defendant conceded that he sold a portion of his land to the plaintiff but his case then was that the purchase price was Kshs. 102,200/=. I have looked at the agreement and it is clear that the purchase price was Kshs. 2,200/=. The 1st defendant cannot now be heard to claim that the purchase price was Kshs. 102,200/=. If it was, nothing would have been easier for him than to counter-claim for the balance. The fact that he has not done so is clear evidence that he received the full purchase price as per the agreement and this Court cannot go beyond what the parties themselves put down in writing.

The plaintiff's evidence is that he went into occupation of the 1 ½ acres out at land parcel **NO KISUMU/RATTA/285** on 3rd August 1977 when the agreement was signed. That means that by the time this suit was filed in 2015, he had been in occupation of the portion for 38 years. The portion that he occupies is now known as parcel **NO KISUMU/RATTA/2923** which is registered in the names of the 2nd defendant. Although the defendants denied that the plaintiff is in occupation of the suit land, they conceded in cross – examination that indeed the plaintiff is in occupation of the same. This is what the 1st defendant said when cross – examined by **MR. ODENY:-**

“It is true that I sold him 1 ½ acres of the land in dispute and he lives on it.”

Further on, he said:-

“The plaintiff is still living on the land that I sold him together with his sons. I have not removed him from the land because it is his. I cannot remove him”

When he was re – examined by his own counsel **MR. KO'OWINOH**, this is what he said:-

“The plaintiff is living on the land which I sold to him in 1977. I don't know the number may be my children know”.

And on his part the 2nd defendant, although admitting that the 1st defendant sold land to the plaintiff, his evidence was that the parcel on which the plaintiff lives is **KISUMU/RATTA/617** and not the suit land. This is what he said on cross – examination by **MR. ODENY:-**

“I know the parcel NO KISUMU/RATTA/2923. It is a sub-division of parcel NO. KISUMU/RATTA/285. I know the plaintiff lives on parcel NO. NO. KISUMU/RATTA/617. I don't have the certificate of search of NO. KISUMU/RATTA/617 but that is the one my father sold to the plaintiff.”

Among the documents produced by the plaintiff in support of his case include the map showing the location of the suit land which he now occupies (**annexture MGS 4**) and photographs of the land (**annexture MGS 6**).

The authenticity of the said map was never challenged and the portion is clearly marked as 2923. Both defendants, admitted in their evidence that the plaintiff has never been evicted from the portion that he now occupies. It is clear from the evidence that when the plaintiff and 1st defendant entered into a sale agreement on 3rd August, 1977, the land was known as **KISUMU/RATTA/285**. That land has since 31st March 2011 been sub-divided into nine portions one of which is the suit land which the plaintiff claims. There can be no truth in the 2nd defendant's claim that the land which the plaintiff occupies is infact **KISUMU/RATTA/617** because that land is not among the resultant sub-divisions that were created when land parcel **NO KISUMU/RATTA/285**, and which was the subject of the agreement between the plaintiff and 1st defendant, was sub-divided on 31st March 2011. Although the ownership of the land in dispute has changed from the 1st to the 2nd defendant, the law is that the change of ownership of land which is being claimed through adverse possession does not interrupt such claim – **GITHU V NDEETE 1984 KLR 776**.

Mr. KO'OWINOH has submitted that in the absence of any structure erected by the plaintiff on the suit land and in the face of opposing oral evidence as to who planted the bananas and trees on the suit land, the onus was on the plaintiff to bring witnesses to prove his occupation. The 2nd defendant upon cross – examination stated as follows when shown the photographs of the suit land:-

“I know there are bananas and mangoes plus other crops on the land. The person in the photographs marked MGS – 6 is the plaintiff in this case. I could not take pictures on the land because I don't own it.”

That there is no home or other structures on the suit land is not fatal to the plaintiff's case as suggested by **MR. KO'OWINOH** in his submission. The plaintiff's case was never that he has established a home on the suit land. His claim was based on the fact that he utilizes the land by growing crops thereon since 1977. This is what he said in cross – examination:-

“I have planted bananas, trees, mangoes on the land since 1977. The defendants have no crop on the land. They never planted anything on the land. When I bought the land, there was nothing growing on it.”

It is a matter of public notoriety that in the rural areas, land is utilized not only for putting up a home but also for growing food crops. Therefore when a party utilizes land for farming food crops, that is sufficient evidence of occupation and possession thereof. The 2nd defendant having conceded that the plaintiff utilizes the suit land, it is clear that the plaintiff has dispossessed the defendants of any use and

occupation of the suit land.

It is also the submission by the defendants counsel that the plaintiff having entered the suit land following the agreement dated 3rd August 1977, his entry and use thereof is with the consent of the defendants. It is true that the plaintiff first entered the suit land on 3rd August 1977 following the agreement which was subject to the consent of the land Control Board. The plaintiff's evidence is that the 1st defendant refused to apply for the said consent. That means that in terms of the provisions of **section 8(1) of the Land Control Act**, the 1st defendant ought to have made the application for transfer of the suit land to the plaintiff within six (6) months from 3rd August 1977 failure to which the agreement would become void. As the consent of the Land Control Board was not sought within that period, the agreement between the plaintiff and 1st defendant became void and unenforceable on 3rd March 1978 and time for purposes of adverse possession started running on that day. In **SAMUEL WAWERU V. JANE NJERI RICHU C.A CIVIL APPEAL NO. 122 OF 2001 (2007 eKLR)** the Court of Appeal stated:-

“Where a purchaser of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of the law and the continued possession if not illegal becomes adverse from the time the transaction becomes void.”

The plaintiff's occupation of the suit land became adverse from March 1978 and since the defendants took no action to evict him before the expiration of 12 years, their right to the suit land was extinguished in 1990. Thereafter, the 1st defendant was simply a trustee for the benefit of the plaintiff and even as he sub-divided land parcel **NO KISUMU/RATTA/285** and transferred the suit land to the 2nd defendant, that did not interrupt the plaintiff's adverse possession. The plaintiff's rights to the suit land were protected by **Section 30(f)** of the repealed **Registered Land Act** (which was the law then applicable) which recognized as overriding interest:-

“Rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription”

A similar provision is found in **Section 28 of the new Land Registration Act 2012 (h)**.

From the evidence before me, the plaintiff has proved that he has since 1977 been in occupation and utilized the suit land without force, without secrecy and without evasion (**nec vi nec clam nec precario**) – **KIMANI RUCHINE .V. SWIFT RUTHERFOLD 1980 KLR 10**

The plaintiff's occupation of the suit land has always been with the knowledge of the defendants who have however not taken any legal action to re-enter or evict the plaintiff therefrom in order to assert their rights. The plaintiff is therefore entitled to the orders sought in his Originating Summons dated 28th July 2015 and filed herein on 30th July 2015.

I therefore answer all the questions placed before me for determination in favour of the plaintiff. A claim for land through adverse possession is against the registered proprietor of the land in dispute. **Section 38(1) of the Limitation of Action Act** provides as follows:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a leave registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the persons then registered as proprietor of the land” Emphasis added.

It was therefore not necessary to enjoin the 1st defendant in this suit since the registered proprietor of the suit land is the 2nd defendant. That is the person against whom any orders in adverse possession can be made.

There shall be Judgment for the plaintiff against the 2nd defendant in the following terms:-

- 1. The plaintiff has obtained title to the land parcel NO. KISUMU/RATTA/2923 measuring 1 ½ acres through adverse possession.**
- 2. The plaintiff be registered as the proprietor of the land parcel NO. KISUMU/RATTA/2923 measuring 1 ½ acres.**
- 3. The 2nd defendant to execute all the necessary documents to effect the transfer of the land parcel NO KISUMU/RATTA/2923 into the plaintiff's names within 30 days of this Judgment.**
- 4. In default, the Deputy Registrar to execute all the documents on behalf of the 2nd defendant to effect the said transfer.**
- 5. The 2nd defendant shall meet the costs of the plaintiff.**
- 6. The claim against the 1st defendant is dismissed but with no orders as to costs since it was his conduct in refusing to obtain the necessary Land Control Board consent that gave rise to this litigation.**

It is so ordered.

Boaz N. Olao.

JUDGE

21st March, 2019.

Judgment dated, delivered and signed in open Court this 21st day of March 2019 at Kisumu.

Mr. Mwamu for Mr. Odeny for plaintiff - present

Mr. Olel for Mr. Kowinoh for defendant – present

Plaintiff – absent

1st defendant – absent

2nd defendant – absent

Right of Appeal explained.

Boaz N. Olao.

JUDGE

21st March, 2019.