



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1130 OF 2016 (O.S.)

(FORMERLY HCC NO. 119 OF 2010)

RHODA MONGINA ONDORO

THOMAS ONDORO

MARGARET ODORO.....APPLICANTS/DEFENDANTS

VERSUS

JOHNSTONE NYANYUKI MENGE...RESPONDENT/PLAINTIFF

J U D G M E N T

1. Johnstone Nyanyuki Menge, the plaintiff herein took out an Originating Summons pursuant to the provisions of Order XXXVI Rules 1 and 3D of the Civil Procedure Rules and Rule 41 (3) and (4) of the Probate and Administration Rules seeking the following orders;

1. A declaration that the Respondent herein is entitled to a portion of land measuring 12 acres of land parcel No. Gesima Settlement/337 and 2 acres of land parcel Gesima Settlement Scheme/ 343 comprised in the estate of the late Stanley Ondoro Boraya which claim and interest should be determined and catered for before the grant in Kisii High Court Succession Cause No. 124 of 2005 is confirmed.

2. OR IN THE ALTERNATIVE a declaration that the deceased's estate's right to recover a portion measuring 12 acres of land parcel No. Gesima Settlement Scheme/337 and 2 acres of land parcel No. Gesima Settlement Scheme/ 343 is barred under the Limitations of Actions Act Cap 22 Laws of Kenya and the deceased's title thereto extinguished on the ground that the Respondent has openly, peacefully and continuously been in occupation, use and possession of the aforesaid portion for a period exceeding 12 years.

3. A declaration that the Respondent has acquired prescriptive rights over the clearly identifiable portions measuring 12 acres and 2 acres of land parcels no. Gesima Settlement Scheme/337 and 343 respectively and an order that he be registered as proprietor of that portion.

4. The cost of this application be borne by the personal representatives of the deceased's estate.

2. By the originating summons the plaintiff was described as the respondent while the defendants were described as the applicants. For ease of reference the court in this judgment will refer to the respondent as the “**plaintiff**” and the applicants as the “**defendants**”.

3. The application was premised on the grounds that the deceased sold 12 acres of land title No. Gesima Settlement Scheme/337 (“**parcel 337**”) to the plaintiff on 21st April 1998 and further sold to the plaintiff 2 acres of land parcel No. Gesima Settlement Scheme/343 (“**parcel 343**”) on 4th October 2004. The plaintiff took possession of the suit property and planted tea, and was cultivating maize and rearing livestock. The plaintiff stated that he had also constructed a residential house on the suit property. He claimed that the personal representatives of the deceased had not interfered with his occupation and possession of the suit property. It was his case that the he had acquired prescriptive rights over the suit property despite the property being registered as part of the deceased's land.

4. The defendants were the personal representatives of the estate of Stanley Ondoro Boraya. In response to the originating summons Rhoda Mongina Ondoro filed a replying affidavit where she deposed that there was no sale agreement between the deceased and the plaintiff. She averred the sale agreement relied upon by the plaintiff was contradictory as the agreement is dated 21st April 1998 and executed on even date while the full consideration was stated to have been paid on 16th October 1998. She claimed that the signature appended on to the agreement was forged and did not belong to the deceased. She averred that the application by the plaintiff was brought in bad faith as the plaintiff stood as a surety in the succession cause in respect of the deceased estate. She denied that the plaintiff was in possession of the portion measuring

12 acres of land parcel No. Gesima Settlement Scheme/337 and 2 acres of land parcel No. Gesima Settlement Scheme/343 (together hereinafter referred to as '**suit property**'). She stated it was herself together with her co-wife Margaret Nyanganyi Ondoro who were in possession and occupation of the suit property. She averred that the plaintiff only entered onto the property in 2008 after the court had issued an order for maintenance of status quo and constructed some temporary structures. The 1st defendant acknowledged that the plaintiff had purchased parcel numbers 338, 339 and 341 from the deceased and had obtained titles thereof. It was her contention that the claim for adverse possession cannot be justified in the circumstances.

5. Directions were given that the matter to be heard by way of *viva voce* evidence. At the trial Johnstone Nyanyuki Menge, the plaintiff testified as the sole witness for the plaintiff while Rhoda Mongina Ondora testified for the defendants and called Janes Nyanoti Boraya and Peter Nyarindo as DW2 and DW3 in support of the defence case.

6. PW1 testified that the deceased initially sold to him land parcels 338, 339 and 341 within Gesima Settlement Scheme and the transactions were completed and he was issued with the titles to the parcels of land. He told the court that the deceased later sold him the suit property. He testified that he entered into an agreement with the deceased, paid KShs 2,300,000/- and took possession of a portion of 12 acres of land parcel 337. He stated that the 2nd defendant, a son of the deceased but now also deceased, was a witness to the sale agreement. He told the court that he fenced the portion of 12 acres of land parcel 337 and subsequently put temporary residential structures for his workers thereon. He testified that he took possession of the portion of land parcel 337 in 1998 following the signing of the agreement for sale when the deceased was still alive. The deceased died in 2004. The plaintiff testified that his possession of the land was continuous and uninterrupted. He testified that by the time he filed the suit on 26th April 2010 none of the personal legal administrators of the deceased had interfered with his occupation and possession.

7. DW1 in her evidence stated that she was not aware of the agreement between the plaintiff and the deceased and to her knowledge the plaintiff only bought land parcels 338,339 and 341. She told the court that the plaintiff was neither staying on land parcel 337 nor land parcel 343. She explained that land parcel 337 comprised of 20 acres occupied by other buyers who had bought 11 acres. She told the court that the remaining 9 acres of land parcel 337 was kept by the deceased and who planted tea thereon. DW1 further testified that in 2008 the plaintiff unlawfully entered and constructed a house on land parcel 337 and when she asked him to remove the structure he refused to do so. She told court that parcel 343 measured 8 acres out of which she was using 6 acres and explained that the plaintiff started using the 2 acres of the land after the order of status quo was issued by the court in the succession cause. She referred the court to photographs of the land that she had exhibited in her supplementary bundle of documents and stated that the buildings thereon are in total disuse which showed that nobody was residing therein. She also testified that she had a grant in respect of the suit property. She testified that the signature on the sale agreement ascribed to the vendor/seller did not belong to the deceased. When pressed in cross examination she stated that the plaintiff had been cultivating maize in the portion of land parcel 343 and that she could not ascertain the period the plaintiff had been using the land.

8. DW2 testified that he was the deceased brother and was aware that the deceased had sold the plaintiff land parcels 338, 339 and 341 but had no knowledge of the deceased selling portions of land parcels 337 and 343 to the plaintiff. On cross examination he admitted that the plaintiff planted tea on land parcel 337 and that he had been picking tea therefrom and was also cultivating land parcel 343. He stated that the plaintiff planted the tea after the death of the deceased. The evidence by DW3 was not different from that of DW1 and DW2. He maintained the plaintiff entered possession of the suit property in 2008/2009 and denied any knowledge of sale of the suit property to the plaintiff by the deceased.

9. After the close of hearing both parties filed their respective written submissions. The Plaintiff contended that he had been in quiet, peaceful and uninterrupted possession of the suit property for more than 12 years and that he had consequently acquired title thereto by way of adverse possession. He relied on the cases of *Harrison Ngige Kaara & Another v Shadrack Njajna Kaara Civil Appeal No. 79 of 1996*, *Githu v Ndeete Civil Appeal No. 24 of 1979*, *Wanjiku Kinuthia & Another v Stephen Kinooro Kamau & Another Civil Case No. 2360 of 1995* and *Mwingi Hamisi Ali v Attorney General and Philemon Mwaisaka Wawaka Civil Appeal No. 125 of 1997* to support his claim for adverse possession.

10. The 1st Defendant in her written submissions argued that the plaintiff had not proved he had been in adverse possession of the suit property for a continuous and uninterrupted period of 12 years. She submitted that time stops running when either the owner asserts his or her right or when his or her right is admitted by the adverse possessor or when some legal steps including succession proceedings are taken. The 1st defendant relied on the case of *Charles Otieno Seto v Didacus Ojwang Onyango & 2 others [2017]eKLR*. The defendant contended that the photographs of the temporary structures depicted dilapidated and inhabitable structures with no signs of persons living in them and referred to the case of *Benson Ogutu Ogero vs Elly C Ambain ELC Case No. 12 of 2011 [2016]eKLR* where the court while holding that adverse possession had not been proved stated at paragraph 11 of the judgment as follows:-

“11. Taking a close look at the paragraphs annexed in support of the application for injunction which Okongo J ruled on, it is evident that the same depict a parcel of land that had been left fallow over a considerable period and there is no evidence of any use by anybody which would appear to dispel the applicant’s claim of possession and use of the property for cultivation.”

The 1st defendant thus contended the plaintiff had failed to prove that he had been in possession and occupation of the suit property.

11. I have considered the pleadings, the evidence and the submissions proffered by the parties in support of their respective positions. The applicable principles regarding the doctrine of adverse possession are now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by various courts. In the case of *Kweyu v Omutut [1990] KLR 709*, the Court of Appeal, Gicheru JA, as he then was, stated as follows:

“In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings on facts.”

12. To fortify this statement of the principle applicable in determining whether the possession is adverse or not the Judge referred to a passage in the text by **K. J. Rustomji** on the **Law of Limitation and Adverse Possession**, Volume II, 5th Edition at pages 1366 and 1367 where inter alia the author stated as follows:-

“...A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on defacto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

13. Similarly the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR** held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years.”

14. In the present case, the plaintiff has stated that he entered into possession and occupation of land parcel 337 pursuant to an agreement of sale dated 21st April 1998. The 1st defendant however has disputed that the agreement was signed by the deceased and has stated the signature attributed to the deceased was a forgery. No evidence was adduced to support the forgery claim. The advocate before whom the agreement was shown to have been made and who attested the signatures is dead and so also is the 2nd defendant, Thomas Ondoro, a son of the seller who was a witness to the agreement. In regard to the disputed agreement, on the evidence adduced, I am inclined to accept that indeed there was such an agreement and the same was signed by the deceased. I have looked at the signature on the agreement attributed to the deceased and the signatures on the deceased copy ID and copy of passport attached to the 1st defendant’s replying affidavit and to my naked eye the signatures have similarities. It is also instructive that the advocate who attested the seller’s and the buyer’s signatures is dead as well as the seller’s son who was a witness to the agreement. My view is that the 1st defendant may have taken advantage of those unfortunate deaths to dispute the agreement. Her assertion that the signature was not that of her late husband could only be ascertained by forensic expert evidence. She did not call such evidence and it was not enough for her to allege forgery and offer no evidence.

15. Be it as it may be, the plaintiff’s case is not predicated on the authenticity of the agreement for sale but on possession. The agreements however provide the point of reference in regard to how and when the plaintiff entered into possession and occupation of the suit properties. It was the plaintiff’s assertion that he took possession upon signing of the agreement and upon payment of the full purchase price. In the case of **Public Trustee –vs- Wanduru Ndegwa C.A No. 73 of 1982 [1984]eKLR** the court held that 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. Thus if a purchaser possesses land which he has fully paid for and utilizes the same as the owner, such a purchaser can successfully claim under the doctrine of adverse possession if the possession and occupation is for 12 years or more.

16. In the present matter, there was contestation whether or not the plaintiff had been in continuous and uninterrupted possession of land parcel 337 for a period of 12 years. The 1st defendant contended that the plaintiff only entered in possession of the portion of land about 2007/2008 though no proof of this was offered. The plaintiff insisted he took possession in terms of the agreement for agreement of sale dated 21st April 1998 which provided for immediate vacant possession. The 1st defendant however pointed to some contradiction in the agreement as the agreement is shown to have been executed on 21st April 1998 yet the payment of the purchase price of kshs. 2,300,000/= supposed to have been paid on execution was stated to have been paid on 16th October 1998. The plaintiff upon the contraction/inconsistency being pointed to him in cross examination stated that the reference to the date of 16th October 1998 as the day the purchase price was paid could only have been an inadvertent typographical error since the agreement was executed on 21st April 1998 and that was when he paid the purchase price of kshs. 2,300,000/=. Clause (1) of the agreement provided as follows:-

“That the full consideration of kshs. 2,300,000/= only has today the 16th October 1998 been paid to the vendor upon executing this agreement and they have acknowledged receipt.”

17. The agreement clearly indicates it was entered into on 21st April 1998 in the preamble on the first page and on the second page where the parties executed it indicated that it was dated at Kisii on 21st April 1998. The attesting advocate equally stamped and endorsed the date of 21st April 1998 against the signatures of the parties including at the bottom of the first page of the agreement. On the basis of the evidence, I would agree with the plaintiff that the reference of the date of payment of the purchase price as 16th October 1998 could only have been a typographical error and therefore I make a finding that the payment of the purchase price was 21st April 1998 which the deceased duly acknowledged when he executed the agreement. Accordingly, I accept the evidence by the plaintiff that he entered into possession of land parcel 337 in April 1998.

18. In regard to whether or not the plaintiff’s possession and occupation was adverse there is evidence that the plaintiff upon taking possession, he fenced the portion that he had purchased and planted tea leaves and he further constructed some temporary structures thereon including, residential houses. DW2 who testified for the defence in cross examination admitted that indeed the plaintiff took possession of land parcel 337 and planted tea thereon which he was still picking. He however stated the plaintiff planted the tea after the deceased passed away. DW3 in his evidence acknowledged there were some tea bushes in land parcel 337 although he stated he did not know who planted them. Equally, DW3 admitted there were some temporary structures on the land which he did not know who constructed. He however stated that in 2008/2009 the plaintiff started staking claims of ownership to parcel 337 and 343 claiming he had purchased the same.

19. Having regard to the totality of the evidence I am inclined to believe the evidence of the plaintiff that he took possession of the portion of land parcel 337 in April 1998 after signing the agreement and paying the full purchase price. Further, the plaintiff took possession of a portion of 2 acres of land parcel 343 in October 2004 after executing the sale agreement with the deceased and paying the purchase price. I got the impression that the evidence of the 1st defendant and her witnesses that the plaintiff entered into possession of the suit property in

2007/2008 was rehearsed with the object of rebutting the plaintiff's claim for adverse possession. I did not think the 1st defendant and her witnesses were truthful in that regard.

20. The possession and occupation by the plaintiff was adverse as the activities he was undertaking on the suit property were hostile to the rights and interest of the true owner. Planting tea bushes and constructing residential houses are acts that are consistent with one exercising rights of ownership and that is what the plaintiff was doing. The 1st defendant had advanced the argument that even though the plaintiff may have taken possession such possession was not continuous and uninterrupted. The 1st defendant referred to a demand notice sent to the plaintiff by her advocates dated 22nd March 2010 demanding that the plaintiff removes the illegal structures on the suit land failing which the 1st defendant would initiate legal proceedings against the plaintiff.

21. Courts have consistently held that a demand notice without more is not sufficient to interrupt the possession of an adverse possessor. In the case of **Githu –vs- Ndeete [1984] KLR 776** the Court of Appeal inter alia held:-

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land. Giving notice to qui cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

22. As I have found that the basis of the plaintiff's entry onto the suit property was the agreements he entered into with the deceased, I have to determine when the period in regard to adverse possession started running. Both agreements, it is clear contemplated the parties would seek and obtain the consent of the Land Control Board as provided under special condition (2) in both agreements. The initial entry into the parcels of land by the plaintiff were with the permission and consent of the deceased pursuant to the sale agreement. There is no evidence to show whether the land board consent was sought and/or obtained. The court in the premises has to make the inference that no consent of the Land Control Board was sought or obtained with the result that the twin agreements relied upon by the plaintiff to establish the points of entry into possession became null and void for all purposes on the expiry of 6 months from the date they were executed for want of consent of the Land Control Board under the provisions of Sections 6(1) and 8(1) of the Land Control Act, Cap 302 Laws of Kenya.

Section 6(1)(a) of the Land Control Act provides:-

6(1) Each of the following transactions-

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b)

(c)

is void for all purposes unless the land control board for the land control area or division in which the land is stated has given its consent in respect of that transaction in accordance with this Act.

Section 8(1) of the Act provides:-

8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.

23. The plaintiff having taken possession of the suit property pursuant to the sale agreements is deemed to have taken possession with the permission of the owner in accordance with the terms of the agreement. During the validity of the agreements the possession by the plaintiff could not be adverse to the rights and interests of the owner. The respective agreements however became null and void after the expiry of 6 months from the dates of execution for failure to comply with Section 6(1) of the Land Control Act. The period of adversity in the premises could only start running after 6 months, as it was as from that time the right for owner to recover the land from the plaintiff accrued.

24. Thus in regard to the agreement in regard to land parcel 337 the period of adverse possession on the part of the plaintiff commenced as from 21st October 1998 and therefore a period of 12 years would only have lapsed on 20th October 2010. In regard to land parcel 343 the period of adverse possession would be deemed to have started on 16th April 2005 and the 12 years period would have lapsed on 15th April 2017. The plaintiff instituted the present suit by way of the originating summons dated 28th April 2010 filed in court on the same date. By the date the plaintiff filed the suit the requisite period of 12 years necessary to found an action based on adverse possession had not lapsed. The suit was therefore premature and the plaintiff was non suited.

25. In conclusion, it is my determination and holding that the plaintiff has failed to prove his case on a balance of probabilities. I dismiss the plaintiff's suit with costs to the defendants.

26. It is so ordered.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 9TH DAY OF October 2019.

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 23rd DAY OF October 2019.

J ONYANGO

JUDGE