



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 311 OF 2011(O.S.)

IN THE MATTER OF: FREEHOLD LAND PREMISES COMPRISED IN L.R. NO. 3589/6, I.R. 23229 SITUATED IN THE CITY OF NAIROBI, NAIROBI AREA;

AND

IN THE MATTER OF: SECTIONS 37 AND 38(1) OF THE LIMITATION OF ACTIONS ACT, ORDER 37 OF THE CIVIL PROCEDURE RULES, 2010;

AND

IN THE MATTER OF: THE ESTATE OF JASON ATINDA OUKO (DECEASED)

BETWEEN

DR. CHARLES MARANGA.....PLAINTIFF

AND

ROSELYN DOLA OUKO.....1ST DEFENDANT

AARON TAFARI OUKO.....2ND DEFENDANT

ANDREW OUKO.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff brought this suit vide the Originating Summons filed in court on 27/6/2011 against the Defendants who were granted letters of administration over the estate of the late Jason Otinda Ouko, seeking the determination of several questions relating to his claim that he bought 2½ acres of the land comprised in land reference number (L.R. No.) 3586/6 (I.R. No. 23229) from the late Jason Atinda Ouko (the late Ouko) in 1989 and further, whether he is entitled to this portion of land by virtue of adverse possession. The Plaintiff also wishes to have the court determine whether the Defendants should not be restrained by a permanent injunction from dealing with the disputed land and whether they should pay him compensation for interfering with or destroying his property, and lastly, who should pay the costs of this suit.

2. The summons was supported by the Plaintiff's affidavit in which he deponed that he entered into an agreement in 1989 and bought 2½ acres of land from the late Ouko, which land was part of L.R. No. 3586/6 (I.R. No. 23229), and in respect of which there was a subdivision plan depicting it as plot no. 3, L.R. No. 3589/34. He claimed that this portion was to be carved out of the whole land and a title transferred to his name.

3. The Plaintiff averred that he paid Kshs. 40,000/= to the late Ouko on 7/10/1989 and immediately took possession of the land. The Plaintiff claimed that before the sale transaction between him and the late Ouko was concluded, he was sued alongside the late Ouko over the same land. Jason Atinda Ouko died in 1996 and letters of administration over his estate were granted to the Defendants.

4. The Plaintiff claimed that he took possession of the suit land and carried out extensive developments on the land and further claimed that it was his only source of livelihood and was where his home was. The Plaintiff stated that he was shocked on 20/6/2011 when he was told strangers had invaded the suit land and pulled down his fence claiming that the same piece of land had been sold to them. He stated that he reported the matter at Hardy Police Station and managed to remove the strangers from the suit land with the help of police officers.

5. He made reference to the suits filed against the late Ouko and referred to **Nairobi High Court Civil Suit No. 1295 of 1991** which he claimed was against him and the late Ouko and claimed that the case was decided in their favour in 2001. He claimed that Richard Manyange sued him in **Nairobi HCCC No. 216 of 2001** over the same land and that this latter suit was dismissed in 2005.
6. He filed this suit based on the apprehension that he stood to lose the suit land following the repeated threats that he received. He produced a copy of the title deed registered in the name of Jason Atinda Ouko showing many caveats registered against this piece of land. He also produced the survey plan for F/R 227/10 whose numbers are not visible. He produced a copy of an acknowledgement dated 7/10/1989 in respect of Kshs. 40,000/= which he paid to the late Ouko as part payment for the proposed sale of 2½ acres. The sale agreement he produced was in respect of 2½ acres being a portion of L.R. No. 3589/6 that was being purchased by Mr. Mrs. Daniel Sindiyo for Kshs. 250,000/=. The late Ouko wrote to Mr. and Mrs. Sindiyo on 2/10/1989 terminating the sale agreement for their failure to honour the terms of the agreement. The Plaintiff produced a copy of a receipt issued by the Nairobi City Commission to him on 5/2/1990 on account of new connection for L.R. No. 3589/6 Mukinduri Karen. He produced another receipt dated 5/2/199-0 issued by the City Commission. The rates payment requests for L.R. No. 3589/34 dated 7/8/2012 which he attached to the supporting affidavit reflected the late Ouko as the ratepayer. He also produced copies of cheques dated 16/8/2008 drawn in favour of the City Council of Nairobi for payment of rates.
7. He produced a copy of the letter dated 4/1/1991 written by the late Ouko to Mr. T. Mogaka of Lang'ata pointing out the measurements of his plot while beseeching him not to undertake any developments on the Plaintiff's plot. He produced a copy of the letter dated 6/3/1995 from Kagwe and Company Advocates to Kivuitu and Company Advocates which made reference to Nairobi HCCC No. 1295 of 1991 – T. N. Mugaka v J. A. Ouko and another – L.R. No. 3589/6. The Plaintiff relied on the Replying Affidavit sworn by the late Ouko in that suit in which he stated that the Plaintiff who was the 2nd Defendant in that case had Mr. Ouko's blessings to take possession of his land and use it and to bring in cattle. He annexed a copy of the decree issued in that case on 20/7/2001 when the suit was dismissed for the non-attendance of the Plaintiff and his counsel.
8. The Plaintiff exhibited the judgement in **Nairobi HCCC No. 216 of 2001** in which Richard Manyange laid claim to plot number 23 measuring 0.9307 ha described as plot number 3589/34 (original number 3589/6). The court notes that the Plaintiff while testifying in that case stated that he bought the suit land from the late Ouko for Kshs. 250,000/= of which he paid Kshs. 40,000/= and produced the copy of the handwritten paper acknowledging payment of the 40,000/=. The court observed that the Plaintiff paid Kshs. 40,000/= to the late Ouko but that neither of the parties in that suit obtained title to the land. The court recommended that in order to obtain title to the land, the parties had to bring proceedings against the estate of the Ouko for specific performance. The court found that the Plaintiff had not established ownership of the plot and had no more right to possession of it than the Defendant. Further, that since the Defendant was in possession pursuant to the agreement with the late Ouko, he had a right to stay on the plot until who owned it was determined. The judgement was delivered on 22/2/2005.
9. The Plaintiff produced copies of letters dated 20/12/2001, 10/7/2002, 27/11/2002 and 28/11/2006 from Ali & Associates with regard to HCCC No. 1295 of 1991. There were letters from Kivuitu and Company Advocates dated 30/5/1991 and 25/9/1991 seeking legal fees from the Plaintiff. He produced copies of petty cash vouchers for the sums of Kshs. 200, 105, 197 and 605 on account of disbursements. He also produced a copy of the demand letter from Ali & Associates dated 8/8/2000 in respect of HCCC No. 1295 of 1991. He produced copies of receipts issued by Kivuitu & Company Advocates on account of payment of legal fees. He produced a copy of the letter written by the late Jason Ouko on 28/1/2010 to Mr. James Ochoki on the issue of establishing the rightful claimants who were the purchasers of the land comprised in L.R. No. 3589/6.
10. The Plaintiff produced photographs of some structures on the suit land and some crops and vegetation. The structures looked incomplete and since the photographs are in black and white, it is difficult to tell what specific crops had been planted on the suit land. The Plaintiff produced a copy of his letter dated 18/2/2019 addressed to Kenya Pipeline Company Limited seeking to know the amount paid to the late Ouko as compensation for the easement over L.R. No. 3589/6/23. Kenya Pipeline Company responded on 20/2/2019 confirming that they paid the late Ouko Kshs. 145,000/= as compensation for the easement for land measuring 0.232 acres on 9/10/1993.
11. The 2nd Defendant swore the Replying Affidavit in opposition to the Plaintiff's claim. He stated that he had the authority of his co-administrators of the estate of the late Ouko and who are his co-Defendants in this case. He deponed that his father, the late Ouko was still the registered owner of L.R. No. 3589/6 (I.R. 23229) which had never been subdivided. He stated that the plot claimed by the Plaintiff being plot number 3589/34 does not exist. The 2nd Defendant denied that the Plaintiff had been in possession of the land as he claimed.
12. The 2nd Defendant deponed that there was an incomplete structure on the land that the Plaintiff claims and that he knew of his own knowledge that the Plaintiff and his family reside next to Hillcrest School while arguing that the Plaintiff could not have resided on the suit land which has no toilet. He further deponed that the Plaintiff moved to the piece of land which was being occupied by his aunt Joyce Manyange and that the plot had remained unoccupied from 2005 after his cousin lost the suit in 2005. He averred that the plot remained unoccupied until 2011 when they fenced off part of the land including the suit land which is when the Plaintiff filed this suit after cutting off the fence and putting up some iron sheets on the incomplete structure on the land.
13. The 2nd Defendant denied that the Plaintiff had lived on the land for more than twelve years or that he had had physical use of the whole portion of the land measuring 2½ acres. The 2nd Defendant set out the facts that a claimant of adverse possession must establish which include the fact that the possession must be hostile and without the owner's consent; and that the occupation must be continuous without any interruption. The 2nd Defendant maintained that the Plaintiff's stay on a portion of the suit land was purely out of a purchaser's interest and that he had never used the whole portion of the suit land. The 2nd Defendant added that the Plaintiff had deponed that he was in occupation of the Suit land with the consent of the late Ouko hence he did not have the intention to dispossess the true owner of the land by adverse possession. He annexed photographs showing an incomplete structure erected on the suit land.
14. The Defendants relied on the Replying Affidavit sworn by the Plaintiff on 16/9/2011 in which he stated that his last payment for the suit land was when the late Ouko requested him to pay the legal fees in HCCC No. 1295 of 1991. He stated in the affidavit that he completed paying the purchase price and continued meeting the legal fees for the late Ouko. He further stated that if his claim to the land as purchaser did not succeed then he would be pursuing the alternative which is adverse possession of the land. The Defendants produced a copy of the

grant of letters of administration of the estate of the late Jason Ouko issued by the court on 22/5/2006.

15. The Plaintiff gave evidence and relied on his supporting affidavit whose contents are set out at paragraphs 2 to 10 above. He stated that he was claiming plot number 3 which became plot number 23 and then number 34. He stated that he was claiming the land both as a purchaser and through adverse possession. He stated that he was to buy the suit land for Kshs. 250,000/= and that he had the blessings of Jason Ouko to take possession of the land. He had erected structures on the land and also farmed on the land. According to him, the structures occupy more than an $\frac{1}{4}$ acre or about $\frac{1}{2}$ an acre.

16. He conceded there was no written instruction from Mr. Ouko for him to pay legal fees. He was among the persons who had challenged the grant of letters of administration issued to the Defendants. He stated on oath that he had paid the full purchase price. He claimed that the late Ouko received the payment of Kshs. 145,000/= from Kenya Pipeline Company Limited in 1993 because the easement took up part of his land measuring 0.232 acres and that he had agreed with the late Ouko that Mr. Ouko would receive the payment from Kenya Pipeline Company Limited. He maintained that the legal fees he paid to the advocates to defend the suits filed against him and the late Ouko over the suit land formed part of the purchase price. He confirmed that he had obtained an injunction restraining dealings on the suit land until the dispute was determined.

17. The 2nd Defendant gave evidence and stated that the late Jason Ouko was his father. The 1st Defendant was his step-mother and the 3rd Defendant was his brother. He stated that L.R. No. 3589/6 measuring 87.6 acres had one title and had not been subdivided. He confirmed that the estate of the late Ouko does not pay rates for the land. He also confirmed that there were vegetables grown on the suit land and that it was fenced and had trees on it. He maintained that the Plaintiff was not on the land at the time he filed this suit. He was emphatic that the Plaintiff does not leave on the suit land on which sits an incomplete structure.

18. Parties filed submissions which the court has considered. The issue for determination is whether the Plaintiff has a valid claim to the suit land either as a purchaser or as an adverse possessor. The Plaintiff filed submissions in which he urged he paid the agreed purchase price of Kshs. 250,000/= as follows: - Kshs. 40,000/= on 7/10/1989; Kshs. 145,000/= on 9/10/1993 and Kshs. 54,598/= as legal fees paid on behalf of the late Ouko, leaving a balance of Kshs. 10,402/= which he submitted that he was ready and willing to perform his part of contract of sale to facilitate the transfer of the suit land to his name. He also submitted that he had been paying rates for the suit land.

19. On the disparity of the plot numbers, the Plaintiff submitted that at some point the suit plot was referred to as plot number 23 or 34 due to the fact that subdivision plans had not been approved by the Director of Surveys. The Plaintiff further urged that since the sale transaction had not been terminated by the late Ouko or the Defendants, he deserved an order for specific performance subject to payment of the balance of the purchase price.

20. In the alternative, the Plaintiff submitted that upon payment of the sum of Kshs. 40,000/= to the late Ouko, he immediately took possession of the suit land and started developing it and living on it and that the late Ouko ceased to have possession of the suit land on 7/10/1989 when he took possession of the land. He maintained that he had been in continuous, uninterrupted, peaceful and open possession of the suit land since 7/10/1989. In addition, that he had erected permanent structures on the suit land and had crops, fruits, vegetables and mature trees on the land. The Plaintiff relied on the case of **Public Trustee v Wanduru Ndegwa [1984] eKLR** in which the court found that the adverse possession had not been broken. The court notes that in that case claimants to adverse possession were living on the land and had entered the land after paying the full purchase price.

21. The Defendants submitted that the Plaintiff had only proved payment of Kshs. 40,000/= on 7/10/1989 when he reached an agreement with the late Ouko and that the Plaintiff had failed to pay the balance of the purchase price 30 years later. The Defendants maintained that the Plaintiff had not adduced evidence of other payments of the purchase price and pointed out that Civil Suit No. 216 of 2001 was filed after Jason Ouko's death in 1996.

22. The Defendants made reference to the Judgement of Rasley J. in HCCC No. 216 of 2001 in which the judge stated that the Plaintiff had only paid Kshs. 40,000/= towards the purchase of the suit land from the late Ouko. The Defendants urged the court to ignore the allegations by the Plaintiff that the sum of Kshs. 145,000/= that Kenya Pipeline Company paid to the late Ouko was intended to offset the purchase price based on the fact that at no point did the Plaintiff plead the offsetting of the sum of Kshs. 135,000/=. The Defendant submitted that the map which the Plaintiff submitted in court showed that plot number 23 is L.R. No. 3589/55 and not L.R. No. 3589/34.

23. The Defendant submitted that there was no agreement showing that the Plaintiff had agreed with the late Ouko that he was to pay the legal fees on his behalf in HCCC No. 1295 of 1991 or that the legal fees paid would be offset from the purchase price. The Defendants added that the documents produced by the Plaintiff in relation to the payments made to Kivuitu & Company Advocates added up to Kshs. 14,000/=. The Defendants submitted that the Plaintiff's claim should fail noting that the Plaintiff stated in court that he was not willing to pay the balance of the purchase based on the current market rates for the land. The Defendants relied on the case of **Mungania v Imanyara [1985] eKLR** in which the court stated that if a party enters land under an agreement, his possession cannot be adverse to anyone's until the agreement is terminated or rescinded. The Defendants relied on the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** in which the court stated that any kind of permissive use such as that by a tenant, licensee or purchaser in possession is not hostile. The court stated that adverse possession rested on *de facto* use and occupation by an entrant and that the occupation by the intruder who pleads adverse possession must be without the true owner's permission and that if one is in possession as a result of permission given by the owner then he is not in adverse possession.

24. The Defendants relied on the case of **Wambugu v Njuguna [1983] KLR 172** in which the court held that where the claimant is a purchaser under a contract of sale of land it would be unfair to allow time to run in favour of a purchaser pending completion and that the possession could only become adverse once the contract was terminated. The court further held that where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is that the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant would succeed under adverse possession upon occupation for at least twelve years after such payment. The court reiterated that an order for specific performance cannot be granted to a purchase who has not performed his part of the bargain or has failed to show that he was at all times ready and willing to do so.

25. It is not in dispute that the Plaintiff agreed to purchase the suit land from the late Ouko and that he paid Kshs. 40,000/= on 7/10/1989 for the land even though they did not execute a formal agreement. This sale came about after the late Ouko had on 2/10/1989 terminated the contract for the sale of the same land to Mr. and Mrs. Daniel Sindiyo on the grounds that they had not honoured the agreement six years after its execution.

26. There was no evidence produced by the Plaintiff to show that he agreed with the late Ouko that he would pay the legal fees for the suit brought against them in relation to the suit land and that the legal fees the Plaintiff paid would defray the balance of the purchase price due from the Plaintiff.

27. The Plaintiff only brought up the issue of the payment made by Kenya Pipeline Company Limited to the late Ouko being part of the purchase price in 2019 yet the payment was made in 1993 whilst the late Ouko was still alive. No evidence was produced to show that the late Ouko received the compensation for the easement on the suit land on the Plaintiff's behalf. In the circumstances the court can only infer that the late Ouko received the compensation funds as the owner of the land and not on the Plaintiff's behalf. Had the Plaintiff been in possession of the land at that time then the compensation funds would have been paid to him and not to the late Ouko.

28. There is a contradiction on the amounts the Plaintiff claims he paid towards the purchase of the suit land. The Plaintiff testified that he had paid the full purchase price but in his written submissions admitted that there was an outstanding balance of Kshs. 10,402/= which he was willing to pay to get the land transferred to his name. A party must show that he is ready, willing and able to perform his obligations under an agreement for the sale of land for the court to grant the order for specific performance. The late Ouko terminated the earlier agreement where the purchasers had failed to pay the purchase price for six years. In this instance, the Plaintiff made no attempt to pay the balance of the purchase price for almost 30 years and is not therefore entitled to an order for specific performance of the agreement. The court is of the view that even if the parties did not provide for the time of payment, the contract of sale ought to have been performed and concluded within a reasonable time and that thirty years is an inordinately long period of time.

29. The late Ouko deponed at paragraph 19 of the affidavit filed in Nairobi HCCC No. 1295 of 1991 that the Plaintiff had his blessings to take possession of his land. This means the Plaintiff entered the suit land with the permission of the late Ouko and used the land for his farming activities with his authority. The Plaintiff did not lead evidence to show that he was in possession of the suit land prior to 20/6/2011 when he claims strangers invaded the suit land and pulled down his fence claiming that the same piece of land had been sold to them. The photographs produced in court depict an incomplete structure which is not habitable on the land and do not prove the Plaintiff's occupation of the suit land prior to 2011. In **Wambugu v Njuguna [1983] KLR 172**, the court found that that the possession by the claimant could only become adverse once the contract was terminated. The Plaintiff did not plead that the contract between him and the late Ouko was terminated for his claim to possession of the land to become adverse to that of the late Ouko or his estate.

30. The court finds that the Plaintiff has failed to prove his claim. It is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 9th day of October 2019

K. BOR

JUDGE

In the presence of:-

Mr. S. Ndege holding brief for Charles Tito for the Plaintiff

Ms. J. Gachomba for the Defendants

Mr. V. Owuor- Court Assistant