



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 962 OF 2013

ASHERA HOLDINGS LIMITED.....PLAINTIFF

VERSUS

JAMES NDEGWA THUKU.....DEFENDANT

CONSOLIDATED WITH

ELC NO. 1027 OF 2012 (O.S)

IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION

OVER

L. R. NO. 13330/548(ALSO KNOWN AS PLOT NOS. 119 AND 130 IN THOME FARMERS NO. 5 LIMITED

JAMES NDEGWA THUKU.....PLAINTIFF

VERSUS

JORETH LIMITED.....1ST DEFENDANT

ASHERA HOLDINGS LIMITED.....2ND DEFENDANT

JUDGEMENT

1. James Ndegwa Thugu filed **ELC No. 1027 of 2012 (O.S)** on 19/12/2012 seeking a declaration that he had acquired title by adverse possession to plot numbers 119 and 130 in Thome Farmers No. 5 Limited also known as L.R No. 1330/548 (“the Suit Property”), and that the registration of Joreth Limited and Ashera Holdings Limited as proprietors of this land should be cancelled and the register rectified with his name being entered as the proprietor of the Suit Property. Ashera Holdings Limited filed **ELC No. 962 of 2013** seeking to have James Ndegwa Thuku evicted from the Suit Property, which it claimed it had purchased from Joreth Limited and that James Ndegwa Thuku was a trespasser on the land. Ashera Holdings Limited sought mesne profits of Kshs. 200,000/= per month from 23/2/2012 until the Defendant moved out of the land. The two suits were consolidated.

2. Anne Mirigo, the wife of James Ndegwa Thuku gave evidence. She stated that her husband bought the suit plot from Mr. Arthur Magugu who was the director of Joreth Limited and Thome No. 5 in 1995 and that he paid the full purchase price. She did not have a copy of the agreement. He also paid the survey fees and was issued a ballot card and share certificate for plot numbers 119 and 130. She produced certificate number 1405 issued by Thome Farmers No. 5 Limited on 9/2/1995. She claimed they took possession in 1995 and started cultivating the land after fencing it. Her husband had three plots in Thome and got title deeds for two of the plots.

3. She stated that after making payment one would be given a share certificate by Thome Farmers Limited which was a land buying company, and told to await the title. She stated that their worker lived on the land. She stated that they had developed the plot extensively and had let out part of the land as a garage to a Mr. Ochieng who she stated had been on the land for more than 15 years. She produced the permit issued by the City Council of Nairobi for the garage for 2012 and the supply contract for electricity which the court notes was issued to Joel Ochieng Olondo. She stated that plot number 548 encompassed two plots being 119 and 130. She confirmed that they lived on another plot in Thome. Her husband was a friend and relative of the late Mr. Magugu. She stated that there was a house on the plot where their worker lived and that they farmed on the land. Electricity was connected to the disputed plots in 2011. She stated that they used the share certificate in getting water and electricity connected to the suit plot. She stated that strangers went to the Suit Property in 2012 and asked their tenant to vacate the premises.

4. Joseph Wangai Wamai gave evidence. He stated that he was a director of the 2nd Defendant. He learned in early 2011 that the Suit Property was up for sale. He viewed the land and noticed some temporary structures on a small portion of the land and was informed that they were constructed by a trespasser who was operating a garage from there. He entered into a sale agreement with the 1st Defendant on 26/7/2011 for the sale of the Suit Property and the 2nd Defendant was registered as proprietor of the lease on 30/12/2011. He produced copies of the sale agreement that Joreth Limited entered into with Ashera Limited and a copy of the certificate of title showing the suit land was transferred to Ashera Limited on 30/12/2011 for Kshs. 1,800,000/=. He stated that he did a search and visited the land before purchasing it. Joreth Limited informed him that there was a trespasser on the land and undertook to give him vacant possession. He not taken possession of the land. Joreth Limited wrote a letter to the trespasser to vacate the land. Apart from the small portion of the Suit Property occupied by the garage, the rest of the land was vacant and was not under cultivation when he visited the land. He did not engage the trespasser who was on the land when he went to view it. He stated that he paid Kshs. 16,000,000 to Joreth Limited and that he had not made any attempt to recover the money since he believed that he would still get the property.

5. Peter Mungai gave evidence for the 1st Defendant which he stated was the registered owner of L.R No. 1330 which resulted from the amalgamation of L.R. No. 4920/3 and 4921/3 both of which belonged to the 1st Defendant from the 1950s. L.R. No. 1330 was subdivided into several plots including L.R. No. 1330/548. He stated that this plot was not sold to anyone prior to it being sold to the 2nd Defendant. Further, that only the directors of Joreth Limited had the capacity to transfer this property to anyone else. He stated that Joreth Limited previously had problems with illegal occupation of its land and it filed **HCCC No. 6206 of 1992** against persons who had trespassed on L.R. No. 1330. That suit was determined in 2002 through a consent order vide which the illegal occupants purchased the plot from Joreth Limited at an agreed price. He maintained that James Thuku did not purchase the plot from Joreth Limited and that the plot was sold to Ashera Holdings Limited. He added that James Thuku had not established any right to the Suit Property and yet he continued to occupy the land to the detriment of the Defendant and that he refused to vacate the land. He maintained that Arthur K. Magugu or Thome Farmers No. 5 Limited could not pass a good title since they were not the registered owners of the land. He produced copies of the pleadings in HCCC No. 6206 of 1992 together with the proceedings. He confirmed that the 1st Defendant did not file a response to the Plaintiff's originating summons. He conceded that there was a garage on the suit land and that there were some structures on the land. He stated that Joel Ochieng was the one on the land carrying on the garage business in the structures that are at one end of the suit land.

6. Parties filed submissions which the court has considered. The issue for determination is whether the Plaintiff has established a claim adverse to the possession of the 2nd Defendant over the suit land or whether the court should issue the orders sought in ELC No. 962 of 2013.

7. The Plaintiff submitted that he had established that he occupied the Suit Property from 1995 without the permission of the Defendants and added that the 2nd Defendant's witness confirmed that there were some structures on the land and a garage being operated on the land when he went to view the land before purchasing it. The Plaintiff relied on the photographs showing it was utilising most of the land and had rented out part of it to Joel Ochieng who is the Plaintiff's tenant. The Plaintiff submitted that this possession of the Suit Property was adequate in continuity in publicity and extent that was adverse to the proprietor. The Plaintiff maintained that he had been on the land for more than 12 years since 1995. Further, that the change of ownership of land which is occupied by another person under adverse possession does not interrupt that person's adverse possession.

8. The 1st Defendant submitted that the documents the Plaintiff relied on to claim occupation of the land were in the name of Joel Ochieng Olondo who was not called to corroborate the Plaintiff's evidence that he had been a tenant of the Plaintiff since 1995. Further, that the documents the Plaintiff relied on were issued in 2011 and that there was nothing to show the Plaintiff was in occupation of the land prior to 2011. The 1st Defendant contended that the garage occupied a small portion of the land and the Plaintiff had not brought evidence to show that he was occupying the entire Suit Property.

9. The 1st Defendant urged that the facts essential to adverse possession must be established by clear and satisfactory evidence the presumption being in favour of a true owner for the full period necessary to divest him of title. The 1st Defendant added that the intention to dispossess the registered owner of the land was an important ingredient to establish adverse possession and that the Plaintiff who claimed to have bought the land in 1995 could not have had the intention of dispossessing the 1st Defendant of the land through hostile means but was therefore acting under the mistaken assumption of sale. The 1st Defendant maintained that the Plaintiff cannot be said to have been factual occupation of the land.

10. The 2nd Defendant submitted that the Plaintiff was not in possession of the Suit Property and that it was Joel Ochieng Olondo who was in possession of the land and running a garage on it. It submitted that the Plaintiff had not at any point taken actual, exclusive, open, notorious and continuous possession of the property and contended that the Plaintiff had not tendered credible evidence to show that it had been in occupation of the land for twelve years prior to filing suit.

11. The Plaintiff claimed that he purchased the Suit Property in 1995 and also acquired two other plots in Thome, which he took possession of and was residing in one of the plots. He did not produce evidence to confirm that he purchased the plot in 1995. No explanation was given as to why he did not process the title over the Suit Property from 1995. There is no evidence of the Plaintiff having been in occupation of the Suit Property from 1995 until 2013 when he filed this claim for adverse possession. The documents the Plaintiff relied on show that Joel Ochieng Olondo was running a garage on the land in 2012. No evidence was led to confirm that Joel Ochieng Olondo was indeed the Plaintiff's tenant. The Plaintiff failed to prove that he was in actual, exclusive, open, notorious and continuous possession of the Suit Property for over twelve years.

12. Ashera Holdings Limited has proved on a balance of probabilities that it entered into an agreement with Joreth Limited for the purchase of the Suit Property on 26/7/2011 and the plot was transferred to its name on 30/12/2011.

13. The Plaintiff in ELC No. 1027 of 2012 (O.S) failed to prove his case on a balance of probabilities, it is dismissed with costs to the 1st Defendant. The court grants prayer (a) of the plaint in ELC Case No. 962 of 2013. The Defendant's counterclaim in ELC Case No. 962 of 2013 is dismissed. Each party will bear its costs in ELC Case No. 962 of 2013.

Dated and delivered at Nairobi this 13th day of December 2019

K.BOR

JUDGE

In the presence of:-

Mr. S. Kingara for the Plaintiff

Ms. B. Olembo holding brief for Mrs. Koech for the 1st Defendant

Ms. C. Mugure holding brief for D. Mworia for the 2nd Defendant

Mr. V. Owuor- Court Assistant