



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 58 OF 2010

JOEL CHEPKWONY.....PLAINTIFF

VERSUS

ENNES SHISIALI MALENYA.....DEFENDANT

JUDGMENT

Introduction

1. The plaint dated 5/7/2010 in this matter seeks a declaration that the defendant is a trespasser in Land Parcel No. **Trans-Nzoia/Sinyerere/Kipsaina Block 8/Kesogon/305** hereinafter called the “suit land” and that an eviction order do issue against the defendant.

The Plaintiff's Case

2. According to the plaint the plaintiff is the registered owner of the suit land. He intended to sell the defendant 2 acres thereof together with all the developments thereon but the sale transaction fell through for the reason that the defendant failed to clear the balance for the developments as earlier agreed. Consequently no Land Control Board Consent was obtained in respect of the transaction but the defendant has continued being in occupation of the suit land which the plaintiff deems unlawful hence the suit.

The Defendants' Defence

3. The defence states that there was an agreement between the parties herein vide which 2 acres out of the suit land were to be sold to the defendant for the sum of Kshs.70,000/= per acre. The defendant paid Kshs.100,000/= and took possession thereof leaving a balance of Kshs.40,000/= which was paid on 6/7/1997. Subsequently a new agreement was made by the parties by which she paid the plaintiff Kshs.95,000/= for the remaining 2 acres, leaving a balance of Kshs.40,000/= whose payment was subject to the plaintiff obtaining consent from the Land Control Board which consent the defendant admits was not obtained.

4. The defendant avers that the balance of Kshs.40,000/= was not paid due the plaintiff's breach of the agreement. She also pleads that she has been in occupation of the suit property for a period exceeding 12 years and that this suit is time barred and that she is entitled to the suit land by way of adverse possession. In the alternative she claims a refund of Kshs.235,000/= together with interest at the rate of 12% p.a with effect from 17/5/1999 to date.

5. The defendant's defence was supposed to be amended Pursuant to order of this court issued on 14/11/2013, to include a counterclaim but it never was. Legal representation of the defendant in this matter changed a number of times but no counsel ever filed the amended defence which would have included an expressly pleaded counterclaim.

The Plaintiff's Reply to the Defence

6. The plaintiff's reply to the defence denies that the defendant took possession in 1997 or that the second agreement was made between the two or that there was any agreement that was contingent on the consent of the Land Control Board. He accuses the defendant of breaching the agreement for the two acres. The plaintiff denies the claim for adverse possession.

The Plaintiff's Evidence

7. The plaintiff gave evidence on 28/10/2015. He adopted his statement dated 25/1/2012 filed in court on 27/1/2012 as his evidence in chief. In respect of the first transaction which he acknowledges in his plaint, he averred that the defendant paid Kshs. 100,000/= and failed to clear the Kshs.40,000/= balance for around 6 months. When the defendant finally came to clear the balance, the plaintiff told her that he had decided that she would pay Kshs.140,000/= per acre. The parties then entered into a fresh agreement on 27/12/1997 which he produced as P.

Exhibit 2. The defendant paid the plaintiff Kshs.40,000/= after signing of the 2nd agreement. According to the plaintiff the balance outstanding according to this new agreement was Kshs.140,000/=.

8. On 8/4/1998, the parties entered into a third agreement which the plaintiff produced as P. Exhibit 3 and the defendant paid the plaintiff Kshs.80,000/= leaving a balance of Kshs.60,000/=. The plaintiff testified that the agreement dated 8/4/1998 was subject to agreement on the developments on the land, failure to which the agreement would be rescinded. The plaintiff named the developments as a house, a barbed wire fence and trees.

9. On 17/5/1991 the defendant paid the plaintiff Kshs.15,000/= leaving a balance of Kshs.45,000/=. The plaintiff avers that he only sold 2 acres out of his 4 acres and that he still has his original title to the entire land and that the defendant took possession of the land in 1999 and constructed structures on the two acres. The plaintiff expressly denies that the defendant bought the entire parcel. The plaintiff avers that he does not want the balance of the purchase price.

The Defendant's Evidence

10. The defendant testified on 27/10/2016. She reiterated the contents of her defence. She averred that she cleared the balance in respect of the first agreement in 1999, then she again bought 2 acres at Kshs.140,000/= vide the agreement marked P. Exhibit 4 and paid Kshs.235,000/= leaving a balance of Kshs.45,000/= in respect of the last two acres. She averred that she has been in occupation of the land since 1997 and 1999 but the plaintiff has refused to transfer the land into her name. The defendant denied the veracity of the agreements produced as P. Exhibit 2 and P. Exhibit 3.

11. The plaintiff filed final submissions in the matter on 31/10/2017 and the defendant on 16/11/2017. The plaintiff cited the cases of *Nakuru CA No. 231 of 1999 - Njuguna Ndatho -vs- Maasai Itumo Mateo & Nguli Kyalo* and *Meru HCCC No. 283 of 1990 - Gabriel Mbui -vs- Mukinda Maranya*. The defendant cited the following cases: *CA No. 19 of 2005 - Elijah Kipkorir Barmalel & Another -vs- John Kiplagat Chemweno & 3 Others: Civil Appeal No. 10 of 1982 - Sisto Wambugu -vs- Kamau Njuguna 1983 eKLR, [2001]EA1*.

12. I have considered those submissions and the cases cited as well as the pleadings and the evidence in the matter. In my view the issues arising for determination in this suit are as follows:-

(1) How many agreements did the parties enter into and for the sale of how much land?

(2) Who breached the agreements?

(3) Are the agreements null and want of Land Control Board Consent?

(4) Is the defendant entitled to the title to land by way of adverse possession?

(5) What orders should issue?

(1) How many agreements did the parties enter into and for how much land?

13. The first and the fourth agreements are not disputed by both parties. The defendant disputes the second and third agreements. It is therefore incumbent upon the plaintiff to prove that the second and third agreements that is P. Exhibit 2 and P. Exhibit 3 were made between the parties.

14. P. Exhibit 1 is an agreement dated 2/4/1997 for sale of 2 acres for Kshs. 70,000/= per acre. According to that agreement the Kshs.40,000/= balance was to be repaid in May of an unspecified year. The agreement dated 17/5/1999 (P Exhibit 4) acknowledges payment by the defendant to the plaintiff the sum of Kshs.235,000/= in total and a balance of Kshs.45,000/= outstanding which would be paid by the end of the year 1999.

15. On the other hand the agreement dated 27/12/1997 (P. Exhibit 2) seems to acknowledge delay on the part of the defendant in paying the balance. By that agreement the defendant is said to have agreed to pay an enhanced price of Kshs.140,000/= per acre. The agreement acknowledges payment of Kshs.40,000/= more on the date it was made and sets out some further facts as follows: that the land bought was 2 acres, and the full purchase price is Kshs.280,000/= which she would pay "later".

16. P. Exhibit 3 is the agreement dated 8/4/1998 which the plaintiff also denies. It states that she had paid Kshs.80,000/= being deposit for 2 acres of land that was, going by the agreement's contents, being sold at Kshs.70,000/= per acre. The said agreement refers to developments which, according to it, would be discussed and agreed on later on, in default of which the agreement would be rescinded.

17. I find it necessary to refer to the parties' pleadings to verify which agreements were entered into by the parties in this suit. The plaintiff speaks of *one* agreement. The plaintiff's reply to defence insists there was only *one* agreement between the parties. The defence speaks of *two* agreements. Of the two parties, I find the defendant's evidence to be more consistent, for at the hearing the defendant, true to the defence she filed, identified and only acknowledged "P. Exhibit 1" and "Exhibit 4" as the true agreements the parties entered into.

18. This court is inclined to believe as true, without further proof only the documents that the parties have agreed on and that applies to P. Exhibit 1 and P. Exhibit 4.

19. As to P. Exhibit 2, the court has to look out for indicators as to its genuineness. No reminders have been exhibited as having been sent to

the defendant to clear the balance; there is also no proper account of how the land price doubled in less than seven months to warrant a demand for Kshs.140,000/= per acre, and if that was meant to be a penalty to the defendant, then there is no evidence by the plaintiff outside of the contents of P. Exhibit 2 itself, to demonstrate the plaintiff acceded to a demand to enhance the purchase price to Kshs.140,000/= per acre. Besides the contents of that agreement do not recite the contents of the agreement dated 2/4/1997 at all and I find there to be no connection between the two.

20. Characteristically of the agreements dated 27/12/1997 and 8/4/1998, the obligations therein are left open ended without any specific dates assigned thereto.

21. If the agreement marked P. Exhibit 3 was in respect of the land sold on 2/4/1997 and it is dated 8/4/1998, it begs the question as to why, four months after P. Exhibit 2 was allegedly made for the price of Kshs. 280,000/= as the total consideration for the two acres, P Exhibit 3 still sticks to the price of Kshs. 70,000/= per acre. This is noteworthy because the plaintiff has insisted that by 27/12/1997 the defendant had agreed to pay Kshs.140,000/= per acre for the land sold on 2/4/1997.

22. I am inclined to disbelieve and subsequently remove P. Exhibit 2 from this equation and deal with P. Exhibit 1 and P. Exhibit 4. I must, even as I depart from P. Exhibit 2 observe that going by the organization, content language and spelling, the apparent general hallmarks of sophistication uncommon to the other exhibits produced in this case by the plaintiff, P. Exhibit 2 appears to have been made by a more enlightened hand and mind and most probably outside of the environment in which the rest of the documents, that is, P. Exhibit 1, P. Exhibit 3 and P. Exhibit 4 were made.

23. Having rejected the said document as evidence in this case, I proceed to note that if there was only a balance of Kshs.40,000/= by 2/4/1997 there would be no reason for the defendant to agree to pay more money on 17/5/1999 unless there was another agreement. That agreement in my view, must be the one dated 17/5/1999, two years after the first agreement.

24. I do not find it plausible that two years down the line after their first engagement with the plaintiff the defendant would be paying Kshs.235,000/= in respect of the first two acres only. There must have been more to it. The explanation is at the foot thereof where it very casually refers to P. Exhibit 3.

25. P. Exhibit 3 speaks of a "deposit" of Kshs.80,000/= being paid by the defendant to the plaintiff to secure 2 acres for Kshs. 70,000/= each. It beats logic and reason as to why the plaintiff would, after entering into an agreement for an enhanced consideration of Kshs.140,000/= per acres on 27/12/1997, revert back to the old price of Kshs.70,000/= per acre in P. Exhibit 3, if it was in respect of land sold through P. Exhibit 1 on 2/4/1997.

26. The only explanation here, going by the interplay between the three documents (P. Exhibit 1, P. Exhibit 3 and P. Exhibit 4) is that the defendant and the plaintiff did enter into the agreement for sale of the additional two acres out of the plaintiff's land vide the agreement dated 8/4/1998, otherwise the term "deposit" would not have been used in that document.

27. Consequently, I find that the two parties herein entered into three agreements. My last quip as I state categorically that I reject P. Exhibit 2 as a forgery, is that it is not even recognized in the summary contained at the foot of P. Exhibit 4 which only recognizes P. Exhibit 1 and P. Exhibit 3.

(2) Who breached the agreements?

28. The plaintiff states that the defendant failed to secure payment of the balance of Kshs.40,000/= hence she was in breach of the first agreement made vide P. Exhibit 1. The defendant avers that the plaintiff failed to obtain the consent of the Land Control Board hence he was in breach.

29. As stated before, the agreement dated 2/4/1997 does not stipulate the proper date for payment of the balance of the purchase price so as to enable the plaintiff to rely on it in his claim of breach by the defendant. It merely states that the balance would be paid in "the month of May" whether it was May, 1999 or May, 2018, is anybody's guess.

30. His claim of breach is therefore unfounded. Besides, if there was breach, why did he produce evidence in court showing he conceded to further agreement with the defendant. On the other hand, though I am not certain that the defendant knew of the legal timelines of **Section 6** of the **Land Control Act** by that time, the plaintiff would be obliged to apply for consent of the Land Control Board within 6 months of the agreement.

31. In truth either party was entitled to make that application but in this case the burden was on the plaintiff, and therefore, scrutiny of this court is riveted on the plaintiff all the more due to his allegations that the defendant was in breach.

32. The question would be whether the plaintiff's hands are clean and this court finds that he never played his role of applying for the consent which would have persuaded this court that his hands were clean and hence shift the burden to the defendant to prove that he himself was not in breach. This court finds that the plaintiff was in breach of the agreements dated 2/4/1997, 8/4/1998 and 17/9/1999.

33. A further observation as I conclude on this point is that the plaintiff's agreements subsequent to P. Exhibit 1 are a vote of confidence in the defendant and not the vice versa.

(3) Are the agreements null and void for want of Land Control Board Consents?

34. It is now 20 years since the defendant bought the first two acres and about 18 years since she purchased the two additional acres. She has

testified that she has been in occupation of the land since the purchase were made in 1998 and 1999 respectively. It is acknowledge by both parties that no consents of the Land Control Board were obtained. **Section 6** of the **Land Control Board Act** states and follows:-

“(6) (1) each of the following transactions that is to say-

(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....

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

Section 7 states as follows:-

“7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

I find that the agreements are not enforceable as they are in breach of the provisions of the Land Control Act.

(4) Whether the defendant has right to title to the land by way of adverse possession?

35. The defendant testified that she entered into occupation of the two acres of land first in the year 1997 after the first agreement and after the second agreement she entered into occupation of the remaining two acres.

36. The plaintiff did not bring any evidence to controvert this and the court will accept the defendant’s evidence as truthful for it is backed by the dates of the agreements the plaintiff himself produced in court.

37. From the date of the first agreement till July, 2010 when the suit was filed in a period of more than 12 years. From the date of the second agreement – even if this court computes the time from the date of the last agreement (P. Exhibit 4) is also a period in excess of 12 years.

38. Adverse possession is defined as the method of gaining legal title to real property by the actual open, hostile and continuous possession of it to the exclusion of its owner for the period stated by the law which in Kenya is 12 years as stated in section 7 of the Limitations of Actions Act Cap. 22 which states as follows verbatim:-

“7. 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 some person through whom he claims, to that person.”

39. The plaintiff did not come to this court until 12 years elapsed since the date of first occupation of the land by the defendant as observed above. His claim is therefore extinguished by the provisions of **Section 7** of the **Act Cap 22**.

40. The defendant on the other hand has been on the land for a period exceeding 12 years since she bought the land. The question arises then whether failure to amend the defence to express include a counterclaim renders her claim for adverse possession under the first defence to be invalid.

41. In my view, the defendant knew that she was seeking title by way of adverse possession since the day she filed her original defence in this matter and any amendment may have only been arrived at defining the issues in a more erudite manner.

42. Though refined pleadings are necessary to make the work of the court and of a party’s adversaries easier in defining the real issues in controversy where the document filed by a litigant leaves no doubt as to what kind of claim the litigant is making, the court should not ignore it.

43. In this case the court will not ignore the claim for adverse possession merely because the defence was not amended to read “amended defence and counterclaim” as intended. It may be that the defendant left issues of crafting pleadings into the proper form to her legal experts, the advocates who represented her and who, one after the other, let her down and departed from the scene without accomplishing a task as simple as filing an amended defence and counterclaim as earlier ordered by the court. I note that paragraphs 7 and 8 of the plaintiff’s reply to defence dated 12/8/2010 state as follows:

“7. It is denied that the defendant has resided on the land for any duration as alleged, and the defendant is put to strict proof of the allegation.

8. It is denied that the defendant has been in continuous or uninterrupted occupation of the said property, and it is further denied that she is entitled to be registered as the owner of the property by way of adverse possession.”

44. This court therefore deems the pleadings at paragraphs 8 and 9 of the defence as sufficient for the purpose. In view of the pleading by the plaintiff as cited in the foregoing paragraph, denying the plaintiff this remedy for the sole faults of her counsel is to me an over-reliance on formalities and technicality which is discouraged by **Article 159** of the Constitution. Substantive justice is to be encouraged. To sum up this

view I will refer to the case of **Mumo Matemu -vs- Trusted Society** of Huma Rights Alliance & 5 Others [2013] eKLR, where it was stated as follows in paragraph 41 and 42. (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point. (42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

45. In this case I therefore find that the parties were well aware of each other's case from the pleadings. Consequently, I find that the defendant has established her claim for title by way of adverse possession on a balance of probabilities.

(5) What orders should issue?

46. The upshot of the above is that I must dismiss the plaintiff suit. I hereby dismiss the plaintiff's suit and I also find that the defendant is entitled to be registered as the proprietor of the land comprised in **L.R. No. Trans-Nzoia/Sinyerere/Kipsaina Block 8/Kesogon/305** by way of adverse possession. I order that she be so registered.

Dated, signed and delivered at Kitale on this **21st** day of **March, 2018**.

MWANGI NJOROGE

JUDGE

21/3/2018

Coram:

Before - Mwangi Njoroge - Judge

Court Assistant - Picoty

Ms. Cheloti holding brief for Murgor for plaintiff

Mr. Bungei for defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

21/3/2018