



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. NO. 48 OF 2014 (OS)

ALICE MUHONJA KIRAMBI.....PLAINTIFF

VERSUS

REDEMPTA SUSAN CHETAMBE.....1ST DEFENDANT

BARCLAYS BANK OF KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Originating Summons dated 3/11/2014 in this matter seeks the following orders:

(A) That this Honourable Court be pleased to declare the applicant to have acquired and become entitled by adverse possession all that parcel of land known as Title No. Trans-Nzoia/Liyavo/187 registered under the Registered Land Act Cap 300 (now repealed) situate in Kitale, Trans-Nzoia.

(B) That said plaintiff/applicant be and is hereby registered as the proprietor of the said parcel of land known as Title No. Trans-Nzoia/Liyavo/187 in place of the present registered owner Redempta Susan Chitambe, the defendant herein.

(C) The defendant be and is hereby ordered to liquidate the amount due to Barclays Bank of Kenya on account of the charge registered as entry No.1 on the encumbrance section dated 17th November, 1999.

(D) An order vesting rights in respect to Title No. Trans-Nzoia/Liyavo/187 in the plaintiff in the place of the defendant.

(E) Costs of this Originating Summons be awarded to the plaintiff/applicant.

2. The Originating Summons is supported by the sworn affidavit of the plaintiff, also dated 3/11/2014, a further supplementary affidavit sworn by the plaintiff on 29/6/2015, the supplementary affidavit of **Nicholas Odera Munoko** sworn on 29/6/2015, the supplementary affidavit of **Rutto Jane Jepkering** sworn on 28/11/2016 and the affidavit of the plaintiff sworn on 27/1/2017.

3. The 1st defendant opposed the Originating Summons by filing her sworn affidavit dated 18/5/2015 and a further replying affidavit dated 27/6/2016.

The Plaintiff's Case

4. The plaintiff's case is that in 1996 she and the 1st defendant agreed on the sale of the 1st defendant's **LR No. Trans-Nzoia/Liyavo/187** measuring **4.0 Ha** or thereabouts to the plaintiff. The title documents were then held by the District Land Adjudication and Settlement Officer Trans-Nzoia pending clearance of some dues owed by the defendant. However the defendant executed a transfer and all the relevant documents in the plaintiff's favour and they were submitted to the District Land Adjudication and Settlement Officer. It then transpired that the title deed could not be traced at the Registry, which delayed the transfer to the plaintiff. In the meantime the plaintiff continued to occupy the land from the year of taking possession, which she identifies as 1996, thereby carrying on small scale farming. The plaintiff also lodged a caution against the title on 22/5/2014, claiming interest as a purchaser.

5. The plaintiff avers that she now believes it to be true, based on the advice of her advocates, that this court can order the vesting of her interests in the land and the registration of the transfer in her favour. The plaintiff pleads that the defendant's title to the land was extinguished in the year 2008 following the plaintiff's continuous, uninterrupted adverse occupation of the suit land. The plaintiff avers that the suit land was completely fallow by the time the defendant handed her vacant possession and she immediately fenced it and constructed a house thereon and occupied the same. The two parties appeared before one **Fred M. Wanyonyi**, a Lands Adjudication and Settlement Officer on 6/6/1996, who prepared the transfer which they executed, with the said Fred M. Wanyonyi appending his signature as a witness. These documents were then forwarded to Kitale District Land Adjudication and Settlement Officer. At the Kitale Lands Office the

documents could not be processed as it transpired the defendant owed Kshs.12,000/= to the Settlement Fund Trustees. The consent to transfer could also not be obtained. At this point the defendant became quite unco-operative and insisted that she be given a copy of the agreement for sale which, according to the plaintiff, had been lost earlier. It was at this point that the plaintiff suspected that the defendant knew that the plaintiff did not have the agreement for sale.

The Defendant's Defence

6. In her reply the defendant avers that she agreed to sell her suit land to the plaintiff and gave the plaintiff a written offer valid for one month on 26/4/1995 for the sale of the land at Kshs.680,000/=. Kshs.340,000/= was to be the down payment while the balance would be paid upon issuance of a Land Control Board Consent. The offer lapsed after the plaintiff failed to take it up during the one month period. However the plaintiff approached her again between 1995-2000 and offered to lease the suit land which the defendant agreed on condition the plaintiff paid her some money. She accepts that she received at least Kshs.300,000/= from the plaintiff under this lease arrangement, which she avers was paid in little instalments.

7. The defendant also points to the legal charge made to the Barclays Bank Ltd to secure Kshs.600,000/= in her favour as evidence that she still claimed the land and she was shocked when between the period from 2000 to date, the plaintiff sought to claim ownership thereof.

8. She further says there was an attempted amicable settlement to the matter in the year 2003 and 2006 when the plaintiff raised the matter before an organization that both parties belong to and through the defendant's family members but the same never bore fruit. She avers that she never sold the suit land at all and further, that the issues have always been alive and the plaintiff's claim of adverse possession is farfetched. However it is noteworthy from paragraph 25 of the defendant's replying affidavit that the parties engagements and communications left it open for the plaintiff to purchase the land.

Hearing

9. The suit proceeded at first on 14/3/2017 when the plaintiff and his two witnesses gave evidence. Though a counsel, Mr. Karani was present in court for the defendant that day he declined to cross examine the plaintiff or any of the witnesses that day and at the end of the hearing this court ordered that final submissions be filed by 10/4/2017. The plaintiff's counsel filed submissions but the defendant's counsel filed an application which led to the written consent of the parties dated 17/8/2017 and filed on 21/8/2017 vide which the application was allowed, paving the way for a *de novo* hearing which started on 6/2/2018.

Evidence of the Parties

The Plaintiff's Evidence

10. The plaintiff testified in this suit and adopted the contents of her filed affidavits which I have analysed as above. The plaintiff insisted that she bought the land for Kshs.680,000/= between 1995-1996. However the sale agreement was stolen from her drawer and she could not therefore produce it. She testified that she was taken to the land by the defendant, and that she took possession thereof and developed it by planting trees, building a house and digging a well as well as fencing it with barbed wire. She found a family thereon who had been caring for the land on behalf of the defendant and took up their son, Nicholas, on a salary to continue doing so. She kept contact with the defendant even after taking possession. She testifies that the latter has never been on the land after that and there has never been any physical challenge to the plaintiff's occupation thereof. The plaintiff testified that at the time of the execution and forwarding of the transfer to Kitale Land Adjudication and Settlement Officer, the defendant had already executed an application form for Land Control Board Consent. She concluded by stating that she wants it to be declared by this court that she is entitled to the land by virtue of adverse possession.

11. **PW2, Nicholas Odera Munoko** testified in favour of the plaintiff. He adopted the contents of his sworn affidavit filed in court on 6/7/2015. He testified that his father had leased the land from the defendant in 1995. Later, after his father died he got to know that the land was on sale and the defendant brought the plaintiff to inspect the land. The defendant told his mother that the plaintiff wanted to buy the land. Later on the defendant and the plaintiff came back and told PW1's mother that the plaintiff had bought the land. That was in 1995. According to PW2 the plaintiff took possession of the land, retained him to care for it and fenced it. He stated that the defendant has never returned to the land.

12. **PW3 Rutto Jane Kipkering** adopted her sworn affidavit filed in court on 28/11/2016 as her evidence. She stated that her plot **Trans-Nzoia/Liyavo/135** is just across the road from **Plot No. Trans-Nzoia/Liyavo/187**. According to her the land across the road belongs to the plaintiff whom she says has been on the land for about 20 years. She does not know the defendant and has never seen her except in court during the hearing of this case. She testified that she knows PW2 and that he has been there on the land since he was a small boy. The plaintiff, according to PW3, came to the land when PW2's father was alive.

The Defendant's Evidence

13. The defendant alone testified in her case on 8/3/2018. She adopted her replying affidavits dated 18/5/2015 and 27/9/2016 respectively as her evidence-in-chief and the exhibits thereto annexed as defence exhibits. She denied selling the land to the plaintiff. She denied ever signing the transfer. She also denied signing any application for consent of the Land Control Board or attending any Land Control Board meeting in 2014 or earlier regarding the suit land. She however admitted in cross examination that she and the plaintiff are best of friends and are members of an organization called Soroptimists International. She admitted that she at one time desired to sell her land and that she made an offer to the plaintiff which lapsed. She also stated that she leased the land to the plaintiff for **Kshs.2,000/= per acre in 1996**, but there was no written lease. She denied that she had anything to do with the disappearance of the agreement with the plaintiff. She specifically denied having taken it. She admitted that though she had known of the documents produced by the plaintiff and that she was disputing the signatures thereon, she has never reported those signatures for further scrutiny. She admitted to introducing the plaintiff to PW2. She testified that the problem between her and the plaintiff arose when the Kshs.300,000/= paid by the plaintiff arose and the plaintiff claimed that the defendant had sold her the land. She insisted that she never abandoned the land and that she always had a caretaker on the

land.

Submissions

14. The plaintiff filed her final submissions on 16/4/2018 and the defendant on 19/4/2018.

Determination

15. It is clear now that the following issues are settled by the evidence of the parties: That the plaintiff and the defendants were great friends who trusted one another deeply; that there was either a lease or a sale transaction between them over **LR. No. Trans-Nzoia/Liyavo/187**. That the plaintiff has been on the land for a duration of over twenty one years now, and had been in occupation of the land for about 18 years by the time she filed this suit. That the land is already registered in the name of the defendant.

16. The following are the issues that arise for determination in this matter:-

(1) Has the plaintiff proved the necessary ingredients to warrant the grant of a prayer for her registration as proprietor by way of adverse possession?

(2) What orders should issue?

(3) Who should pay costs?

(1) Satisfactory proof of ingredients of adverse possession

17. In considering whether a plaintiff has proved adverse possession, the court must consider whether the plaintiff has taken possession of the land in question, asserted rights over it in a manner adverse to the title of the owner thereof, and been in open continuous possession thereof for a minimum of 12 years. Such occupation must be open or public, without force and without secrecy. I agree with the plaintiff that **Section 28(h) of the Land Registration Act 2012** specifies that one of the overriding interests against title to land is any right acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription and that Section 7(1) of the Land Act 2012 recognizes that title to land may be acquired by any manner prescribed by statute. Again, **Section 7 of the Limitation of Actions Act** states as follow:-

“An action may not be brought by any person to recover land after the end of twelve (12) 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”.

18. The plaintiff submits that the right of action crystallized in the year 2008, for she had been in occupation thereof since 1996. I note that even if the defendant disputes this date of entry into the land, she does not give her own version of when the entry occurred. This court is therefore of the view that the plaintiff took possession of the land in the year 1996. There is ample evidence to that effect. The evidence of the plaintiff and that of her two witnesses corroborates each other that the plaintiff had been in occupation of the land for a minimum of 18 years by the time of filing this suit. Indeed the defendant's own evidence is that her letter of offer was made to the plaintiff in the year 1996 but the plaintiff never took up the offer and it lapsed. The defendant admits to having introduced the plaintiff to PW2's family only as a "friend". It is therefore clear that PW2 and PW3 stated that the event of the plaintiff coming to the land took place in or about the year 1995, which is the date in the letter of offer, which the plaintiff testified that she orally accepted and paid for the land and took up possession thereof. I have no doubt therefore that the plaintiff has been in occupation of the land for a duration of more than 12 years.

19. The next question that arises is when time began to run for the purposes of acquisition of prescriptive rights in this case. The plaintiff avers that she came onto the possession of the land by virtue of an agreement for sale with the defendant. The defendant on the other hand testified that there was no such agreement. This court is faced with a countdown whereby if the plaintiff's word is believed then the only proper position in law is to consider that time started running the moment that agreement lapsed, or was rescinded, or ought to have been deemed as rescinded. In this case the agreement was not produced, for the plaintiff's testimony is that it was lost. However, if the defendant's evidence is to be believed that the letter of offer lapsed in 1995 and the plaintiff entered into possession of the land after that letter of offer lapsed, it cannot be considered that the plaintiff entered that land by virtue of the agreement, and indeed the plaintiff's prayers are that she seeks title by way of adverse possession and not performance of the agreement. It is the defendant's version that the plaintiff took possession of the suit land by way of a lease agreement, yet no lease agreement or evidence of periodic payments on that lease was produced by the defendant. This court does not have a basis for concluding that there was such a lease arrangement between the parties. On the other hand I find that the position that the plaintiff paid **Kshs.340,000/=** on **26/4/1995** and **Kshs.280,000/=** on **12/7/1995** to be evidence that is credible. That **Kshs.280,000** was the final sum in payment of the consideration. There was thus a sale agreement between the parties.

20. If the sale agreement was entered into on 12th July, 1995, and this court found that indeed that is the last date on which the court can presume the last payment occurred, then time within which the parties ought to have applied for a Land Control Board Consent started to run on that date and expired 6 months later on 11th January, 1996. As no consent of the Land Control Board was granted within this period, the court must assume that the agreement became void on the latter date and that the defendant was entitled to take measures to repossess the land at any time within 12 years from that date. I therefore find that by the time of filing suit the plaintiff had been in occupation of the land since **11/1/1996** which is a period of more than **12 years**.

21. The next question that this court will deal with is if the occupation of the plaintiff was open, peaceful without force and secrecy. On that issue I find that even the evidence of a neighbour, PW2 testifies that the plaintiff is the only person whom she can relate to the ownership of the suit land, and whom she has seen on the land for 20 years. She does not know the defendant. Ordinarily neighbours do get to know one another by virtue of geographical contiguity of their respective land parcels the way PW3 appeared to know the plaintiff. I must add that

there is very little possibility of any person remaining on the defendant's land for a period in excess of 18 years without permission unless there has been acquiescence on the part of the owner.

22. This court heard no evidence of any physical re-entry on the suit land on the part of the defendant whether forceful or peaceful. There is also no evidence of the filing of any suit for recovery of the land by the defendant between the years 1995 to 2014 when this suit was filed. All that the defendant has stated is that she used to visit the land but she never supported that by way of any evidence at all. The defendant's version is not credible. She testified as follows on cross-examination:- “

“I considered friendship. I have said I leased the land to her in my affidavit. As long as she needed it. Since we never had a written lease it was verbal and I took what she gave. I know the amount. The period of lease was for as long as she needed it from year 1996. It was Kshs.2,000/= per acre. The following year it would be Kshs.2,500/= per acre. We didn't have a written lease. I didn't put these things I am saying into my affidavit. She claims she paid Kshs.300,000/=. She paid Kshs.300,000/= for a sale that did not materialize”.

23. The challenge that faces this court is how someone can pay Kshs.300,000/= for an unwritten long term lease whose yearly rent was Kshs.2,000/= with increments on unclear dates. Upon calculations, it shows the lease if any, was for not less than 16years. I cannot be blind to the contents (however impotent) in paragraph 38 (iii) of the defendant's replying affidavit and which is reiterated in paragraph 37 of the further replying affidavit, seeking to refund Kshs.300,000/= to the plaintiff upon her being ordered to vacate the land at the end of this litigation. I doubt that the defendant would offer to refund any monies that she had received from the plaintiff for a spent lease.

24. All in all I find that the plaintiff's occupation of the suit land was open, peaceful, uninterrupted and that it continued for a period in excess of 12 years and that she is therefore entitled to the prayers sought in the originating summons.

25. I therefore enter judgement in favour of the plaintiff against the defendant in terms of prayers **(A), (B), (D)** and **(E)** of the Originating Summons dated **3/11/2014**. Further the Deputy Registrar of this Court shall execute on the defendant's behalf all necessary documents required to effect the transfer of the suit property into the plaintiff's name.

Dated, signed and delivered at Kitale on this 14th day of June, 2018.

MWANGI NJOROGE

JUDGE

14/6/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

(Plaintiff present)

N/A for the defendant

COURT

Judgment read in open court in the presence of the plaintiff and in the absence of her counsel and of the counsel for the defendant who had notice of the judgment date.

MWANGI NJOROGE

JUDGE

14/6/2018