



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT AND LAND CASE NO. 1160 OF 2016**

**(FORMERLY HCC NO. 183 OF 2011)**

**JOSEPH OMBAIRE ISABOKE.....PLAINTIFF**

**VERSUS**

**AGNES NYABOKE OBONGO.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff/applicant initiated this suit by way of an originating summons. The plaintiff's claim was that he had acquired through the doctrine of adverse possession ownership over portions of land measuring 80feet by 57feet in land parcel numbers **Central Kitutu/Bogetaorio/1689** and **1690** registered in the name of the defendant/respondent. the plaintiff sought the determination by the court of the following questions:-

- 1) **Has the applicant herein been in quiet and/or peaceful and uninterrupted possession of portions of lands measuring 80feet by 57feet in land parcels No. Central Kitutu/Bogetaorio/1689 and 1690 for a period of over 12 years.**
- 2) **If so by the operation of the law has the respondent's title to the said portion not been defeated by the applicant who has thereby acquired adverse possession thereto?**
- 3) **If (1) and (2) above are answered in the affirmative can this court order for cancellation of the said respondent's title to the said portions and order the same to be transferred to the applicant?**
- 4) **Who shall pay the costs of this suit?**

2. The originating summons was supported on the supporting affidavit sworn by the applicant on 14<sup>th</sup> September 2011 and the annexures thereto. The applicant averred he purchased a portion measuring 184feet by 150feet from the respondents original parcel of land known as **Central Kitutu/Bogetaorio/464** vide an agreement of sale entered into in 1995. The land parcel **464** was subsequently subdivided into land parcels **1688, 1689** and **1690**. The applicant stated that only a portion measuring 80feet by 69feet has been transferred to him out of land parcel **1688** leaving a portion measuring 80feet by 57feet comprised in land parcels **1689** and **1690** which the applicant has been in occupation and possession of since 1995. The applicant contends he has in the premises acquired title to this portion of land by way of adverse possession.

3. The defendant/respondent filed a replying affidavit dated 25<sup>th</sup> February 2013 in response to the originating summons and averred that the doctrine of adverse possession would be inapplicable in favour of the applicant in the circumstances of the instant case. The respondent averred that the applicant has never enjoyed peaceful and uninterrupted possession and occupation of the portion of land for a period in excess of 12 years as alleged. She further stated that the issues raised by the applicant have been the subject of litigation in Nyamira PMCC No. 77 of 2005 where the applicant was awarded a portion of land out of land parcel **Central Kitutu Bogetaorio/464** leading to the subdivision thereof where the applicant was registered owner of land parcel **Central Kitutu/Bogetaorio/1688**. The respondent contends that this suit is *res judicata* and the same ought to be dismissed.

4. The plaintiff/applicant testified in support of the originating summons and called no other witness. In his evidence, he reiterated the contents of the affidavit in support of the originating summons. He explained that he entered into two separate agreements, the first one on 12<sup>th</sup> June 1995 with the defendant for the purchase of a portion of land parcel **Central Kitutu/Bogetaorio/464** measuring 184feet by 100feet ("**PEX.1**") at the consideration of kshs. 62,000/=. The second agreement was dated 5<sup>th</sup> June 1996 and was for a portion measuring 182feet by 50feet for a consideration of kshs. 41,000/=. The plaintiff stated that following the agreements, the defendant granted him possession of the land but failed to process the transfer for him which prompted him (the plaintiff) to institute a suit in Nyamira SRMCC No. 77 of 2005 seeking appropriate reliefs. The plaintiff stated that as at the time he filed the suit, the defendant had caused parcel number **Central Kitutu/Bogetaorio/464** to be subdivided into 3 portions namely land parcels **Central Kitutu/Bogetaorio/1688, 1689** and **1690**. He stated his case was over land parcel 1688 and that he was awarded a portion measuring 80feet by 69feet which he said was not the whole parcel of

land that he had purchased from the defendant. He further stated that at the time of filing the suit he had not known that land parcel 464 had been subdivided. He confirmed that he obtained title for the land he was awarded by the court at Nyamira but a balance of land measuring 80feet by 57feet remained out of the portion he purchased. The plaintiff stated that he has occupied the land he bought from the date of the purchase.

5. In cross examination the plaintiff affirmed that in 2004 there had been a dispute at Manga Land Disputes Tribunal in 2004 that involved land parcels **Central Kitutu/Bogetaorio/1688, 1689 and 1690** and that he was one of the complainants.

6. The defendant gave evidence and called no witnesses in support of the defence case. The defendant admitted that the plaintiff purchased a portion of land from land parcel number **Central Kitutu/Bogetaorio/ 464** which was initially registered in the name of the defendant's late husband. The land parcel **464** was subsequently subdivided into parcels 1688, 1689 and 1690. It was the defendant's evidence that the plaintiff instituted Nyamira SRMCC No. 77 of 2005 claiming the land that he had purchased from her and that the court awarded him a portion measuring 184feet by 80feet out of land parcel **Central Kitutu/Bogetaorio/1688** but the plaintiff instead of taking a portion as awarded took the whole of parcel **1688**. The defendant stated that the plaintiff does not occupy any portion of land parcels **Central Kitutu/Bogetaorio/1689 and 1690** as he claims and neither is the plaintiff utilizing any part thereof. The defendant stated that she and her children are the ones using parcels **1689 and 1690** and that it is her and her children who have built their houses thereon. The defendant stated that the plaintiff has not constructed any house and/or structures on land parcels **1689 and 1690**. The defendant produced abstracts of title relating to land parcels **1688 - 1692** as "DEx. 5(a)-(f)".

7. At the close of the trial the parties filed their final written submissions. The plaintiff's submissions were filed on 15<sup>th</sup> May 2018 while the defendant filed his submissions on 20<sup>th</sup> June 2018. I have reviewed and considered the pleadings, the evidence and the submissions and the issues that arise for determination are as follows:-

**(i) Whether the plaintiff has proved and/or established that he has been in possession and occupation of any portions of land parcel numbers Central Kitutu/Bogetaorio/1689 and 1690.**

**(ii) Whether the possession by the plaintiff, if any, has been adverse to the rights and interests of the defendant for a period in excess of 12 years such that the defendant's title has been extinguished.**

**(iii) Whether the plaintiff's suit is res judicata.**

**(iv) What reliefs should the court make?**

8. There is evidence adduced by the plaintiff that in 1995 he and the defendant entered into some agreement for the sale of a portion of land comprised in land parcel **Central Kitutu/Bogetaorio/464** as per "PEX.1" and "PEX.2". However, as at the time the alleged agreements dated 12<sup>th</sup> June 1995 and 5<sup>th</sup> June 1996 were purportedly entered into land parcel **Central Kitutu/Bogetaorio/464** had ceased to exist as the abstract of title for property certified by land registrar on 1<sup>st</sup> February 2017 shows that this title was closed upon subdivision on 29<sup>th</sup> March 1995 when the same was subdivided to create land parcels **1688, 1689, 1690, 1691 and 1692**. The agreement(s) therefore was incapable of being performed as the land it related to in fact did not exist at the time it was made. The agreement was null and void. Besides, the agreement even if it was capable of being enforced, it became null and void by operation of the law after the expiry of six (6) months from the time it was made as no consent of the land control board was sought and/or obtained within the period of 6 months as provided for under Section 6 of the Land Control Act, Cap 302 of the Laws of Kenya.

9. The plaintiff as per the evidence, sought the intervention of Manga Land Disputes Tribunal in 1997 and 2004 and the Nyamira Principal Magistrates Court vide Nyamira PMCC No. 770 of 2005 where in the case of Nyamira PMCC No. 77 of 2005 he was awarded a portion of 184 feet by 80feet out of land parcel **Central Kitutu/Bogetaorio/1688** as per the court order dated 28<sup>th</sup> July 2010 ("DEx1"). The plaintiff in his evidence stated that the court ordered that the defendant do transfer to him land measuring 80feet by 69feet and he stated further that this is the title he got yet the order directed that a portion of 184feet by 80feet be transferred to him. The plaintiff did not produce the copy of the title he got after the transfer was effected to him. The defendant in her evidence stated that the plaintiff took the whole of land parcel number **Central Kitutu/Bogetaorio/1688**. The abstract of title in respect of land parcel **Central Kitutu/Bogetaorio/1688** shows that this title was closed on subdivision on 29<sup>th</sup> April 2011 when new subtitles **2571 and 2572** were created. It is not clear who the registered owner of the subtitles is and the plaintiff did not provide any evidence. Is it probable that the plaintiff got title to a smaller parcel of land than he was awarded by the court? I doubt the plaintiff would have acceded to that. The plaintiff merely alleged that he was and has been occupying portions of land parcels **1689 and 1690** since the time he purchased the land. The defendant on her part states the plaintiff is not in occupation of any portions of land parcels **1689 and 1690** asserting that it is her and her children who are in occupation of the land.

10. Whether or not a party has been in adverse possession or not is a matter of evidence and the burden of proof rests with the person who claims adverse possession. In my view, the plaintiff has not proved or established he has been an adverse possessor on portions of land parcels **1689 and 1690**. If it is true the plaintiff has been in adverse possession since 1995/1996 when the alleged agreements were entered into, one would have expected the plaintiff to have carried out visible developments on the alleged portions and photographs of the developments so effected would have been persuasive evidence that the plaintiff indeed was in occupation and possession of the land in question. There was no such evidence and the plaintiff did not call any witness to corroborate his assertions that he has peacefully, openly and quietly been in occupation of the disputed land for uninterrupted period of over 12 years. It is therefore my holding and finding that on the basis of the evidence, the plaintiff has not proved that he is entitled to a declaration that he has acquired title to portions of land parcels **1689 and 1690** through the doctrine of adverse possession.

11. Even if I had found the plaintiff had been in occupation and possession of the disputed land since 1995/96 when the sale is said to have taken place, I would not have found the doctrine of adverse possession applicable in the present suit. The plaintiff instituted a suit vide Nyamira Resident Magistrate's Court Civil Suit No. 77 of 2005 vide a plaint dated 10<sup>th</sup> August 2005 which was subsequently amended on 7<sup>th</sup> November 2005. Before the institution of the Nyamira Senior Resident Magistrate's Court case the plaintiff had previously sought a

resolution of his land dispute with the defendant through the Manga Land Disputes Tribunal. These interventions constituted legal processes by the plaintiff to seek recovery of the land from the defendant and it is my view that for as long as there was a pending legal process involving the plaintiff and the defendant touching on the disputed land, the period of adverse possession could not run.

12. In Nyamira SRMCC No. 77 of 2005 the plaintiff quite clearly was seeking to recover all the portions of land that the defendant had sold to him. The following extracts from the amended plaint filed on 10<sup>th</sup> November 2008 ably illustrates this:-

**3B. On or about 12<sup>th</sup> June 1995 and 5<sup>th</sup> June 1996 the defendant unlawfully and fraudulently purported to sell to the plaintiff portions of land totaling to 184feet by 150feet out of land known as Central Kitutu/Bogetaorio II/464 at agreed purchase price of kshs. 103,000/= which the plaintiff paid in full and final settlement.**

**3D. The defendant unlawfully purported to transfer part of the sold portion measuring 70feet by 184feet to a 3<sup>rd</sup> party which transfer the plaintiff caused to be cancelled and the said portion now known as Central Kitutu/Bogetaorio/2303 registered in the name of the plaintiff.**

**4A. The defendant neglected, ignored and/or refused to transfer the remaining portion of land measuring 80feet by 184feet in favour of the plaintiff and instead filed a complaint with the Land Disputes Tribunal at Manga namely Manga LDT Case No. 12 of 1997 which was decided in faovur of the plaintiff herein that the plaintiff herein should get title to the sold portion of land in default he be compensated according to the current commercial rates, the plaintiff shall refer to the decision of the tribunal for its full tenor and effect.**

**6A. The plaintiff's claim against the defendant is for the recovery of a portion of land measuring 184feet by 80feet out of LR No. Central Kitutu/Bogetaorio II/1688 in the alternative refund of the purchase price and interest thereon at court rates from 12/6/1995 to the date of payment in full and final settlement, general damages and an order of injunction restraining the defendant from interfering with the plaintiff's occupation, use and enjoyment of the sold portion of land.**

**Interalia the plaintiff prayed for an order:-**

**bb. Transfer and registration of 184feet by 80feet out of LR No. Central Kitutu/Bogetaorio/1688 in favour of the plaintiff. In the alternative a refund of the purchase price together with interest thereon at court rates from 12<sup>th</sup> June 1995 till payment in full and final settlement.**

13. It is evident therefore that in the suit before the Magistrate's Court at Nyamira, the plaintiff was claiming the portions of land he had allegedly purchased from the defendant pursuant to the agreements entered into on 12<sup>th</sup> June 1995 and 5<sup>th</sup> June 1996. In the instant suit, it is the same agreements the plaintiff is relying upon to found his action against the defendant. This is clear from the evidence of the plaintiff. Although no copy of the proceedings and/or judgment in the Nyamira SRMCC No. 77 of 2005 was tendered in evidence the order given by the court on 28<sup>th</sup> July 2010 shows that the determination was made in favour of the plaintiff as a portion measuring 184feet by 80feet out of LR No. Central Kitutu/Bogetaorio II/1688 was ordered to be transferred to the plaintiff. The plaintiff in the Nyamira case acknowledged that the defendant had caused land parcel **Central Kitutu/Bogetaorio II/464** to be subdivided into land parcels **1690, 1689** and **1688** and if he had any claim against land parcels **1690** and **1689** the opportune moment to have had the claim adjudicated would have been in the course of the proceedings in the Magistrates Court.

14. I have in the course of my analysis and evaluation held that the plaintiff has not proved he was in adverse possession of the land he claims. Further, I have held that even if the possession was adverse the cases before the Manga Land Disputes Tribunal and the suit before the Nyamira Senior Magistrates Court operated to interrupt the period of adverse possession from running. Further given that the plaintiff in the present suit is laying claim to the same land he instituted an action to recover vide Nyamira SRMCC No. 77 of 2005 and there was a decision in that suit, it is my view that the present suit is *res judicata* and that the issue of adverse possession cannot arise where the subject matter has been the subject of litigation and a determination made.

15. In view of the findings that I have made and on the basis of the evidence, I am satisfied that the plaintiff has failed to prove his claim on a balance of probabilities. The plaintiff's suit is devoid of any merits and the same is ordered dismissed with costs to the defendant.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 28<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the present of:**

Mr. Soire for the plaintiff

Mr. Ollando for Nyambati for the defendant

Ruth Court assistant

**J. M. MUTUNGI**

JUDGE