



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KISUMU**

**MISC. APPLICATION NO. 9 OF 2017**

**(FORMERLY MISC. CIVIL APPLICATION NO. 115 OF 2014 (O.S))**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012 (CAP 284) LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22) LAWS OF KENYA**

**BETWEEN**

**JOSEPH EVANS OKWANY**

**PHOEBE FLORENCE AGUMBI.....PLAINTIFFS**

**VERSUS**

**ROSLIDA MBAJA MALAWO.....DEFENDANT**

**JUDGEMENT**

By an originating summons dated 17<sup>th</sup> June 2014 and amended on 9<sup>th</sup> June 2017, the plaintiffs herein sued the defendant urging the court to determine the following issues:

- a) Whether the Plaintiffs purchased an identified portion of the original Kisumu/Kogony/1688 measuring 41 x 75m now subdivided into parcel No. Kisumu/Kogony/4660 and 4661.
- b) Whether the Plaintiffs are lawful owners of Kisumu/Kogony/4661 by virtue of adverse possession.
- c) Whether the Kisumu District Lands Registrar should be directed to register the rights and interests of the Plaintiffs upon Kisumu/Kogony/4661.
- d) Whether the Defendant is unlawfully interfering with the Plaintiffs' peaceful occupation of the suit land.
- e) Whether the Plaintiffs are entitled to compensation of the land Kisumu/Kogony/4661.

The originating summons was supported by the affidavit of Phoebe Florence Agumbi and later the amended one dated 9<sup>th</sup> June 2017 was supported by the affidavit of Joseph Evans Okwany.

The defendant was served with the summons but did not file any replying affidavit. When the matter came up for directions on 1<sup>st</sup> November 2016, the defendant's son one George Odeke of ID no. 989293 told the court that the defendant who is his mother had been sick and he required more time to file a response to the originating summons.

Counsel for the plaintiff informed the court that the said George Odeke had gone to his office and that he advised him to seek the services of a lawyer to represent the defendant and file a response. He confirmed that he had indeed gone to the plaintiff's Counsel's office but they did not have money to engage a lawyer.

The court granted the defendant 30 days to file a response of which she did not adhere to. The court gave directions that the originating summons and supporting affidavit be treated as a plaint and the plaintiff was granted leave to file witness statements if need be.

This matter therefore proceeded by way of formal proof as the defendant was given an opportunity to defend the claim but failed to file any response. The Plaintiff Joseph Evans Okwany gave evidence and adopted his statement as his evidence in chief.

It was the plaintiff's case that they purchased a portion of the said parcel on 4<sup>th</sup> December, 1991 from the Defendant herein, took immediate possession and fenced it with a view of developing it.

It was further the plaintiff's evidence that when they embarked on the process of registering the title in their name, the Defendant and her son were uncooperative and frustrated all their efforts to have them registered as owners.

The plaintiff stated that he later conducted a search and discovered that the Defendant had subdivided the original Kisumu/Kogony/1688 to create Kisumu/Kogony/4660 and 4661. The plaintiff also stated that they further discovered that the defendant intended to sell Kisumu/Kogony/4661 which had originally been sold to them.

It was the plaintiff's testimony that they further discovered that the Kenya Roads Authority sought to acquire the suit parcel of land with a view of constructing a road thus issued a Gazette Notice No. 20 of 27<sup>th</sup> February, 2015 which provided for the registered owners of Kisumu/Kogony/1668 as the Plaintiffs and the Defendants. The plaintiffs produced the said gazette notice as exhibit before the court.

The plaintiffs' are claiming ownership of a portion of the original land parcel No. Kisumu/Kogony/1688 measuring 41 x 75m by way of adverse possession thus equally entitled to compensation upon acquisition of the land by the Kenya Roads Authority. The defendant was served with a hearing notice but failed to attend court, therefore the matter proceeded in her absence.

### **Plaintiffs' Submissions**

Counsel for the plaintiffs filed written submissions and responded to the issues for determination in the originating summons as hereunder. On the first issue as to

#### **Whether the Plaintiffs purchased an identified portion of the original Kisumu/Kogony/1688 measuring 41 x 75m now subdivided into parcel No. Kisumu/Kogony/4660 and 4661,**

Counsel submitted that the Plaintiffs herein stated that they purchased a portion of the original land parcel No. Kisumu/Kogony/1688 measuring 41 x 75m from the Defendant and in order to support their claim, they produced an Agreement dated 4<sup>th</sup> December, 1991 whereby they were identified as purchasers.

Counsel also stated that the agreement was in respect of a portion of parcel No. Kisumu/Kogony/1688 situated in Kisumu measuring 41 by 75 metres at a consideration of Kshs.48,000/- of which they paid Kshs.38,000 on the execution of the Agreement and the balance of Kshs.10,000/- paid at the end of February, 1992. Counsel further submitted that the said agreement was duly signed by both the Vendor and the Purchaser before a Magistrate and was attested to by 5 witnesses, 3 being the vendor's while 2 the purchasers.

It was Counsel's submission that the plaintiffs started the process of transfer but were frustrated by the lack of cooperation by the defendant. That the plaintiff's on routine search at the registry in 2014 realized that the portion of the parcel of land which they had purchased had been sub-divided to create Kisumu/Kogony/4660 and 4661 of which they produced the Mutation Form and Certificate of Official Search dated 12<sup>th</sup> June, 2014 in respect to parcels No. Kisumu/Kogony/4660 and 4661. It was therefore Counsel's submission that the answer to this issue should be in the affirmative as the defendant did not file any response to rebut the same.

#### **Whether the Plaintiffs are lawful owners of Kisumu/Kogony/4661 by virtue of adverse possession**

On the second issue Counsel submitted that the substantive law governing adverse possession is Section 38(1) of the Limitation of Actions Act while the procedural law is Order 37 Rule 7 of the Civil Procedure Rules, 2010. Counsel cited Halbury's **Laws of England, 4<sup>th</sup> Edition, Volume 28, paragraph 768**, which states that "no right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land".

Counsel relied on the case of **KWEYU VERSUS OMUTUT [1990] KLR**, at 709 where Gicheru JA as he then was, stated that;

*"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but in reality is). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim of colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously."*

Counsel for the plaintiff also submitted on the issue whether a purchaser for value can claim as an adverse possessor by citing the case of

**Public Trustee – Vs – Wanduru, (1984) KLR 314 at 319** Madan, JA, stated that;

*“Adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession.”*

Additionally, the Court of Appeal in **Peter Mbiri Michuki –V- Samuel Mugo Michuki [2014] eKLR** opined as follows;

*“The sale agreement and transaction between the parties hereto was entered into in 1964 and in the same year the Plaintiff/Respondent took possession of the suit property... On our part, we are of the view that there are **four alternative timelines that could be used to compute when time began to run for purposes of the plaintiff’s claim for adverse possession.** These are 1964, 1970, 1971 or 1978. The year 1964 is the year of the sale agreement between the parties and in this year the plaintiff took legal possession of the suit property... The evidence on record shows that in each of these years, the plaintiff/respondent was in actual and or constructive possession of the suit property; **that the possession by the plaintiff was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value.** From whichever year adverse possession is computed, **as at the time of filing the Originating Summons in 1991, twelve (12) years had lapsed and the plaintiff’s right and claim based on adverse possession had arisen, accrued and vested.”***

It was therefore the submission of Counsel that the Plaintiffs testified to having taken possession of their portion of the suit parcel of land now registered as Kisumu/Kogony/4661 immediately after purchasing the said parcel of land. The parties entered into a sale agreement on 4<sup>th</sup> December, 1991. This means that possession began in the month of December, 1991.

He stated that after full payment of the purchase price, the defendant became a trustee and held title to the property in favour of the Plaintiffs and that the Plaintiffs acquired equitable beneficial interest in the suit property and therefore right to recover accrued in accordance with Section 18(4) of the Limitation of Actions Act. Possession having been open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value for a period of 12 years made a claim for adverse possession to arise. He submitted that the Plaintiffs are therefore lawful owners by virtue of adverse possession.

**Whether the Kisumu District Land Registrar should be directed to register the rights and interests of the Plaintiffs upon Kisumu/Kogony/4661.**

On the third issue Counsel submitted that according to Section 17 of the Limitation of Actions Act, after the expiration of the 12 years period title of a person to land is extinguished and cannot bring an action to recover land.

It was Counsel’s submission that the plaintiff’s having established that they have been in occupation of the suit parcel of land for over a period of 12 years without claim from the Defendant to recover the same, it therefore goes without say that title to the portion of the said parcel of land being Kisumu/Kogony/4661 has been extinguished and any transfer of the said parcel of land to a 3<sup>rd</sup> Party is therefore null and void as the Defendant did not have any title to pass. Counsel therefore submitted that pursuant to Section 38 of the Limitation of Actions Act, the Kisumu District Lands Registrar should be directed to register the rights and interests of the Plaintiffs upon Kisumu/Kogony/4661.

**Whether the Defendant is unlawfully interfering with the Plaintiff’s peaceful occupation of the suit land.**

On the fourth issue as to whether the defendant is unlawfully interfering with the plaintiff’s peaceful occupation, Counsel stated that the evidence on record indicates that the Defendant’s son got jittery and started questioning why they were in a hurry to construct and that the defendant further frustrated all efforts by the Plaintiffs to have the land registered in their name. That the defendant further proceeded to secretly sub-divide the original Kisumu/Kogony/1688 to create Kisumu/Kogony/4660 and 4661 without notifying the Plaintiff despite having knowledge of the fact that she had sold a portion of the suit land to the Plaintiffs. It was further Counsel’s submission that the Plaintiffs registered a caution on land parcel No. Kisumu/Kogony/4661 claiming purchaser’s interest but the said caution was removed irregularly.

**Whether the Plaintiffs are entitled to compensation of the land Kisumu/Kogony/4661.**

On the fifth issue as to whether the Plaintiffs are entitled to compensation of the suit land by the Kenya Roads Authority, Counsel submitted that the Kenya Roads Authority sought to acquire land parcel No. Kisumu/Kogony/4661 with a view of constructing Kisumu Northern By-Pass vide Gazette Notice No. 20 of 27<sup>th</sup> February, 2015 and that the Plaintiffs herein were recognized as the proprietors of parcel of land No. Kisumu/Kogony/4661 together with the Defendant.

Counsel also submitted that the Plaintiffs have been able to demonstrate to the Court that they are entitled to land parcel No. Kisumu/Kogony/4661 by adverse possession and therefore entitled to compensation of land Kisumu/Kogony/4661. Counsel therefore urged the court to enter judgement in favour of the plaintiffs as prayed in the originating summons and find that the plaintiffs have proved that they have acquired the land by way of adverse possession.

**Analysis and Determination**

This is a claim of adverse possession by the plaintiffs to the suit land against the defendant. It should be noted from the onset that the defendant was served with summons to enter appearance but did not file any response. The court further granted the defendant an opportunity to file her papers out of time but she did not comply even after the son came to court to plead with the court to give them more time. This shows that the defendant was not interested in defending this suit.

The issues for determination are as to whether the plaintiffs have acquired the suit land by way of adverse possession. The ingredients of

adverse possession are well settled in many judicial authorities and therefore I will not reinvent the wheel.

The Ingredients of adverse possession were discussed by the Court of Appeal in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** where the court stated:

*Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-*

*“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.”*

The Limitation of Actions Act makes further provision for adverse possession at Section 13 that:

*“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.*

*(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.*

*(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”*

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that:-

*“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”*

There has been an upsurge of cases of adverse possession in our courts due to parties who sell land, give possession to the purchasers and later refuse to fulfil their part of the bargain to transfer within the agreed period as per their agreements of sale. They have often reneged on the agreement claiming that the Land Control Board Consent was not obtained within 6 months as required by the Land Control Act.

There is a need to relook the provisions of the Land Control Act for purposes of amendment or tweaking it to serve Kenyans in a better way. Of late there have been judicial decisions which have been forward looking and futuristic including from the Court of Appeal and the Supreme Court on the issue of constructive and customary trusts. Most of the cases emanate from situations where the sellers have put purchasers into occupation for a long period of time and then turn their back on them with a threat of eviction. This is not to say that the law and procedure need not be followed but where there is glaring intended injustice by rogue sellers then the court must intervene to ensure that justice is served.

In the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** the Court of Appeal sitting in Eldoret gave effect to constructive trusts by stating as follows:

*“Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.*

*As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”*

Going back to the current case, the plaintiffs produced sale agreements between them and the defendant which had very clear terms on payment and taking of possession. It is on record that the plaintiffs paid the full purchase price and took possession and fenced their

respective portions. This agreement was dated 4<sup>th</sup> December 1991 and they took possession upon execution of the agreement. If we compute when time started running then we would start when the parties entered into the sale agreement that is 1991 making it more than 27 years.

By the time the defendant caused the suit land to be subdivided without the plaintiff's knowledge and registered in her name, she was already holding the land in trust for the plaintiff and that they had acquired the land by way of adverse possession. The plaintiffs bought identifiable parcel of land measuring 41 by 75 of the suit land.

I have considered the evidence on record together with the submission from Counsel and I come to the conclusion that the plaintiffs have proved that they have acquired the suit land by way of adverse possession. I therefore allow the plaintiffs' prayers in the originating summons plus costs

**DATED and DELIVERED at KISUMU this 29<sup>TH</sup> DAY OF NOVEMBER, 2018.**

***M. A. ODENY***

***JUDGE***

**JUDGMENT READ, and SIGNED** in open court in the presence of;

Mr. Achura holding brief for Mr. Odeny for plaintiff, court assistant Joanne and in the absence of the defendant.

**M. A. ODENY**

**JUDGE**