



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KISUMU

ELC NO. 32 OF 2017 (O.S)

IN THE MATER OF THE REGISTERED LAND ACT (CAP 300) (REPEALED)

AND

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

BETWEEN

ALOYS ADIANGO OLANDE.....PLAINTIFF

VERSUS

SAMUEL AMON SIAJI.....1ST DEFENDANT

PETER OTIENO NYAKOYL.....2ND DEFENDANT

PETER WALUNYA NYAKOYL.....3RD DEFENDANT

SAMUEL OTIENO OBUDO.....4TH DEFENDANT

JUDGMENT

The plaintiff herein filed an originating summons dated 11th June 2012 and amended on 27th August 2018 sued the defendants claiming that he had acquired parcel No. KISUMU/TAMU/914 & KISUMU/TAMU/916 by way of adverse possession. The plaintiff listed the following issues for determination of the court:

- 1) Whether the plaintiff purchased the parcels **KISUMU/TAMU/916 and KISUMU/TAMU/916** from the 1st 2nd and 3rd defendants on 25th March 1998 but the defendants to date failed to execute transfer documents in favour of the plaintiff.
- 2) Whether the plaintiff has an overriding interest under section 30(a), (d) and (g) of the registered land Act Cap 300 Laws of Kenya , against the 1st 2nd and 3rd defendants.
- 3) Whether the plaintiff is an adverse possessor of **KISUMU /TAMU/914 and KISUMU/TAMU/916**.
- 4) If (2 &3) above are in the affirmative, whether the Kisumu District land Registrar should be directed to register the rights of the plaintiff upon **KISUMU /TAMU/914 and KISUMU/TAMU/916**.
- 5) Whether the honourable court ought to vest the suit land to the plaintiff.
- 6) Whether the plaintiff is entitled to costs of the application.

The originating summons was supported by the affidavit of the plaintiff herein. The defendants were served with summons and filed replying affidavits whereby the 3rd admitted that he was aware that the plaintiff bought part of parcel Nos. Kisumu/Tamu/671 and Kisumu/Tamu/227 for a consideration of Kshs. 400,573/ of which the plaintiff paid kshs. 350,003/ upon execution leaving a balance of Kshs. 50.570/

The 4th defendant also filed a replying affidavit and stated that he entered into a sale agreement on 8th April 2012 with the 1st, 2nd and 3rd defendants whereby he bought 12 hectares at a consideration of Kshs 2,520,000/ and paid in full.

This matter came up for hearing and the court had ordered that the plaintiff serve the defendants directly with a hearing notice which was done and an affidavit of service filed in court. The matter therefore proceeded in the absence of the defendants.

Plaintiff's case

The plaintiff adopted his statement and the list of documents that he had filed in court to support his case. He stated that he had purchased the suit parcels vide an agreement dated 25th March 1998 from the 3rd defendant and one Benter Odiyo and paid the full purchase price.

It was his evidence that they went to the lands office and a subdivision was done as per the agreement. That later the family of the late Jabes Anyango Jakoyo who was the registered owner as per entry No. 2 in the green card filed a succession cause No. 683 of 2010 and the land was transferred in their names through transmission to Peter Otieno Nyakoyi, Peter Walunya Nyakoyi and Samuel Amon Siaji who later sold the land to the 4th defendant Samuel Obudo.

PW1 stated that he has been staying on the suit land since 1998, growing sugar cane for a period of 20 years without interruption. The plaintiff also produced the sale agreement, copy of Land Control Board application and consent and a copy of the extract of the green card.

He therefore urged the court to enter judgment as prayed in the originating summons in his favour. Since the defendants were served and did not appear in court, the defence case was closed and plaintiff's Counsel filed written submissions.

Plaintiff's Submissions

Counsel for the plaintiff submitted that the plaintiff in his original originating summons dated 11th June, 2012 had pleaded that he had purchased two parcels of land being Kisumu/Tamu/914 and Kisumu/Tamu/916 from the 1st, 2nd and 3rd Defendants on 25th March, 1998 and that the Plaintiff and the vendor had gone to the extent of obtaining consent to transfer the two parcels to the name of the Plaintiff. However, the registered owner one Jabes Anyango Nyakoyi who was the mother to the vendors and who had authorized the sale and transfer passed away after the consent was issued thus they could not proceed with the transfer until succession was done.

It was Counsel's submission that the plaintiff had already taken full possession of the two properties and using the same for farming. Counsel further submitted that at the time of drawing the sale agreements the parties were under the impression that all along the lands in question were Kisumu/Tamu/914 and Kisumu/Tamu/916 which to their understanding were sub divisions of Kisumu/Tamu/671 and Kisumu/Tamu/227 respectively.

That when the plaintiff carried out a routine search at the lands office he discovered that the parcels of land which he was occupying and using as shown to him by the vendors (1st, 2nd and 3rd Defendants) was actually on the ground 2.19Ha of Kisumu/Tamu/627 and 0.62 of Ha Kisumu/Tamu/227.

Counsel submitted that the plaintiff subsequently amended his originating summons on 29th August, 2013 to include the new numbers Kisumu/Tamu/627 and Kisumu/Tamu 227 as the parcels he was seeking orders for adverse possession on since it was the same parcel he was in occupation of for over a period in excess of 12 years.

Counsel listed the following as the issues for the courts determination:

- 1) Whether the plaintiff purchased the suit properties from the 1st, 2nd and 3rd defendants.
- 2) Whether the suit properties purchased by the Plaintiff as Kisumu/Tamu/914 and Kisumu/Tamu/916 was actually 2.19 Ha of Kisumu/Tamu/627 and 0.61Ha of Kisumu/Tamu/227.
- 3) Whether the Plaintiff has been in constant possession and use of the suit parcels of land without force, secrecy, permission and without interruption for a period more than 12 years.

On issue no. one as to whether the plaintiff purchased the suit properties from the defendants, Counsel submitted that the sale took place as evidenced by the sale agreement that the plaintiff produced and that the defendants do not deny that the same took place and purchase price was paid.

On the 2nd issue as to whether the suit properties purchased by the Plaintiff Kisumu/Tamu/914 and Kisumu/Tamu/916 was actually 2.19Ha of Kisumu/Tamu/627 and 0.62Ha of Kisumu/Tamu/227, Counsel submitted that the Plaintiff amended his originating summons and Supporting Affidavit that he adopted as his evidence in chief that the parcel number was originally **Kisumu/Tamu/617 and Kisumu/Tamu/217**. The plaintiff was to purchase was 2.19Ha from Kisumu/Tamu/627 and 0.62Ha of Kisumu/Tamu/217.

It was further Counsel's submission that the surveyor who drew the mutation forms had booked the new sub divided numbers as Kisumu/Tamu/914 and Kisumu/Tamu/916 therefore this explained the reasons why these two new numbers are the ones that appeared in the sale agreement and consent to transfer. Parties had by then mistakenly thought that the new numbers had been registered.

Counsel also submitted that after the death of the registered owner Jabes Anyango Nyakoyi the new numbers were no longer appearing in the

land register and the old numbers were the ones in existence being Kisumu/Tamu/617 and Kisumu/Tamu/227.

On the 3rd issue as to whether the Plaintiff has been in constant possession and use of the suit parcels of land without force, without secrecy, without permission and without interruption for a period more than 12 years Counsel submitted that the Plaintiff testified that immediately after entering the sale agreement he took possession of the land and has been in occupation for the past 20 years without secrecy, force and interruption.

Counsel submitted that the fact that the contract read the property sold as Kisumu/Tamu/914 and Kisumu/Tamu/916 is not a bar to the fact that the Plaintiff has in reality been occupying 2.19Ha of parcel Kisumu/Tamu/627 and 0.62Ha of parcel Kisumu/Tamu/227. Further, that the plaintiff is not claiming specific performance using the agreement taking into account the provisions of section 4 of the Limitation of Actions Act and Section 6, 7 and 8 of the Land Control Act limits him. The plaintiff is thus only using the agreement to prove the existence of a transaction and possession of the suit property. The Plaintiff's claim does not arise from the agreement for sale but from the claim of adverse possession.

Counsel cited the case of **Richard Satia & Partners and Another –vs- SAMSON Sichangi C. A Nakuru Civil Appeal No. 164 of 1995** where it was stated as an orbiter of the learned Judges of Appeal that a contract for sale can be used as evidence in possession of a suit property.

Counsel submitted that with respect to the interest of the 4th defendant who bought the suit property from the 1st, 2nd and 3rd defendant has no defence as it was held in the case of **Public Trustee –vs- Wanduru (1984) KLR** that a purchaser's title is subject to an adverse possessor overriding interest. Further, that in the case of **Peter Thuo Kairu –vs- Kuria Gacheru (1988) 2 KLR and in Samuel Miki Waweru –vs- Jane Njeri Richu Nairobi C.A 122 of 2001** it was held that the law relating to prescription affect not only present holders of title but their predecessors.

Counsel therefore urged the court to grant the orders as prayed as the Plaintiff has demonstrated that he had come into possession of 2.19Ha of parcel **Kisumu/Tamu/627** and 0.62Ha of parcel **Kisumu/Tamu/227** the suit properties and that he has been in constant and uninterrupted possession of the same two portions of land for well over 20 years and further, having demonstrated that the 4th defendant's registration as a buyer is subject to the overriding interest of the plaintiff as an adverse possessor.

Analysis and determination

This is a case where the plaintiff prays that the court declares that he has acquired the suit land by way of adverse possession. In cases of adverse possession, the major issue for determination by the court is as to whether the plaintiff has met the threshold to warrant the court to give such orders. It is trite law that the test of adverse possession is whether the plaintiff has been in open, exclusive, continuous and uninterrupted occupation of the suit land.

The plaintiff gave evidence that upon entering into the sale agreement with the defendant, he took immediate occupation of the suit land and has been in such occupation uninterrupted to date. He stated that he has been growing sugar cane for more than 20 years and no one has interfered with his occupation.

It is also on record that the 3rd defendant admits to having sold the suit parcels of land to the plaintiff and that the plaintiff paid the purchase price save for the fact that he did not clear a balance of Kshs.50,000/-. The defendant did not deny in the replying affidavit that the plaintiff is in occupation. He actually stated that he took immediate possession contrary to the agreement that he was to take such possession upon payment of the balance of the purchase price.

The 4th defendant stated in his replying affidavit that he had bought the suit land after conducting due diligence. The 1st 2nd and 3rd defendants filed a succession cause in respect of the estate of the deceased and transferred the suit land into their names by way of transmission but did not tell the 4th defendant that the plaintiff had bought the land and was in occupation. The 4th defendant's claim lies at the doorstep of the 1st 2nd and 3rd defendants who were not candid with him to tell him the truth.

The issue of the correct citation of the parcel number was rectified vide the amended originating summons and the fact that the 3rd defendant also admitted that he had sold land to the plaintiff. In the case of **Githu -vs- Ndeete (1984) eKLR 776** it was held that it did not matter that the suit parcel was subdivided or that the parcel number changed description.

In the current case the subdivision, change of description, and change in proprietorship, did not constitute any interruption of the possession of the land by the plaintiff and the Defendants. The possession of the land by the Plaintiff had been in excess of a period of Twelve (12) years, such possession was quiet and uninterrupted. The possession was open for all to see and neither was it forceful, was not in secret and was exclusive in nature without permission of the Defendants.

It should be noted that registration of one as proprietor does not affect the rights of one claiming to have acquired the suit parcel of land by adverse possession. In the case of **Francis Mungai Kimani -vs- Ngendo Kibogoro [1988] eKLR** it was held that *"the Defendant on being registered as the proprietor of the land as successor in title to her husband acquired exactly the same rights and liabilities as her husband had held. She could not have acquired rights which were superior to her deceased husband..."*

The 4th defendant's registration as an owner was therefore subject to the rights of the plaintiff who was claiming an interest through adverse possession. I therefore find that the plaintiff has proved that he has been in occupation of the suit parcels for a period of more than twelve (12) years and is therefore entitled to be registered as the proprietor of the suit parcels by way of adverse possession. I therefore make the following orders.

- a) A declaration is hereby issued that the Plaintiff has acquired 2.19Ha of parcel **KISUMU/TAMU/627** and 0.62Ha of parcel **KISUMU/TAMU/227**.
- b) Cancellation of the registration of the 4th Defendant as the registered owner of **KISUMU/TAMU/627** and **KISUMU/TAMU/227**.
- c) The Land Registrar and Land Surveyor of Awasi/Nyando Nyakach District to subdivide the two parcels of land and issue the Plaintiff with a title deed measuring 2.19Ha from **KISUMU/TAMU/627 AND 0.62HA for KISUMU/TAMU/227** upon payment of the requisite charges.
- d) Defendants to pay costs of the suit

DATED and DELIVERED at KISUMU this 6TH DAY OF DECEMBER, 2018.

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of :-

Ms. Imbanya for the Plaintiff, court assistant Joanne and in the absence of the defendants.

M. A. ODENY

JUDGE