



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 817 OF 2015

**ANDERSON OMONDI OWANDHO (Suing as the Legal Rep. of the estate of THOMAS
OWANDHO RAJWAI
(DECEASED)).....PLAINT
IFF**

=VERSUS=

**AUGUSTINOS ONDIEK.....
DEFENDANT**

JUDGEMENT

BACKGROUND

1. By a Plaint filed herein on 26th October 2011, the Plaintiff Anderson Omondi Owandho, suing as the Legal Representative of the Estate of his father the late Thomas Owandho Rajwai, accuses the Defendant of unlawfully and without any colour of right or permission trespassing onto all that parcel of land known as Kisumu/Kawino/2580, sometimes in the year 2008. The said parcel of land is said to be registered in the name of the Plaintiff’s father.
2. Accordingly the Plaintiff’s claim against the Defendant is for an order of permanent injunction restraining the Defendant, his servants, employees, agents, licensees or anybody claiming under him from entering upon, taking possession of, carrying on any construction, ploughing or in any manner whatsoever alienating or interfering with the suit property. In addition, the Plaintiff prays for an order of eviction of the Defendant from the said parcel of land.
3. In his Defence filed on 10th November 2016, the Defendant denies the Plaintiff’s assertions and avers that in the year 1993, he entered into an agreement with the said Plaintiff’s father, the said Thomas Owandho Rajwai (now deceased) in which they agreed to exchange two parcels of land. By the said Agreement, the Plaintiff’s father gave the Defendant all that parcel of land known as Kisumu/Kawino/2580 currently under adjudication (the suit property) while the Defendant gave the Plaintiff’s father a parcel of land measuring 0.816 Ha situated at the Ahero Irrigation Scheme.
4. It is the Defendant’s case that following the exchange he proceeded to build his homestead on the suit property in the year 1993 and his sons have equally built their homes thereon. It is further the Defendant’s case that the suit is time barred as they have occupied the land for more than 12 years during which time they enjoyed peaceful and uninterrupted occupation and that the Plaintiff never raised any complaint until sometime in the year 2007. Accordingly, the Defendant prays that the suit as filed be

dismissed with costs.

THE PLAINTIFF'S CASE

5. At the hearing hereof, the Plaintiff testified that he is the son of Thomas Owandho Rajwai who is the registered owner of Land Parcel No. Kisumu/Kawino/2580. It was his case that though a title deed for the land is yet to be issued, the Adjudication process is complete. According to the Plaintiff, he discovered that the Defendant had trespassed into his father's land in the year 2008. When he asked him why he had built on the land, the Defendant answered that they had exchanged parcels of land with the Plaintiff's father. The Plaintiff however testified that the Defendant did not show him the parcel of land which the Defendant gave the Plaintiff's father in return.

6. The Plaintiff then proceeded to report the matter to the Area Chief but no amicable solution was found. Having established from the Lands Office that the suit property was registered in his father's name, the Plaintiff proceeded to obtain consent from the Area Land Adjudication Officer to enable him file this suit as the land was still under adjudication. The consent (produced as PEX 3) was obtained on 19th January 2011.

7. It was the Plaintiff's testimony that despite all efforts to get the Defendant out of the Suitland, he still resides there. It was accordingly the Plaintiff's prayer that the Defendant be evicted from the land.

THE DEFENDANT'S CASE

8. The Defendant Augustino Ondiek Sidhe called two witnesses in support of his case. Testifying in support of his own case, the Defendant conceded that he resides on the said Land parcel No. Kisumu/Kawino/2580. It was his case that he has lived on the land since 1993.

9. According to the Defendant, the Plaintiff's brother by the name Andrew Akira approached him sometime back and told him he wanted some land for growing rice. They then agreed to exchange land. The said Andrew Akira then took the Defendant to the plaintiff's father and after discussions, it was agreed that the Defendant would give Andrew somewhere to grow rice while the Defendant moved to live in the dryland which happened to be the suit property. The Parties never put anything in writing and the agreement was only by word of mouth.

10. According to the Defendant, who appeared fairly old, the land he exchanged with the Plaintiff's father was No. 2285 and the said Andrew (or Andericus) Akira still occupies the land. It was further the Defendant's testimony that the said Andrew could actually be the Plaintiff herein and that the name he knows is probably different from his name as registered in the identity card.

11. The Defendant further testified that he has lived on the land since 1993 and he has buried his son Barrack Odoyo Ondiek and two of his grandchildren who were twins on the suitland. According to the Defendant, they did not have any problems with the Plaintiff until the year 2007 when the Plaintiff started clearing his home with help of some seven people.

12. The matter was then reported to the Area Chief who summoned the parties for a meeting on 19th October 2007. Since then, the Plaintiff has not gone back to the Defendant's land. It is the Defendant's case that he has nowhere else to go since he gave the Plaintiff the only parcel of land he owned in exchange for the one he now occupies. It was also his case that the Plaintiff is now the registered owner of the land the Defendant gave him in exchange.

13. Mr. James Owuor Abuto testified as the Defendant's second witness (hereafter DW2). According to the witness, he knows both the Plaintiff and the Defendant herein. DW2 testified that the Defendant started living on the land in 1993 after he moved there from his former home. DW2 is however not aware as to how the Defendant acquired the land. He is however aware that for some 8-10 years now, the Defendant has had problems with the land as the Plaintiff has been trying to take it back.

ANALYSIS OF THE EVIDENCE AND THE LAW

14. I have carefully considered the pleadings filed herein. I have similarly considered the testimonies of the witnesses who testified before me and the evidence placed before the court by both parties.

15. It is not in dispute that the parcel of land in contention that is Kisumu/Kawino/2580 is registered in the name of one Thomas Owandho Rajwai who is now said to be deceased. According to the Plaintiff, the said Thomas Owandho Rajwai was his father and the owner of the disputed parcel of land. He thus brings this suit as the Legal Representative of the estate of the deceased. In the course of his testimony in Court, the Plaintiff produced a Limited Grant of Letters of Administration Ad Litem (marked as plaintiff's Exhibit 6) issued by the High Court at Kisumu on 29th September 2011. A perusal of the Limited Grant reveals that the said Thomas Owandho Rajwai died on 13th October 1994 and further that the Court allowed the Plaintiff herein to file the present suit and administer the deceased's estate pending further orders of the Court.

16. On the basis of the said Grant, the Plaintiff accuses the defendant of trespassing onto his father's land in the year 2008 and thereafter without any colour of right, proceeding to construct his home thereon.

17. On his part, Augustino Ondiek Sidhe, the Defendant herein does not deny that he resides on the said suitland. It is however his case that he lives on the suit land as of right having exchanged the land with his own after the Plaintiff and/or his brother and father approached him to use his parcel of land situated at the Nyando Irrigation Scheme for purposes of growing rice. The said exchange of the two parcels of land was, according to the Defendant, simply based on trust and was not documented.

18. DW2-James Owour Abuto testified in support of the Defendant's case. It was his case that he personally knew both the Plaintiff and the Defendant. According to him, even though he did not know how the Defendant acquired the land, he could remember that the Defendant started residing thereon in the year 1993.

19. Section 3(3) of the Law of Contract Act provides that no suit based on a contract or disposition of interest in land can be entertained unless the contract is in writing, is executed by the parties and attested accordingly. Section 3(7) of the Act however excludes the application of Section 3(3) aforesaid to contracts made before the commencement of the Subsection.

20. Section 3(3) of the Law of Contract came into effect on 1st June 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the Subsection read as follows:-

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract:-

(i) Has in part performance of the contract taken possession of the property or any part thereof; or

(ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

21. On the material placed before me and having considered the demeanor of the defendant on the witness stand, he did not look to me as someone who happened on the suitland by stealth and/or fraud. It was his contention that he gave the plaintiff's father and/or his brother (whom he also thought could be the Plaintiff himself) a parcel of land at the irrigation Scheme in exchange for the suit property. At the time of the exchange, no adjudication had been done and/or completed in the area. This would probably explain why the land in contention, remains in the name of the plaintiff's father to-date.

22. As it were, the plaintiff's father according to the documents presented before me, passed on in 1994. This would be one year after 1993-the year when the Plaintiff states that he moved into the disputed parcel of land and established his home therein. The Plaintiff did not claim that the Defendant took forceful possession of the suitland. Instead, it was his contention that he had discovered sometime in 2007 that the Defendant had trespassed onto their land. From the record, the Defendant did not have any other parcel of land near the plaintiff's land from which he could have accidentally or knowingly trespassed in the Plaintiff land and in the absence of any claim or proof that he forced his way into the land, I am prepared to accept his explanation that they entered into an agreement to exchange two parcels of land, his own being parcel No 2285 measuring 0.816 Ha at the Ahero Nyando Irrigation Scheme.

23. In my view there existed a valid oral agreement between the parties pursuant to which the Defendant moved into the suitland. From the oral evidence adduced herein, I am satisfied that the defendant took possession of the suit property in part performance of the said oral contract and he has continued being in possession thereof to-date.

24. It is further my view that Section 3(7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. Section 3(3) of the Law of Contract Act having come into effect in 2003 does not apply to an oral contract for sale (or exchange) of land concluded before it came into effect.

25. Having so found, it is my view that the suit herein having been filed in the year 2011 to challenge a transaction which took place in the year 1993 is hopelessly out of time and cannot be allowed to stand.

26. Accordingly, it is my finding and I do hold that the plaintiff's suit lacks merit. The same is dismissed.

27. Each party shall bear their own costs.

Dated, signed and delivered at Kisumu this 24th day of October, 2017.

J.O. OLOLA

JUDGE