



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
CIVIL SUIT NO. 570 OF 2015
FORMELY CIVIL SUIT NO. 18 OF 2012(OS)
IN THE MATTER OF LR. NO KISUMU/KONYA/4488
BETWEEN
SIPROSA ANYANGO ORWA.....1ST APPLICANT
JEREMIAH ORWA ANUDO.....2ND APPLICANT
=VERSUS=
NICHOLAS OTIENO HONGO.....RESPONDENT

JUDGEMENT

1. By an Originating Summons dated 31st January 2012 and filed herein on 6th February 2012, the Applicants Siprosa Anyango Orwa and Jeremiah Orwa Anudo pray for the following Orders:-

(i) THAT (there be) a declaration that the Applicants have acquired title to part of land Parcel No. Kisumu/Konya/4488 measuring approximately 0.20 Hectares by way of adverse possession.

(ii) THAT an order be issued to direct the Land Registrar to transfer the said parcel of land to the Applicants.

(iii)(Spent)

2. The said application is supported by an Affidavit sworn by the 1st Applicant Siprosa Anyango Orwa on 31st January 2012 and is premised on the following grounds:-

(i) That Land Parcel No. Kisumu/Konya/4488 is part of the 2nd Applicant's ancestral land which was passed to him by his fore-fathers. The other part of the ancestral land is now registered as land Parcel No. Kisumu/Konya/3073 and Land Parcel No. Kisumu/Konya/4487 in other people's names.

(ii) That the 2nd Applicant now 87 years old was born and brought up on the land and has resided

and continue to reside on it in his adult life.

(iii) That the 2nd Applicant married the 1st Applicant as a second wife in 1993 and they established their matrimonial home on the said parcel of land.

(iv) That the Respondent illegally purchased Land Parcel No. Kisumu/Konya/4488 from Amos Onudi Ondieki and Jared Onudi Ondiek without the knowledge and consent of the Applicants who are in actual possession of the land.

(v) That the Respondent had the land registered in his name in September 1996.

(vi) The Applicants have been in actual, open, exclusive, adverse and continuous use of the (portion) of land measuring approximately 0.20 Ha for a period in excess of 12 years without any complaints, interference and/or threats by the Respondent since the land was registered in his name.

(vii) That the Applicants have acquired title to the said portion of land by adverse possession and are hence entitled to be registered as the owners thereof.

(viii) That the Respondent who is unknown to the Applicants has never resided or cultivated the subject portion of the parcel of land in issue.

3. Having tried a number of times to trace the Respondent Nicholas Otieno Hongo in vain, the Applicants moved to court vide an application dated 19th August 2013 seeking leave to be allowed to serve summons upon the Respondent by means of substituted service through an advertisement in a local newspaper. The said orders were granted on 21st August 2013 and subsequently an advertisement was carried in the Daily Nation Newspaper of Wednesday 11th September 2013 requiring the Respondent to enter appearance within 21 days from the date thereof. The Respondent has since neither entered appearance nor filed a defence and/or reply to the matters raised in the Originating Summons.

4. At the hearing hereof, the 1st Applicant Siprosa Anyango Orwa (PW1) testified on behalf of her husband who apparently passed on while the case was still pending on 8th June 2014. Before then she had obtained his authority to conduct the suit on his behalf. PW1 told the court that they had sued the Defendant because he took their land without permission.

5. PW1 testified that she got married to the 2nd Plaintiff in 1993 under Luo Customary Law and they established their matrimonial home on the 2nd Applicant's ancestral land. It was her testimony that at the time of her marriage, the 2nd Applicant's 1st wife one Wilkista Amolo Orwa had passed away and was buried on the same land in which they lived. Wilkista's two children died thereafter and were also buried on the self-same parcel of land. The 2nd Applicant was equally buried upon his death on the same land.

6. PW1 further told the court that her husband was allocated the land by his parents and by the time of her marriage, he found the 2nd Applicant already established their matrimonial home on the land. According to PW1, her husband had allocated part of his land to his sister Truphena Onoka Ondiek who cultivated part of the land until 1999 when she passed away. Thereafter, Truphena's son by the name Carilus Anudo continued to utilize the land. The said Anudo however also passed away in 2008.

7. PW1 told the court that shortly after the death of Carilus Anudo, one Nicholas Otieno Hongo, the Respondent herein started using the land and planting sugar cane thereon. Efforts by PW1's husband to restrain the Respondent failed. In October 2010, PW1 and her husband proceeded to the Lands Office in Kisumu where they discovered that the entire land that they have lived in for years had now been sub-divided and was registered in other people's names. The land previously known as Kisumu/Konya/1210 had been sub-divided into Kisumu/Konya/3073 which was now registered in the name of one Kilimeres Angili Odia; L.R. No. Kisumu/Konya/4487 registered in the names of the late Carilus Anudo's sons-

Amos Onudo Ondiek and Jared Onudo Ondiek; and the suitland-Kisumu/Konya/4488 which was now registered in the Respondent's name.

8. PW1 further told the Court that upon realizing what had happened, they filed a case at the Kisumu East District Land Disputes Tribunal. The Tribunal however dismissed their case. It was PW1's case that they have resided on the land and used a portion of it measuring approximately 0.20 Ha together with members of her family for a period of more than 12 years. She told the Court that the Respondent was neither their relative nor did he buy the land from them. The Defendants had however stated at the Tribunal that he bought the land from the late Carilus Anudo but he had lost the Sale Agreement. She further stated that after the ruling of the tribunal, the Respondent had never come to Court. He however continues to use the rest of the land to plant sugarcane. PW1 therefore asked the Court to have the Respondent evicted from the land and to revert the ownership thereof to herself.

9. According to PW1, when they discovered that the land in which they had lived over a number of years had been sub-divided and registered in other people's name they first moved to the Kisumu East District Land Disputes Tribunal where they lodged a complaint. When they lost the case before the tribunal, they moved to this Court and filed the present proceedings seeking to be registered as the owners of a portion of the land which they occupied by operation of the doctrine of adverse possession.

10. While counsel did not address me on the repercussions of the claim having first been filed before the tribunal, I think it raises, fundamental issues which require the Court's attention before the Court can deal with any other issue raised herein. A perusal of the Tribunal's proceedings (produced herein as plaintiff Exhibit No. 4) reveals that the same were commenced on 14th December 2010 and were concluded on 21st April 2011. It is apparent from the proceedings that the claim was not about one but two titles, namely; Kisumu/Konya/4487 and Kisumu/Konya/4488. From the decision/Judgment of the Panel as recorded at page 9 of Exhibit 4, it is evident that the Applicants were successful as regards parcel No. Kisumu/Konya/4487 which the tribunal ordered to revert to their name but lost in regard to parcel No. Kisumu/Konya/4488. The said decision/Judgment of the tribunal reads as follows:-

"1. Kisumu/Konya/4488 was genuinely bought from the late Carilus Anudo by Nicholas O. Hongo (the Respondent herein) himself.

Mzee Jeremiah Orwa Anudo, (2nd Applicant herein) has lost this case with costs.

2. Kisumu/Konya/4487 was wrongly registered in the names of Amos Anudo Andiek and Jared O. Anudo. This has to be corrected by the District Land Registrar Kisumu.

Jeremiah Orwa Anudo himself has to make a follow up to make sure this mistake is corrected soonest so that Kisumu/Konya/4487 is registered in his own name Jeremiah Orwa Anudo ID No. 2781635.

Right of Appeal is allowed within 30 days from the date of adoption by the Magistrates Court in Kisumu."

11. Annexure "SAO-05(b) in the 1st Applicant's Affidavit in support of the Originating Summons is a record of the proceedings which transpired in Kisumu Chief Magistrates Court, Land Case No. 77 of 2011 between the 2nd Applicant herein and the Respondent as the 3rd Defendant. The said annexure shows that the decision of the Tribunal was read and adopted as an order of the Court by the Honourable Mr. S.O. Atonga, Senior Resident Magistrate on 24th November 2011.

12. It is clear to me that the decision of the tribunal and the subsequent adoption by the Chief Magistrate's Court at Kisumu as aforesaid is what triggered the Applicants to file this Originating Summons some three months after the award was adopted by the Court. As it were, the jurisdiction of the Land Disputes Tribunal was clearly set out at Section 3 of the (now repealed) Land Disputes Tribunal Act. Once a Tribunal had determined an issue, Section 7(1) of the Act required the Chairman to cause the decision to

be filed in the Magistrates Court together with any depositions or documents which have been taken or proved before the tribunal. The Court was then required to read and adopt the award (as per Section 7(2) of the Act).

13. If any of the parties was aggrieved by the said award, the options were for them to either prefer an appeal to the Appeals Committee as provided under Section 8(1) of the Act or if there were reasonable grounds for challenging the decision by way of Judicial review application, one could proceed to institute such proceedings before the High Court (as it then was) and not otherwise.

14. From the face of it therefore, it would appear that the Applicants herein proceeded to this Court oblivious of and/or in disregard of those requirements of the Land Disputes Tribunal Act. To their aid however Section 31 of the Environment and Land Court Act, 2011 repealed the Land Dispute Tribunal Act. The Environment and Land Court Act commenced operations on 30th August 2011. A perusal of the award in question reveals that it was made on 21st April 2011, obviously a few months before the new Act came into effect. However, the adoption of the award was on 24th November 2011 another three months after the Land Disputes Tribunal Act No. 18 of 1990 had been repealed by Section 31 of the Environment and Land Court Act.

15. It is apparent from a reading of the Act that there was no saving provision for proceedings which were either pending hearing before the Tribunal or adoption before the Courts. Accordingly, by repeal of the Land Disputes Tribunal Act, No. 18 of 1990, no court could purport to exercise any powers thereunder. In adopting the award on 24th November 2011, the Learned Senior Resident Magistrate was invoking the provisions of Section 7 and 8 of the said repealed Act. That jurisdiction in my view had ceased to exist by operation of the law. That being the case, whatever proceedings flowed from the Magistrates decision would be null and void.

16. Arising from the foregoing, it is my view that the Applicants were equally saved by operation of the law from being bound by an order or decree which amounted to nothing but a nullity. That finding then paves the way for the court to consider whether the Applicants have made out a case for adverse possession against the Respondent.

17. As I understand it, adverse possession connotes 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/her title for a certain period. The essential prerequisites for this situation to apply is that the possession of the adverse possessor is acquired neither by force or stealth nor under the licence or permission of the owner as normally expressed in the Latin maxim ***nec vi, nec clam, nec precario***. Such possession must be adequate in continuity, in publicity and in extent.

18. Section 7 of the Limitation of Actions Act (Cap 22) embodies this doctrine in the following terms:-

“Any action may not be brought by any person to recover land after the end of 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.”

19. Section 13(1) of the Limitations of Actions Act on the other hand provides that:-

“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 Section 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.”

20. Under Section 37 of the Limitation of Actions Act aforesaid, even where the land in question is registered under one of the registration Acts, the title is not extinguished but is held in trust for the person in adverse possession until he shall have obtained and registered an order of this Court vesting the land in

him. Under Section 38 of the Act, where a person claims to have become entitled by adverse possession to land, he must apply to this Court for an order that he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the Court is provided in Order 37 Rule 7 of the Civil Procedure Rules as follows:-

“7(i) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(ii) The Summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

21. In ***Teresa Wachuka Gathira –vs- Joseph Mwangi Gachira (Civil Appeal No. 328 of 2003***, the Court of Appeal emphasized the importance of following the prescribed procedure in adverse possession claims. Because this sort of claim is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. It is only through such an exhibit that the existence and ownership of the suit property can be ascertained by the Court.

22. In compliance with that requirement, the Applicant produced a Title Deed for L.R. No. Kisumu/Konya/4488 measuring approximately 0.55 Ha. The said title issued on 27th September 1996 is in the name of the Respondent. It was the Applicant’s case that together with her now deceased husband, they have established their matrimonial home and utilized a portion measuring 0.20 Ha of L.R. No. Kisumu/Konya/4488 since the year 1993. It was further her case that they have been in continuous occupation of that portion of the suit property since 1993 without any interruption.

23. Indeed in my mind, if the Applicants have established a matrimonial home and utilized the portion of land they claim for that period of time, their stay on the same cannot be secret. The Respondent who was registered as the owner of the land on 27th September 1996 should have been aware of their presence. Indeed the proceedings before the Kisumu East District Land Disputes Tribunal (Plaintiff Exhibit 4) appear to confirm that the Applicants have been in occupation of a portion of the land which they claim and further, that the Respondent was aware of their presence therein. Between the year 1996 and 2012 when the Applicants came to this Court, a period of 16 years had lapsed.

24. The Applicants evidence was not controverted. In spite of service by way of an advertisement in a newspaper with nationwide circulation, the Respondent neither entered appearance nor a reply to the Summons. On the basis of the uncontroverted testimony of PW1 and the evidence placed before me I am of the view that the Respondent’s rights over the portion of LR No. Kisumu/Konya/4488 claimed by the Applicants has been extinguished by virtue of the long period that the Applicants have occupied and utilized it.

25. For the foregoing reasons, I find and hold that the Applicant’s claim as framed in the Originating Summons dated 31st January 2012 has merit. Accordingly I hereby order:-

(a) That a declaration be and is hereby issued that the Applicants have acquired title to a portion of land Parcel No. Kisumu/Konya/4488 measuring approximately 0.20 Ha by way of adverse possession.

(b) That an order be and is hereby issued directing the relevant Land Registrar Kisumu to transfer the said portion measuring 0.20 Ha of all that parcel of land known as Kisumu/Konya/4488, to the Applicants.

(c) That the costs of this suit be borne by the Respondents.

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

J.O. OLOLA

JUDGE