



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
MISC APPL NO.212 OF 2012
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
ZAIDA BEGUM SHAFFIR RAI.....PLAINTIFF
=VERSUS=
CALEB OTIENO ORWA
ELIJAH OUMA ORWA
PAUL OMONDI ORWA
S O.....DEFENDANTS

JUDGEMENT

BACKGROUND

1. By an Originating Summons dated 7th September 2012 and filed herein on 14th September 2012, the Applicant Zaida Begum Shaffir Rai claims to be an adverse possession of land Parcel No. Kisumu/Kogony/1538 and sets out the following six(6) questions for determination by this Court:-

1. Whether the Plaintiff's Mother one Zuleha Mohamed (deceased) bought an identified Portion measuring 25 metres x 8 metres of the original land Parcel No. Kisumu/Kogony/1538 on 20/01/1986 from its original owner one Boaz Orwa Ogutu (also deceased) who is the late father to the defendants herein.

2. Whether the Plaintiff has an overriding interest under Section 28(c), (e) and (j) of the Land Registration Act, 2012(Cap 284 of the Laws of Kenya) of the land parcel known as Kisumu/Kogony/1538.

3. Whether the Plaintiff is an adverse possessor of the parcel of land known as Kisumu/Kogony/1538.

4. Whether the Honourable Court ought to vest the Suitland Kisumu/Kogony/1538 to the Plaintiff

5. If (questions) 1, 2, 3, and 4 above are in the affirmative, whether the Kisumu District Land Registrar should be directed to register the rights and interests of the Plaintiff upon Kisumu/Kogony/1538.

6. Whether the Plaintiff is entitled to the costs of this application.

2. The Summons is supported by an annexed affidavit of the Applicant sworn on 7th September 2012 and a further one sworn on 13th March 2013, which Affidavits are premised on the grounds that:-

a. The Parcel of land belonged to the Plaintiff's mother who purchased it in 1986;

b. Upon purchasing the land, the Plaintiff's mother constructed rental houses and installed tenants who are still occupying the premises to-date and the plaintiff derives rent from them.

c. The Plaintiff has continued to benefit from the same without interruptions for a period exceeding 25 years.

3. In a Replying Affidavit sworn on 11th February 2013, by the 1st Respondent Caleb Otieno Orwa on his own behalf and on behalf of the other three co-respondents, the Respondents oppose the grant of the orders sought in the Summons.

4. It is the Respondents case that the four of them as brothers are the registered joint and equal owners of land parcel No. Kisumu/Kogony/1538 which land was initially registered in the name of their father, the late Boaz Orwa Ogutu who died on 31st December 1991. The Respondents aver that following the death of their father, they filed Kisumu High Court Succession Cause No. 676 of 2009. On conclusion of the Succession Cause on 21st October 2011, the dependants of the estate were granted a Certificate of Confirmation of Grant whereupon they proceeded to register the said parcel of land in the joint names of the Respondents herein.

5. Further, the Respondents aver that they enjoyed peaceful occupation of the said parcel of land until sometime in the year 2008 when someone erected an iron sheet structure on the land. They did not however meet the person who put up the structures until after they were served with Summons to Enter Appearance herein.

6. The Respondents aver that the Applicants claim is fraught with falsehoods since the Applicant has only occupied a portion of the parcel of land from the year 2008 and not 1986 as claimed in the Originating Summons. The Respondents further state that they are complete strangers to an Agreement purportedly signed between their father and the Applicant's mother and urge the Court to strike out and/or dismiss the Summons for being bad in law, totally defective and an abuse of the Court Process.

7. On 25th June 2013, this matter was placed before the Honourable Justice Kaniaru whereupon directions were given that the Originating Summons be deemed as the Plaint and the Applicant therein be deemed as the Plaintiff. On the other hand, the 1st Respondent's Replying Affidavit sworn on 11th February 2013 was deemed to be the Defence while the Respondents would henceforth be deemed as the Defendants. Parties then agreed to file any other documents and to proceed by way of viva voce evidence.

THE PLAINTIFF'S CASE

8. When the matter came before me for hearing, the Plaintiff called one witness. PW1, Zaida Begum

Shaffir Rai informed the Court that she is the daughter of Zuleha Mohammed, now deceased. She stated that she is the Administrator of the Estate of her late mother. It was her case that by an agreement dated 20th January 1986, her mother had purchased a portion of the parcel of land No. Kisumu/Kogony/1538 from the then registered owner one Boaz Orwa Ogutu.

9. She testified that her mother then went ahead and built rental houses on the land. At first, her mother built a mud-walled house but when it collapsed, she built houses made of iron sheets and continued to rent them out. Her mother passed away in 1991 and members of her family have been collecting rent from the houses.

10. According to PW1, in or about the year 2009, she approached the family of the seller to have certain forms signed for purposes of transferring the land to the name of her Mother's beneficiaries but the Defendants refused. She also approached the Area Assistant Chief to mediate in the dispute but the same failed to resolve the matter.

11. PW1 stated that sometime in August 2012, she visited the land and found the euphorbia fence had been interfered with. When she enquired from her tenants she was told that it was the Defendants who had cut down the fence on the purport that they were the registered owners of the land. This prompted PW1 to carry out an official search at the Lands Registry from which she discovered that indeed the land had been registered in the names of the four defendants. To-date the defendants have refused to sign the land transfer forms.

12. Upon cross examination, PW1 agreed that she was not there when the alleged sale agreement between her mother and the father of the Defendants was signed. It was however her case that her mother knew the Defendants' father and that indeed an elder brother of the Defendants known by the name Janes Ogutu had signed the Sale Agreement. She testified that the only other witness to the Agreement who was alive other than the said Janes Ogutu was one Saidia Akbar but she was now too old and suffered from memory lapses hence her failure to call her as a witness.

13. PW1 further testified that even though she did not live on the land, she had put tenants in the property. The tenants previously lived there peacefully but they later informed her that the 1st Defendant was going there and threatening them with a panga. She however admitted that no caveat or caution had been registered in her mother's name as at the time the transfer into the Defendants name was done.

THE DEFENDANTS CASE

14. Similarly in support of their case, the Defendants called one witness. DW1, Caleb Orwa Otieno who is the 1st Defendant testified that land parcel Kisumu/Kogony/1538 belongs to them. He testified that the land was initially registered in the name of their father-Boaz Orwa Ogutu who is now deceased. The land was subsequently registered in his name and that of his three brothers, Elijah Ouma Orwa, Paul Omondi Orwa and Stephen Orwa on 12th April 2012.

15. DW1 testified that in 2008, he went to the land and found an iron sheet house newly built thereon. According to him, there had been no other house that had been built previously on the land. After about a month he found tenants in the house and when he enquired, the tenants told him that the house was owned by "Mama Mwarabu". He never knew the "Mama Mwarabu" until when he was served with the Court Papers in this case.

16. DW1 further testified that sometime in 2013, he had a boundary dispute with his neighbours. This forced him to call a Surveyor who came and surveyed the land. Thereafter he fenced off his land using barbed wire and euphorbia. When the tenants saw the fence, they realised the place did not belong to the "Mama Mwarabu" and they left the place on their own volition.

17. On cross-examination, DW1 stated that in 1986 when the land was allegedly sold, he was about 9 years old. He told the Court that as per the title deed in their name the entire land parcel No.

Kisumu/Kogony/1538 measures approximately 0.17 Ha.

18. It was further his testimony that his elder brother Janes Ogutu who is said to have signed the agreement as a witness is alive but he left their home and DW1 does not know where he resides. He told the Court that his father died in 1991 and he is not aware that he had sold the land to anyone before his death. It was his case that he only saw the alleged Sale Agreement in 2012 when he was served with the Court papers for this case. He further told the Court that even though the Agreement had the Area Assistant Chief's stamp thereon, he had never tried to find out from the Chief if he knew about it.

19. According to DW1, the house built of the iron sheets was at the corner of the disputed parcel of land. They had left the area without tilling for a while. Further, DW1 told the Court that he did not report to the Chief or the Police when he found the house built of iron sheets on their land. He however knew a tenant by the name Edwin Munanda who used to live in the iron sheet house. He denied removing the tenants doors in order to force them out of the premises. It was his case that the tenants left on their own.

ANALYSIS OF THE EVIDENCE

20. I have carefully considered the pleadings and the evidence placed before me by the parties. I have equally considered the submissions and authorities placed before me by the Learned Advocates acting for the parties herein. In my view, two broad issues stand out for determination herein. These are:

- a. Whether there was an agreement for the sale of the land; and
- b. *Whether the Plaintiff has made out a case for adverse possession*

ISSUES FOR DETERMINATION

a. Whether there was an Agreement for the Sale of the Land

21. One of the Questions the Plaintiff's wants determined is whether the Plaintiff's mother one Zuleha Mohammed bought a portion of land Parcel No. Kisumu/Kogony/1538 from the original owner. In support of her position, the Plaintiff avers that to her knowledge the mother bought a portion of the land measuring 25 by 8 metres on 20th January 1986. Her said mother subsequently passed on in 1991 before obtaining title to the land.

22. In support of her Claim, the Plaintiff produced a copy of the Land Purchase Agreement dated 20th January 1986. The said Agreement reads in the relevant part as follows:

"I Boaz Orwa Ogutu, ID No. 6783205/69 certify that I have sold my piece of land Parcel No 1538 at Nyambaja Sub-Location Kogony Location Kisumu East to Mrs. Zuleha Mohamed Shaffir ID NO. 0423045/63 at the Cost of Kshs 7,300/=. I have received Kshs 4,000/= paid cash and remaining Kshs 3,300/= balance will be paid to me in due course."

23. The Agreement is shown to have been witnessed for the seller by one Janes Ogutu while the buyer had two witnesses, Saida Akbar and Ramadhan Asmani. It is also signed before the Area Assistant Chief under whose signature the words "Confirmed" and "Size 25 x 8" are endorsed. There is also a further endorsement and signatures thereon around the area where the balance of the purchase price is shown that reads:

"Kshs 3,300/= paid cash on 30/1/86".

24. It was the Defendant's contention that the validity of the Sale Agreement can only be ascertained by the makers or witnesses thereof and that given that the Plaintiff was neither the author nor a witness to the document, she could not vouch for its authenticity. I have looked at the Sale Agreement produced as evidence herein and I am satisfied that the same is an authentic document that underpins the relationship between the Plaintiff and the Defendants. It is instructive that one of the witnesses to the Sale Agreement

is an elder brother of the Defendants named Janes Ogutu. The said Janes Ogutu is said to be alive. The Defendants claim that they only came to see the Sale Agreement for the first time when they were sued and served with documents in 2012. While the Defendants claim they are strangers to the Sale Agreement, they did not produce any denial from their elder brother that he witnessed the Sale Agreement.

25. Indeed it is instructive to note that by the 1st Defendant's own admission, in 1986 when the Sale Agreement is said to have been signed, he was still a minor barely aged 9 years. From the Certificate of Death the Defendants produced herein, DW1's father died some 5 years later in December 1991. DW1 would therefore have been barely 14 years old and he cannot therefore be heard to assert as a matter of fact that the agreement never existed because his father never told him about it. From the evidence placed before me, it is clear that PW1's elder brother the said Janes Ogutu is alive and active in the affairs of the family except for this case. In the 1st Defendants documents annexed to the Replying Affidavit, he has exhibited a letter dated 16/9/2009 from the Area Chief (marked "COO4") in regard to their father. The said letter addressed to the Area Chief reads in the relevant part as follows:-

"This is to confirm that the above named deceased person was a resident of Kogony Sub-Location of your Location and that he died and was buried in the same.

Deceased person left behind a widow called Hellida Obura Orwa ID No....with whom (they) were blessed with the following as children:-

Janes Ogutu Orwa, ID NO.....

Elija Ouma Orwa, ID NO.....

Caleb Otieno Orwa, ID NO.....

Paul Omondi Orwa, ID NO.....

S O O-Minor

They have therefore nominated their mother and Caleb Orwa to be granted Letters of Administration of the deceased's estate to enable effective administration of the above."

26. It is evident to me that the person referred to in these proceedings as Janes Ogutu is the same one referred to as James Ogutu Orwa in the Assistant Chief's Letter. That there was some confusion as to the correct name of PW1's elder brother is confirmed by a look at the Certificate of Confirmation of Grant issued to PW1 and his mother on 21st October 2011 wherein the heirs of the Estate are listed in the schedule thereto as follows:-

SCHEDULE

Name	Description of Property	Share of Heir
Joanes Ogutu Orwa	Kisumu/Kogony/2804	Whole
Elijah Ouma Orwa	Kisumu/Kogony/1538	To be
Caleb Otieno Orwa	Kisumu/Kogony	shared equally
Paul Omondi Orwa	Kisumu/Kogony	among the four
S O of majority.	Kisumu/Kogony	Caleb to hold in trust till he attains the age

27. It is clear from the said Schedule that the said Janes Ogutu is the same one referred to in the Assistant Chief's Letter as James" and in the Confirmation of Grant as 'Joanes". It is also clear from the Grant that the said Janes never laid any stake on land parcel number Kisumu/Kogony/1538 which was left to be shared equally by his four brothers-the Defendants herein. In my mind, if the Defendants were denying the fact that the sale took place, nothing would have been easier than to call their elder brother to testify as to how his thumb print came to be in the Sale Agreement. I do not believe PW1 when he says he does not know where his elder brother lives. The confirmation of the grant clearly shows he was granted LR No. Kisumu/Kogony/2804 in 2011.

28. Besides, the conduct of PW1 after the alleged discovery of the iron sheet house built by the Plaintiff in 2008 is rather telling. According to him, he neither bothered to remove the structures nor to report their presence in their parcel of land to the Area Chief nor the Police. When one month down the line he saw tenants occupying the houses, he merely asked them about the owner of the houses and then went away. One of the tenants Edwin Aluda Munaga swore an Affidavit herein in support of the Plaintiff's case. PW1 conceded that at some point the said Edwin lost a child and buried him on the permission of the Plaintiff on the suitland. PW1 did not take any legal action to evict or stop the plaintiff using the land. Instead and especially after this suit was filed; he resorted to intimidating the tenants including by fencing off the area surrounding the houses to deny the tenants ingress and egress to and from the suit premises.

29. Such conduct can only be a manifestation of one thing; that the Defendants had all along known that the Plaintiffs had some sense of right to occupy the land in dispute. Indeed the Defendants were unable to explain how the Plaintiff, an "Arab Woman" as they referred to her could have just moved into their parcel of land and proceeded to erect a house thereon without some sense of entitlement. Their actions must have arisen as a result of the realization that the plaintiff had no title in her name and hence the reason she continued to beg them to sign transfer forms to enable her to transfer the land to her name. Accordingly, I am satisfied that the late Zuleha Mohammed purchased a portion measuring 25 x 8 metres of all that parcel of land known as Kisumu/Kogony /1538.

(b) Whether the Plaintiff has made out a Case for Adverse Possession

30. In my understanding, adverse possession is essentially a situation where a person takes possession of land and asserts rights over it while the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, which in Kenya is stipulated as 12 years. The process springs into action due to the default or inaction of the land owner. The essential prerequisites for this situation to apply is that the possession of the adverse possessor is acquired neither by force nor stealth or under the licence or permission of the owner as normally expressed in the Latin **Maxim nec vi, nec claim nec precario**. Such possession must by law be adequate in continuity, in publicity and in extent.

31. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22, Laws of Kenya) in these terms:

"An 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."

32. Section 13 of the Limitation of Actions Act aforesaid further provides that:-

"(1) A right of action to recover land does not accrue unless the land is in 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."

33. Section 37 of the Limitation Actions Act further provides that

“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 of land comprised in a lease registered under any of those Acts, he 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.”

34. It is the Plaintiff’s claim that her mother first entered into the suitland through a Sale Agreement. She produced the agreement as her Exhibit No 3. It is dated 20th January 1986. It is apparent that this was an agricultural land for which the Land Control Board consent ought to have been obtained pursuant to section 6, 7 and 8 of the Land Control Act. It would appear that no such consent was obtained hence the persistent request by the plaintiff to the Defendants to sign in her words “the land transfer forms”. Such consent ought to have been obtained within 6 months from the date of sale. That being the case, the sale agreement became void by operation of the law. It is evident that the plaintiff was cognizant of this fact hence her decision to base her claim on adverse possession as opposed to the fact of the sale.

35. It was the Plaintiff’s case that immediately after the sale agreement was concluded her mother moved into the suitland and constructed some mud-walled houses which she rented out to her tenants. When the houses collapsed, they built new houses made of iron sheets sometime around the year 2008. The Plaintiff annexed photographs of the said houses in her Supporting Affidavit sworn in support of her Notice of Motion dated 30th November 2013 in which she sought orders of injunction against the Defendants. It was her testimony that they have been in continuous and uninterrupted occupation of the premises since 1986. In support of her case, she also produced a letter dated 3rd August 2009(Exhibit 7) from the Office of the Assistant Chief, Kogony Sub-Location which letter confirms that her mother bought the land and that they had been using the land for a long time.

36. Although the Defendants claimed that they only came to learn of the Plaintiff’s occupation of their land in the year 2008, they did very little to refute the plaintiff’s assertions that they had been in uninterrupted occupation of the suit premises since 1986. As I pointed out earlier, the evidence adduced by DW1 suggested that they were cognizant of the Plaintiff’s entitlements to her portion of the land. That was the reason that even as he claimed he discovered the iron sheet building in their land and later found tenants thereon, they took no step to demolish the building and/or to evict the tenants for purposes of redeeming their title. Indeed, according to DW1, they did not even bother to find out who had in actual fact built the iron sheet building and were contented instead by the explanation given by the tenants that the building belonged to Mama Mwarabu.

37. In the circumstances, I do believe the Plaintiff when she states that they entered the suitland shortly after the Sale Agreement in 1986. That agreement in my view is proof of the Plaintiff’s initial entry into the Suit Premises as an intended buyer. While the sale agreement was vitiated by operation of the law, to wit, the failure by the parties to obtain the Land Control Board Consent within six months, it is evident that the plaintiff took possession of her portion and developed residential houses thereon. They enjoyed quiet and uninterrupted possession and control of the premises between 1986 and the year 2012 when the Defendants somehow coerced the tenants into abandoning the premises by putting a fence surrounding the premises and giving them no room for movement into and out of the suit premises. That is a period of 26 years.

38. It is further clear to me that when the Defendants moved the High Court at Kisumu in Succession Cause No. 676 of 2009, they were already aware of the Plaintiff’s claim on the suitland which is one of the two properties listed in the schedule to the Grant as having belonged to the late Boaz Orwa Ogutu. It would appear however that they deliberately left out the interest of the plaintiff who had already by then, in the Defendants admission, built the iron sheet houses on the land.

39. Having built rental houses from which they collected rent for a period of 26 years, the Plaintiff’s occupation of the land must have been open and well known to the Defendants. The same was certainly adverse to the Defendant’s title.

40. The upshot is that I find merit in the Plaintiff’s case. Accordingly I hereby make the following orders:-

a. A declaration that the Plaintiff has acquired by way of adverse possession a Portion measuring 25 m x 8 m of all that parcel of land known as Kisumu/Kogony/1538 measuring approximately 0.17 Ha.

b. The County Surveyor Kisumu is hereby directed to carry out a survey and demarcate the portion of land measuring 25m x 8m currently occupied by and belonging to the plaintiff out of all that parcel of land known as Kisumu/Kogony/1538 within 30 days from the date hereof.

c. The County Land Registrar, Kisumu is hereby directed to register the Plaintiff as the registered absolute proprietor of all that portion measuring 25m x 8m to be curved out of land Parcel No. Kisumu/Kogony/1538 as aforesaid.

d. The costs of the Survey shall be borne by the Defendants.

e. The Plaintiff shall have the costs of this suit.

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

J.O. OLOLA

JUDGE