



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 244 OF 2013 (OS)

CHARLES OTIENO SETO.....PLAINTIFF

VERSUS

DIDACUS OJWANG ONYANGO.....1ST DEFENDANT

JOSHUA ONYANGO OLOO.....2ND DEFENDANT

GIDEON OTIENO DANS.....3RD DEFENDANT

J U D G M E N T

1. The plaintiff by an originating summons grounded under Order 37 Rules 7 and 4 of the Civil Procedure Rules and Section 38 of the **Limitation of Actions Act**, Cap 22 laws of Kenya dated and filed in court on 4th June 2013 claims to have acquired title over **LR No. Kamagambo/Kabuoro/4342** by way of adverse possession. He seeks orders that:-

1. A declaration that the defendants rights to recover the entire of LR No. Kamagambo/Kabuoro/4342 is barred under the Limitation of Actions Act, Cap 22 of the Laws of Kenya, and her title thereto extinguished on the grounds that the plaintiff herein has openly, peaceful and continuously been in occupation and possession of the aforesaid parcel of land herein for a period of over 12 years.

2. There be an order that the plaintiff b registered as the proprietor of LR No. Kamagambo/Kabuoro/4342 in place of the 2nd and 3rd defendants.

3. There be an order restraining the defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit land that is LR No. Kamagambo/Kabuoro/4342, in any manner whatsoever and/or howsoever.

4. The deputy registrar and/or the Executive Officer of the Honourable High Court be directed and/or ordered to execute the Transfer Instruments and all attendant documents on behalf of the 2nd and 3rd defendants to facilitate the transfer and registration of LR No. Kamagambo/Kabuoro/ 4342, in favour of the plaintiff.

5. Costs of this originating summons be borne by the defendants.

2. The Originating Summons is supported on the grounds set out on the body of the Originating Summons and on the supporting affidavit sworn by the plaintiff/applicant in support thereof. Inter alia the

plaintiff/applicant grounds the Originating Summons on an agreement for sale of a portion of **LR No. Kamagambo/Kabuoro/3192** said to have been entered into on 13th January 2001 pursuant to which the plaintiff/applicant claims to have been let into possession of the portion of the land the subject of the sale. The plaintiff further avers that **LR No. Kamagambo/Kabuoro/3192** was subdivided to give rise to land parcels **Kamagambo/Kabuoro/4218-4222** and that the portion he had purchased fell on land parcel number **Kamagambo/Kabuoro/4342** and **4343** respectively. The plaintiff states that following the further subdivision, the portion he had purchased and in respect of which he has remained in possession since 2001 became land parcel **Kamagambo/Kabuoro/4342** and it is this parcel of land he now claims by virtue of adverse possession. The plaintiff supports his claim by the affidavit sworn in support of the originating summons on 4th June 2013 to which various annexures have been attached to verify the plaintiff's depositions.

3. The 2nd respondent, Joshua Onyango Oloo swore a replying affidavit dated 26th June 2013 filed in court on 1st July 2013 on behalf of himself and the 1st and 3rd defendants in opposition to the plaintiff's originating summons. The defendants through the replying affidavit sworn by the 2nd defendant denied the averments by the plaintiff as set out in the Originating Summons and the affidavit sworn in support. The defendants stated that land parcel **Kamagambo/Kabuoro/3192** was prior to being subdivided being leased to 3rd parties who were farming sugarcane on the land and that the lease agreement was to lapse in December 2006. The 1st and 3rd defendants averred that they are the registered owners of land parcel number **Kamagambo/Kabuoro/4342** having purchased the same sometime in 2005. The defendants deny the plaintiff was in occupation of any portion of land parcel **Kamagambo/Kabuoro/3192** and specifically land parcel **4342** which was a subdivision thereof during the period 2002 and 2006 as the whole of land parcel **3192** was under lease to 3rd parties.

4. The defendants aver that they became aware of the plaintiff in 2010 when the plaintiff and one Elisha Odete Randusi filed an application seeking to revoke grant of letters of administration issued to the 1st defendant in respect of the estate of Linet Atieno Otieno in Kisii High Court Succ. Cause No. 24 of 2003 which application was dismissed. The defendants aver that the plaintiff trespassed onto the suit land in 2012 and that it was not true that the plaintiff had been in possession of the suit land since 2001 as alleged and further contends that the plaintiff's claim predicated on the doctrine of adverse possession is mischievous and amounts to abuse of the court process.

5. On 1st October 2013 the court gave directions that the originating summons be heard viva voce and the originating summons and the affidavit in support be treated as the plaint and the replying affidavit as the defence respectively. The case was heard before me on various dates. The plaintiff and 2 witnesses testified in support of the plaintiff's case while the 2nd defendant and one other witness testified in support of the defendant's case.

6. The plaintiff's case:

The plaintiff, Charles Otieno Seto testified as PW1 and it was his evidence that on 13th January 2001 he purchased a portion of 3 acres from one Lynette Atieno Otieno (now deceased) who was the mother in law of the 1st defendant. The plaintiff produced a copy of the agreement of sale dated 13th January 2001 ("**PEx.1**") which showed that the subject of the sale was **Kamagambo/Kabuoro/3192** then registered in the name of Lynette Atieno Otieno (deceased). It was the plaintiff's evidence that he was granted possession and that he took possession of the portion of 3 acres sold to him and started utilizing and developing the same. The plaintiff further states that the vendor died before the Land Board Consent for transfer of the portion he had purchased was processed although he stated, he and Lynette Atieno had attended the Land Board on one occasion.

7. The plaintiff stated that land parcel **Kamagambo/Kabuoro/3192** was initially subdivided to create land parcels **Kamagambo/Kabuoro/4218, 4219, 4220** and **4221** and it was his evidence that the portion he purchased fell on land parcel **4218** which he stated was further subdivided into land parcels **4342** and **4343**. He testified that he presently is in occupation of land parcel **4342** and that is where he has

constructed his house. He stated that Lynette Atieno died without transferring land parcel **4342** to his name and that instead the 1st defendant caused the transfer of land parcel **4342** to the 2nd and 3rd defendants, a discovery he made after carrying out a search at the lands registry. The plaintiff maintained that he took possession of the portion of land he purchased from Lynette Atieno (deceased) in 2001 and has remained in possession ever since. He insisted that it is in 2001 he constructed his house on the suit property and denied that he only entered the land in 2011 and/or that he built the house on the suit land in 2012 after being acquitted of the charge of forcible detainer that the 2nd and 3rd defendants had instigated.

8. The plaintiff in cross examination by Ms. Kusa advocate for the defendants stated that the local chief S. Ngoje Adika had given him a letter exhibited at page 50 of the plaintiff's bundle of documents dated 20th March 2013 confirming that he had resided in the suit land since 2001. Shown another letter dated 10th July 2013 from the same chief disowning the letter dated 20th March 2013, the plaintiff expressed surprise that the chief would do that. The plaintiff admitted that at the time he entered into occupation of the suit land in March 2001 there was sugarcane which belonged to Lynette Atieno. The plaintiff further admitted in 2004 there were tribunal proceedings as per the proceedings of the tribunal annexed in the bundle of documents and further that he made an objection in the succession case relating to the estate of Lynette Atieno (deceased). The plaintiff denied any knowledge that the 2nd and 3rd defendants had bought the suit land stating that the 1st defendant who supposedly sold the land to them was infact a witness to the agreement between the plaintiff and Lynette Atieno.

9. The plaintiff stated that the land he purchased was delineated with boundaries which he planted. He further stated that the photograph depicting his house on the suit land was taken in 2003. The plaintiff maintained that his possession of the suit land had never been interrupted and on that account contends his possession has been adverse the interests and rights of the proprietor and that he has consequently acquired title to the subject suit land.

10. Erastus Randusi Odete (PW2) testified that his father one, Elisha Ondente Randusi (now deceased) purchased a portion of land now **LR No. Kamagambo/Kabuoro/4343** from Lynette Atieno which is a subdivision of **LR Kamagambo/Kabuoro/3192** which was owned by the said Lynette Atieno in 2001. He stated his father died in July 2015 before the suit property had been transferred to him. PW2 stated after his father bought the land he gave the same to him and that it is him (PW2) who has been in occupation of the land since 2001. The witness testified that the plaintiff is his neighbour and that the plaintiff has been in occupation of land parcel 4342 since 2001 when he built a house thereon. PW2 stated that neither he nor the plaintiff has title to the parcels they occupy. He further stated, in February 2012 the defendants caused the plaintiff to be arrested on allegations that he had forcefully entered and occupied land parcel **4342** which allegation he averred was incorrect since the plaintiff had been in occupation since 2001.

11. The witness admitted that he and the plaintiff were arrested in 2012 and charged at Rongo with the offence of forcible detainer as per the charge sheet in PMCCR. Case No. 85 of 2012 annexed at page 45 of the plaintiff's bundle of documents. The witnesses further admitted that his late father raised objection in Succession Case No. HC Succ. Cause No. 24 of 2003 [Kisii] in regard to the estate the late Lynette Atieno. He further admitted that in 2004 there had been Tribunal proceedings relating to the suit property in which he did not participate. The witness denied that the plaintiff chased the defendants away from the suit property asserting that the plaintiff had always been in possession.

12. PW3 Sam Onyango advocate testified that he drew the agreement dated 13th January 2001 between Lynette Atieno Otieno (deceased) and the plaintiff and that the 1st defendant was a witness and that he executed the agreement as such.

13. The Defendants Case;

The 2nd defendant testified as DW1 on his own behalf and on behalf of the 1st and 3rd defendants. The area chief one Silas Ngonje Adika testified as DW2 whereupon the hearing closed. The 2nd defendant

(DW1) testified that he and the 3rd defendant are the registered owners of land parcel **Kamagambo/Kabuoro/4342** having purchased the same from the 1st defendant in 2005. He stated that they were issued with title deed to the parcel of land in 2011 after the grant of letters of administration issued to the 1st defendant in the succession case had been confirmed. The 2nd defendant explained that at the time they bought the parcel of land in 2005 the same was fully under sugarcane and that the plaintiff was not in occupation and was not residing on the land and that no house had been constructed thereon. The witness testified that the 1st defendant had informed them the land had been leased to two persons and showed them two lease agreements made in 2002 which were produced in evidence as “**DEx.3**” and “**DEx.4**” respectively.

14. The witness (DW1) further testified that at the time they purchased the suit property in 2005 the 1st defendant had informed them he was the administrator of the estate of Lynette Atieno and he was awaiting confirmation of the grant of letters of administration. The plaintiff together with one Elisha Odete Randusi applied to have the grant issued to the 1st defendant revoked but the application was dismissed as per the copy of the ruling annexed to the defendants’ bundle of documents (“**DEx.8**”). The date of 17th January 2010 shown as the date the ruling was delivered clearly is a typing error as the application it was dealing with was dated 18th January 2010 as set out in the ruling at page 6. Hon. Justice Asike-Makhandia (as he then was) gave final directions on the application on 22nd October 2010 when he states the parties agreed to have the application proceed on the basis of the affidavits on record and further to file and exchange written submissions. The copy of the ruling was produced as “**DEx.5**”.

15. DW1 stated that the plaintiff invaded their land in 2011 after they (the defendants) and got their titles and were establishing the parcel boundaries. In particular the witness stated that the plaintiff invaded the land in February 2012 when the defendants were on site. The plaintiff and his agents removed and damaged the beacons that had been place and the fencing posts and chased the defendants away. The defendants reported the matter to the chief who summoned the plaintiff but he declined to attend before the chief prompting the chief to advise the defendants to report the matter to the police. The defendants reported the matter to Kamagambo Police Station and the plaintiff together with Erastus Odete (PW2) were arrested and jointly charged in Rongo PMCR. Case No. 85 of 2012 with the offence of forcible detainer in regard to land parcels **Kamagambo/Kabuoro/4342** and **4343**. The plaintiff and his co-accused were acquitted of the offences with the magistrate holding the accused and the complainant were both claiming interest on the subject land which dispute could only be properly adjudicated through civil proceedings. The charge sheet, the proceedings and ruling in the criminal case were produced as “**DEx.7**” and “**DEx.8**” respectively. The defendants insisted the plaintiff constructed the house on the suit property after the acquittal in the criminal case by the Rongo Magistrate’s Court and termed the plaintiff’s evidence that he had peacefully possessed and occupied the suit property from 2001 as a lie.

16. DW2, Sila Ngonje Adika was the local area chief of Central Kamagambo location where the suit property is situated. DW2 stated he knew the plaintiff and the defendants well as they came from his location. He affirmed that in 2012 the 2nd and 3rd defendants reported to him that the plaintiff and PW2 had trespassed onto their land and upon visiting the land he found the 2nd and 3rd defendants fencing materials had been removed. DW2 stated that he requested the 2nd and 3rd defendants to furnish him with their ownership documents which they did. He summoned the plaintiff and Erastus Odete to his office but they declined to attend which prompted him to advise the 2nd and 3rd defendants to report the matter to the police for necessary action.

17. The witness stated that at the time he visited the suit property in 2012 there was no house built on the suit property and that the house claimed by the plaintiff must have been constructed after he had visited the land in 2012. The chief (DW2) denied he was the writer of the letter dated 20th March 2015 produced by the plaintiff in his evidence.

18. After the close of the trial, the parties filed final written submissions as directed by the court. Having considered the pleadings, the evidence and the submissions made by the parties the issues that stand out for determination are as follows:-

(i) Who is the registered proprietor of land parcel Kamagambo/ Kabuoro/4342 (the suit property)?

(ii) Whether the plaintiff is in occupation and possession of the suit property, and if so when the occupation and possession commenced?

(iii) If the plaintiff is in possession, whether such possession is adverse to the interests and rights of the registered proprietors; and if so whether the adverse possession has been open, continuous and uninterrupted for a period of over 12 years?

(iv) What orders should the court make?

19. On the first issue as to who the registered proprietor of the suit property is, the plaintiff produced an abstract of the title (green card) in respect of land parcel **Kamagambo/Kabuoro/4342 (PEX.8)** which shows the land was on 14th August 2011 registered in the name of Didacus Ojwango Onyango the 1st defendant as the administrator of the estate of Lynette Atieno pursuant to HCC Succ. Cause No. 24 of 2003 and on the same date was transferred to Joshua Onyango Oloo and Gideon Otieno Dans the 2nd and 3rd defendants respectively. The plaintiff in his evidence affirmed that when he carried out an official search at lands office he discovered that the 2nd and 3rd defendants had been registered as proprietors of the suit property. The 2nd and 3rd defendants equally tendered in evidence a copy of the official search and a copy of the title deed which showed they were the registered owners of the suit property. Thus on the first issue, there can be no dispute as to who presently is the registered owner of the suit property. It is the 2nd and 3rd defendants and I so find and hold.

20. The plaintiff however contends that as at the time the 2nd and 3rd defendants were registered as the proprietors his rights and interest as an adverse possessor were accruing arising from his entry and occupation of the suit property in 2001 following purchase of the suit property from Lynette Atieno deceased. The plaintiff as per his evidence states he purchased a portion of 3 acres out of the initial land parcel **Kamagambo/ Kabuoro/3192** owned by Lynette Atieno which was subsequently subdivided into four (4) parcels **Kamagambo/Kabuoro/4218-4221**. He stated his portion formed part of land parcel No. **4218** which was registered in the name of Lynette Atieno who unfortunately died before she could effect the transfer to him. While there was evidence that the plaintiff was in occupation and possession at the time of the institution of the suit there was contestation as to when the plaintiff entered into possession and whether the possession was peaceful and uninterrupted for a period of over 12 years to enable the doctrine of adverse possession to be applicable.

21. The plaintiff strenuously argues and submits that he has been in possession of the suit property since 2001 and that his possession has been adverse citing the fact that he has built a house thereon and has resided thereon since 2001 when he bought the property. PW2 who the plaintiff called as his witness supported the plaintiff's assertion that he had been in possession of the suit land since 2001 and the possession was continuous and uninterrupted.

22. The defendants on their part contend the plaintiff was not in occupation of the suit property from 2001 as claimed but rather forcibly invaded the suit property in 2012 when the plaintiff chased the defendants out of the property. The 2nd and 3rd defendants argued that at the time they bought the property in 2005 the property was in vacant possession and was under sugarcane belonging to 3rd parties who had leased the property. The 2nd and 3rd defendants stated that the house the plaintiff claims to have built on the property was constructed in 2012 after the criminal case preferred against the plaintiff at Rongo PM's Court for forcibly entering into the defendants land (forcible detainer) was dismissed and the plaintiff acquitted of the charge. DW2 the area chief who testified on behalf of the defendants visited the suit property before the plaintiff was charged in the criminal case at Rongo Magistrate's Court and he was emphatic that there was no house constructed in the suit property in 2012. His evidence was that the house claimed by the plaintiff must have been built after he had visited the land in 2012.

23. Having carefully reviewed and considered the evidence respecting to the plaintiff's occupation of the

suit property, I am inclined to accept the defendants' evidence that the plaintiff did not actually take possession of the suit property in 2001 as claimed by the plaintiff but in 2012. In coming to this conclusion and finding I have taken account of the fact that there is clear evidence that the 1st defendant had vide lease agreements dated 29th June 2002 leased an aggregate of 6 acres out of land parcel **Kamagambo/ Kabuoro/3192 ("DEx.3 and 4")** to third parties. The plaintiff himself stated the land was under sugarcane save he stated the sugarcane belonged to Lynette Atieno. The 2nd and 3rd defendants stated at the time they were buying the land it was under cane which they were informed belonged to the lessees who remained in possession upto 2006-2008 as per the lease agreement. DW2, the area chief, who knew all the parties affirmed that he was not the author of the letter dated 20th March 2015 attributed to him by the plaintiff and claimed the letter was falsified and did not emanate from his office. The chief (DW2) further testified that it was not true that the plaintiff had resided in the suit property before 2012. The chief, DW2 who testified before me, struck me as a witness of truth. He being a public officer had no reason to favour any party and no evidence of bias was demonstrated. Accordingly, I found his evidence truthful and I accepted the same. I therefore hold and find that the plaintiff's possession and occupation of the suit property is from the year 2012 and not 2001 as claimed by the plaintiff. I hold the evidence of PW2 who testified on behalf of the plaintiff to be suspect considering that he was also making a similar claim as the plaintiff against the defendants. It is noteworthy that PW2 was a co-accused with the plaintiff in the Rongo PM's Criminal Case.

24. Let me for the avoidance of doubt state that even if I had found as a fact that the plaintiff had entered in possession of the suit property in 2001 as he had claimed, I would nonetheless have held that the possession was not peaceful and uninterrupted for a period of over 12 years for the doctrine of adverse possession to be applicable. In the case of **Njuguna Ndatho –vs- Masai Itumo & 2 Others [2002] eKLR**, the Court of Appeal considered when a person may claim to have become entitled to land by adverse possession and when time ceases to run in a claim of adverse possession. The appellate court cited with approval an excerpt from the judgment of **Kwach, JA** in the case of **Joseph Gahumi Kiritu –vs- Lawrence Munyambu Kabura [Civil Appeal No. 20 of 1993] (unreported)** where the Judge stated:-

“The passage from Cheshire’s Modern Law of Real Property to which Potter JA made reference in Githua –vs- Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubrick THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says –

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry even through it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.”

25. The Judge in the case of **Kiritu –vs- Kabura** (supra) went on to state as follows:-

“I agree the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being physical thing, but as regards to stopping of time for the purposes of the Act, I would subscribe to the position expounded by Potter JA in Githu –vs- Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position set out by Kneller JA in Muthoni –vs- Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya.

As there are authorities of this court going both ways I am free to decide which way to go. And on this point, I will go with Potter JA. The only reason I can think of the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be addressed.”

26. I agree with their Lordships that the legal owner of a property when there is an adverse possessor must take some legal step against the adverse possessor to assert his legal right if he is to stop time in favour of the adverse possessor from running. In the instant case, it is evident that the 1st defendant who had petitioned for grant of letters of administration to the estate of the late Lynette Atieno and had obtained a temporary grant in 2004 challenged the purported purchase by the plaintiff of a portion of land parcel No. 3192 from Lynette Atieno before the Rongo Land Disputes Tribunal seeking the land to be reverted back to the estate. This in my view constituted a valid legal step by the beneficial owner to assert his legal right to ownership and in case any period of adversity was running it was stopped by this act.

27. Additionally, in February 2012 when the 2nd and 3rd defendant lodged a complaint with the police at Rongo and the plaintiff was arrested and charged with the offence of forcible detainer, this was a further act by the legal owners asserting their rights and that would in my view stop the period of adverse possession from running.

28. The plaintiff together with one, Elisha Odete Randusi in January 2010 moved the court in HC Succession Cause No. 24 of 2003 seeking the grant issued to the 1st defendant to be revoked. By the application, the plaintiff and his co-applicant were in effect acknowledging the 1st defendant had acquired letters of administration to the estate and had failed to acknowledge them as beneficiaries by reason of purchase from the deceased. As at the time of lodging the application, the plaintiff was not predicating his claim on adverse possession. He was acknowledging the title belonged to Lynette Atieno (deceased) now represented by 1st defendant as the administrator of the estate. This in my view would equally have stopped the period of adversity from running.

29. Having carefully evaluated the evidence in this matter and from my analysis above, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. The plaintiff has not proved that he was in adverse possession of the suit property for a period of 12 years. Adverse possession has to be proved by evidence and the evidence adduced by the plaintiff does not establish that he was in adverse possession of the suit property from 2001 when he claims he bought the same up to the time he instituted the instant suit. For a party to succeed in a claim for adverse possession, he must prove that he possessed the land peacefully and openly for a continuous uninterrupted period of 12 years before the institution of the suit and that the possession was adverse to the interest of the true owner. This, the plaintiff has failed to do.

30. The net effect is that I find no merit in the plaintiff's suit and I dismiss the same with costs to the defendants.

Judgment dated, signed and delivered at Kisii this 13th day of October, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Soire for Ochwangi for the plaintiff

Mr. Wesonga for the 1st, 2nd, 3rd and 4th defendants

Milcent court assistant

J. M. MUTUNGI

JUDGE