



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1151 OF 2016

(FORMERLY HCC NO. 301 OF 2011) (OS)

IN THE MATTER OF LIMITATION OF ACTION ACT CAP 22

AND

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38
OF LIMITATION OF ACTIONS ACT**

BETWEEN

CHARLES ODONGO NGANI.....PLAINTIFF

VERSUS

MILKA AKINYI OTIENO.....DEFENDANT

J U D G M E N T

1. The plaintiff by an originating summons (OS) dated 16th December 2011 claims to have acquired title to a portion of land measuring 1 acre out of **LR No. Kamagambo/Koluoch/1000** by way of prescription and/or adverse possession from the defendant. The plaintiff's originating summons is supported on the grounds set out on the body of the application and the affidavit sworn in support thereof by Charles Odongo Ngani the plaintiff/applicant. The plaintiff seeks the determination of the following issues/questions:-

1. A declaration that the deceased and/or defendant's right to recover a portion measuring 1 acre of LR No. Kanyamkago/Koluoch/1000 is barred under the Limitation of Actions Act, Cap 22 Laws of Kenya, and her title over a portion in occupation/use of the plaintiff thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation/use and possession of the aforesaid portion of 1 acre for a period exceeding 12 years.

2. That there be an order that the plaintiff be registered as the proprietor of the portion measuring 1 acre of LR No. Kanyamkago/Koluoch/ 1000 in place of the defendant and/or register thereof be rectified to reflect the plaintiff's ownership of the aforesaid 1 acre under his use.

3. That the defendant herein be ordered to execute all the requisite papers necessary to have the plaintiff be registered as owner of the portion of LR No. Kamagambo/Koluoch/1000 measuring 1 acre, decreed by the court in default, the Deputy Registrar and/or court

executive officer be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of the court.

4. Costs of the originating summons be borne by the defendant.

5. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of the case.

2. The plaintiff avers that he has openly occupied and cultivated a portion measuring approximately 1 acre of land parcel **Kamagambo/Koluoch/1000** for uninterrupted duration of more than 20 years since 1984 and contends that he has therefore acquired ownership thereof by way of prescription and/or adverse possession. The plaintiff states that his entry onto the portion of land was pursuant to an agreement of sale entered into between his father, one Zakayo Ngani (now deceased) and the defendant's late husband, one Ongoma Ochuka in 1984. The plaintiff states that he and his late father took possession of the portion of land and continued in possession uninterrupted up to 2000 when his father died. That after the death of his father, the plaintiff states that he continued to exclusively use and cultivate the parcel of land without any interruption from the defendant.

3. The plaintiff further states the late Ongoma Ochuka, husband to the defendant died in 2002 and the plaintiff, to protect his interests over the suit property, placed a caution over title **Kamagambo/Koluoch/1000** but the same was removed by the Land Registrar in unclear circumstances. The plaintiff avers that the defendant is the legal administrator of the original owner of land parcel **Kamagambo/Koluoch/1000** and contends that she holds title to the 1 acre portion in trust for the plaintiff as title in respect thereof was extinguished in favour of the plaintiff by virtue of the plaintiff having acquired title through adverse possession.

4. Simultaneously with the chamber summons (OS) the plaintiff filed a Notice of Motion dated 16th December 2011 seeking injunctive orders against the defendant/respondent in regard to the portion of 1 acre of land parcel **Kamagambo/Koluoch/1000** occupied by the plaintiff. A temporary injunction was granted pending the hearing and determination of the suit.

5. The defendant filed a replying affidavit to the chamber summons and the Notice of Motion dated 16th January 2012. The defendant asserted the plaintiff had trespassed onto a portion of land parcel No. **Kamagambo/ Koluoch/1000** and built structures thereon without any colour of right. The defendant averred that the plaintiff had not been in adverse possession of the parcel of land and was therefore not entitled to the orders sought.

6. On 13th February 2013 the court gave directions for the originating summons to be heard viva voce whereupon the OS was to be treated as a plaint and the affidavit in response thereof as a defence. The matter was part heard before **Okongo, J.** who took the evidence of the plaintiff and his witness, PW2 whereupon the plaintiff's case was closed. The case for the defendant proceeded before me on 7th March 2017 when the defendant testified and closed her case. The parties exchanged written submissions as per the directions of the court.

7. Evidence by the parties;

The plaintiff testified that his late father purchased suit property from one, Ongoma Ochuka in 1983. He stated that the property was then owned by Ongoma Ochuka. He produced a copy of official search dated 2nd August 2010 which indicated Ongoma Ochuka was registered as proprietor of land parcel **Kamagambo/Koluoch/1000** on 17th March 1986 which measured 2.55 Hectares. The plaintiff stated that his father purchased a portion of 0.4Ha or 1 acre which he gave to him. He stated that he entered into occupation of the land in 1990 and has been residing and cultivating the land ever since. The plaintiff explained that he constructed a house on the property as shown on the photographs produced as **PEx.2(a), (b) and (c)**. He stated he also planted trees on the portion of land. The plaintiff further stated that although his late father and the late Ongoma Ochuka had attended an initial land board meeting to seek

consent for subdivision as allegedly confirmed by a letter from the Land Control Board dated 7th November 2011 (“**PEx.3**”) the process was not completed allegedly because Ongoma Ochuka, the seller moved away from the area and went to leave elsewhere with another family.

8. The plaintiff testified that Ongoma Ochuka died in 2010 and slated that although he had placed a caution against the title, the caution was removed without his knowledge and the defendant was registered as the owner of the suit property on 20th September 2011. After learning the defendant was registered as owner, the plaintiff registered a restriction against the title on 3rd November 2011 to protect his interest in the suit property. The plaintiff further testified he had peacefully been residing on the land and sought orders as prayed for in the originating summons.

9. In cross examination the plaintiff maintained that his father had purchased the portion of 1 acre and not leased the same. He stated he had put up the house exhibited in the photographs (**PEx.2(a), (b) and (c)**) when Ongoma Ochuka was still alive. In response to questions by the court, the plaintiff stated he had constructed the house (**PEx.2(a), (b) and (c)**) in the 1990’s and that he completed its construction in 1998. He further explained that before he built the said house, he had another small house on the suit property. He further stated the suit property was transferred to the defendant after the death of Ongoma.

10. PW2, John Opiyo Ngoma testified that he was present when the plaintiff’s father, one Zakayo Ngani and Ongoma Ochuka negotiated and agreed on the sale of 1 acre. The plaintiff’s father is the one who was buying and that though the agreement was made in 1983 the witness stated that the parties agreed the purchase price was to be made in 1987. He stated that the plaintiff’s father took possession of the land in 1987 and planted trees and was farming various crops thereon. He further testified that the plaintiff’s father set up his home on the land and that he occupied the parcel of land peacefully from the year 1987.

11. In cross examination, the witness stated that the plaintiff’s father and the late Ongoma Ochuka did not enter into a written agreement but had an oral agreement. He reiterated that the plaintiff has occupied the property in dispute since 1987 and that the portion he had occupied has distinct boundary marks of sisal plants. Responding to questions by the court, the witness stated that the plaintiff’s father Zakayo Ngani and the plaintiff started using the land at the same time in 1987. He stated further that the plaintiff’s father had his homestead in this parcel of land and that the plaintiff’s mother was in fact buried on the same parcel of land when she died.

12. The defendant, Milka Akinyi Otieno who testified as DW1 stated she was not aware of any sale agreement between her father in law Ongoma Ochuka and the plaintiff’s father as alleged by the plaintiff. She stated she was given the suit property **LR No. Kamagambo/Kolouch/1000** by her father in law and she is presently the registered proprietor as per the copy of the title annexed to the defendant’s bundle of documents. She stated that all the due process was followed before she was registered as owner on 20th September 2011. The defendant stated that she applied for the removal of the caution that the plaintiff had registered against her title and the same was removed by the land registrar.

13. The defendant further testified that the plaintiff in 2010 unlawfully entered onto the suit land and built a house after the death of her father in law and that he has further registered a restriction against her title which she stated she wanted the court to order to be removed. The defendant further stated the portion that the plaintiff is occupying is less than 1 acre and wished the court to order him to vacate. The defendant under cross examination stated that she never reported to the police when the plaintiff entered into her land. She stated that she however wrote a letter of demand to the plaintiff to cease using her land after she got title to her land but the plaintiff did not oblige and remains in occupation of the portion of the land.

Submissions, Analysis and Determination;

14. At the close of the hearing the parties exchanged written submissions as directed by the court. The plaintiff’s submissions were filed on 14th June 2017 while the defendant’s submissions were filed on 17th July 2017. Having considered the pleadings, the evidence and the submissions by the parties the issues

that arise for determination are as follows:-

- (i) Whether the plaintiff has been in possession of a portion of land parcel LR No. Kamagambo/Koluoch/1000 measuring 1 acre for a period of over 12 years?**
- (ii) Whether the possession has been adverse to the rights and interests of the registered owner?**
- (iii) Whether the registration of the defendant as the owner of LR No. Kamagambo/Koluoch/1000 on 20th September 2011 would affect any accrued rights of the plaintiff under the doctrine of adverse possession?**
- (iv) Whether the plaintiff is entitled to the reliefs sought?**

15. The plaintiff's suit is predicated on an alleged agreement of sale of land between his father (deceased and Ongoma Ochuka (also deceased) who was the father in law of the defendant. PW2, John Opiyo Ngoma testified that he was present when the parties entered into the agreement albeit orally. Pursuant to the agreement the plaintiff's father and the plaintiff entered into occupation and possession of the portion of 1 acre which they started utilizing from 1987. PW2 testified that the plaintiff's father established his homestead on this portion of land and this evidence was not contravened. The plaintiff also testified that he was given this 1 acre portion of land by his late father and he entered into possession in 1990. He stated he had built a small house before he constructed the house or houses exhibited in the photographs **"(PEX.2(a), (b) and (c))"**. The photographs show a permanent house and a semi permanent house. These houses, it is not disputed are on the portion of 1 acre the plaintiff claims to have been sold to his father.

16. The defendant has argued that the alleged agreement of sale was not in writing as required under Section (3) of the **Law of Contract Act**, Cap 23 Laws of Kenya and could therefore not be the basis of the present action. The plaintiff's counsel in response has submitted the amendment to Section 3(3) of the Law of Contract Act which came into force on 1st June 2003 did not affect transactions that took place before the coming into force of the amendment. I agree with the plaintiff's counsel that the amendment to Section 3(3) of the **Law of Contract Act** which provided that no suit based on a contract of disposition of interest in land ought to be entertained by the court unless the contract was in writing, executed by the parties and the parties signature duly attested by a witness is not applicable as the sale transaction in the present matter predated the effective date of the amendment.

17. Prior to 1st June 2003 when the amendment became effective, the Law of Contract Act had a proviso to Section 3(3) which enabled suits founded on unwritten agreements where a party to such a contract had taken possession. The old Section 3(3) of the Act provided thus:-

(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 it, 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 of the contract taken possession of the property or any part thereof; or

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

18. Although the alleged agreement of sale entered into in 1983/1984 is infact not the basis of the instant suit, its relevance is in showing how the plaintiff's father and the plaintiff gained entry onto the suit property. On the basis of the evidence given by PW2, I accept there was an oral agreement of sale of land between the plaintiff's father and the said Ongoma Ochuka (deceased) and that in part performance of the contract the plaintiff's father took possession and occupation of the portion of land the subject of the sale. Thus even though the sale transaction did not satisfy the provisions of the **Land Control Act** Section 6(1) which require the consent of the Land Control Board to be obtained in respect of all controlled

transactions under the Act, of which the alleged sale qualified as one, the transaction nonetheless is evidence to show in what circumstances the plaintiff entered the suit property and took possession.

19. The plaintiff is not seeking the enforcement of the alleged contract but is rather making a claim predicated on the doctrine of adverse possession. Simply put, the plaintiff is saying that he has been in adverse possession of the portion of 1 acre for a period of over 12 years and has accordingly acquired title to the land as the title of the real owner has been extinguished and he (the plaintiff) has become entitled to be declared as owner thereof through the operation of the law. On the basis of the evidence from the plaintiff and PW2, I am satisfied that the plaintiff has been in occupation of the suit property from 1987 and that during the 1990s during the lifetime of Ongoma Ochuka (deceased) the plaintiff constructed his permanent house shown in **PEx.2(a), (b) and (c)** and in my view this constituted an act of adversity as it was clearly an hostile act to the rights of the registered owner.

20. In the case of **Jandu –vs- Kirpal [1975] E. A 225 Chanan Singh, J.** in considering the ingredients in proof of adverse possession states as follows:-

“To prove, title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. It must be actual, visible, excessive, hostile, open and notorious.”

In the case of **Kenya Tea Development Authority –vs- Jackson Gichuhi Karanja & Another [2006] eKLR** where the above case was cited with approval **J. B Ojwang, J.** (as he then was) referred to a decision in the High Court of India, **Turubat –vs- Verktrao [1920] 27 BSM 43** holding that **Chanan Singh, J.** in the **Jandu case** [supra] had drawn inspiration in the Indian case where the court made the following proposition as to the ingredients of **“adverse possession”** thus:-

(i) There must be an adverse act (by the applicant) and nothing that would lead the owner (respondent) to suppose that his right remains intact;

(ii) The assertion of possession must be open, peaceable, and as of right;

(iii) The party claiming to hold adversely must go to prove that his possession was in denial of the other’s title, and that he excluded that other from enjoyment of the property;

(iv) The registered owner must have knowledge of his ouster by the adverse possessor.

21. I am in agreement that the ingredients that need to be proved in adverse possession are as set out in the **Jandu case** (supra) and in the **Turubat –vs- Verktrao case** (supra). I would additionally add that the adverse possessor must have dispossessed the legal owner for a continuous and uninterrupted period of 12 years for his title to be held to have been extinguished.

22. Conclusion and Decision;

In the instant case the plaintiff has in my view proved by evidence that he has been in possession of the disputed portion of land since 1990 and he has constructed a permanent home and has been using the disputed portion of land. The defendant admits the plaintiff has built on the parcel of land but states he entered the land in 2010 and that is when he constructed the house. I did not believe her. By her own evidence she stated neither her deceased father in law nor herself raised any issue when the construction was taking place. The defendant belatedly wrote a demand letter on 3rd October 2016 only after she had acquired title to the suit property which included the portion claimed by the plaintiff. As per the burial permit dated 3rd July 2010 annexed to the defendant’s bundle of documents Ongoma Ochuka died on 30th June 2010 and up to the time he died he had not taken any action to recover the land occupied by the plaintiff. His title to the portion occupied by the plaintiff had become extinguished after the expiry of 12 years at least from 1990 so that as at the time of the transfer of the land to the defendant in 2010 he did not have title to the portion of 1 acre that the plaintiff occupied.

23. Taking the totality of the evidence it is my finding and holding that the plaintiff has proved on a balance of probabilities that he was an adverse possessor of a portion of 1 acre of land out of land parcel **Kamagambo/ Koluoch/1000** and that he is entitled to be declared as the owner thereof. I so declare.

24. I accordingly enter judgment in favour of the plaintiff on the following terms:-

(1) A declaration be and is hereby issued that the plaintiff, the said Charles Odongo Ngani has become entitled to be registered as owner of a portion of 1 acre out of land parcel Kamagambo/Koluoch/1000 by reason of being in adverse possession for a period exceeding 12 years.

(2) That it is ordered that the portion of 1 acre in occupation and possession by the plaintiff be hived off from land parcel Kamagambo/Koluoch/1000 and be transferred to the plaintiff, the said Charles Odongo Ngani.

(3) The defendant is hereby ordered to execute all the necessary and appropriate documents to facilitate the subdivision and transfer of the 1 acre portion aforesated to the plaintiff failing which the Deputy Registrar of the court be and is hereby authorized to execute the necessary documents to give effect to the decree herein.

(4) I direct that parties do bear their own costs of the suit.

Judgment dated, signed and delivered at Kisii this 6th day of October, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Omoto for the plaintiff

Mrs. Asati for Odera for the defendant

Milcent court assistant

J. M. MUTUNGI

JUDGE