



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 184 OF 2015

IN THE MATTER OF THE LAND PARCEL NO. SOUTH MUGIRANGO/ BOIKANGA/706

AND

IN THE MATTER OF LAND REGISTRATION ACT

AND

IN THE MATTER OF CIVIL PROCEDURE RULES 2010

BETWEEN

ISAAC MAOBE OKERI..... APPLICANT

VERSUS

MAGERO NYAOSI alias MAUTE OKERI..... RESPONDENT

RULING

1. The applicant herein Isaac Maobe Okeri by an originating summons dated 11th May 2015 seeks the following questions to be determined by this court:-
 - a. **Whether or not the applicant herein bought a portion of the respondent's land parcel No. South Mugirango/Boikanga/706 (suit land) measuring 1.5acres or thereabout approximately and put the applicant into quiet and peaceful possession of the same which quiet and peaceful possession the applicant has enjoyed to date?**
 - b. **Whether the applicant herein has acquired by way of adverse possession a portion of land measuring 1.5acres or thereabouts and if so should the respondents title and/or claim be declared as having distinguished and in place of the respondent should the applicant to be registered as the owner thereof?**
 - c. **Who should pay costs to this suit?**
2. The above application was supported by a supporting affidavit by the applicant where he deponed that the respondent is the registered owner of the suit land as evidenced by a copy of a certificate of official search marked as "IMO-1". The applicant averred that sometime in 1980 the respondent agreed to sell a portion of the suit land measuring 1.5 acres as evidenced by a copy of the land sale agreement marked as "IMO-2". The applicant further stated that as consideration he paid to the respondent 8 heads of cattle and 3 goats in full and final settlement of the purchase price and he was given vacant possession of the portion he had bought in the suit land which he has enjoyed fully till only recently in the month of April 2015. The applicant further contended

that despite him performing his part of the bargain in regard to the agreement of sale, the respondent failed/neglected to seek the consent of the land control board to transfer the suit land and execute the transfer in completion of the transaction.

3. It is the applicant's case that he has been in uninterrupted and open occupation of the said suit land for a period of now 35 years and to evidence this he has attached a bundle of photocopies (not actually annexed) of the trees and vegetation planted by him (applicant) and marked as "**IMO-3**". That sometime in April 2015 the respondent by himself, his servants, agents and persons acting on his behalf without any justifiable excuse or cause entered into a portion of the suit land, cut down some sugarcane plants and are intent on felling the same in breach of the applicant's right to the suit land.
4. The originating summons was filed simultaneously with a Notice of Motion seeking injunctive orders. Before the applications were heard, the respondent moved the court vide a Notice of Motion dated 15th October 2015 which is the subject of this ruling seeking the following orders:-

1. **That the originating summons herein be struck out and the suit be dismissed with costs to the respondent**
2. **Costs.**

The application by the respondent was premised on the following grounds:

1. **The applicant's suit is premised on an alleged sale agreement dated 13/6/2014.**
2. **That as per clause (1) of the special conditions of the said agreement duly attested "the purchaser has taken the possession of land immediately upon signing this agreement.**
3. **Accordingly, time began to run from 13/6/2014 when the claimant alleged purchaser assumed possession, yet the suit herein was lodged on 5/5/2015 which is barely 11 (eleven) months of the agreement.**
4. **The applicant has therefore not acquired adverse possession over the suit land.**
5. **In any event going by the originating summons itself, the claimant was not in possession of the suit land as at the time of lodging the suit herein.**
6. **The respondent is effectively and actively in possession of his land.**

5. The applicant/respondent on his part filed a replying affidavit in opposition to the respondent/applicant's application dated 12th November 2015 where he depones that the sale agreement annexed to his originating summons as an exhibit is just one of the pieces of evidence he will rely on and he reiterates that the sale agreement was not entered into on 13/6/2014 but sometimes in the year 1980. He further avers that ever since the year 1980, he has been in uninterrupted occupation of the suit land until April 2015 when the respondent dislodged him from a portion of the suit land and has continued to do so.
6. The application was argued by the parties by way of written submissions. The applicants submissions dated 15th February 2016 were filed in court on 18th February 2016 while the respondents submissions dated 20th April 2016 were filed in court on 21st April 2016. I have reviewed and considered the applicant's application together with the affidavits sworn in support and in opposition. I have also considered the submissions by the parties and the issue for the court to determine is whether the defendant/applicant has laid a proper basis to have the originating summons struck out as sought in the application.
7. The foundation of the applicant's application is firstly, that the agreement the respondent relies on as giving him the right to possession was only entered into on 13th June 2014 as evidenced by the attestation by the advocate and the same cannot therefore support the claim for adverse possession. The respondent refutes this and states the agreement was made in 1980 and points to the preambular part of the agreement which indicates the agreement to have been made in 1980 but no date or month is given. It is not explained then how S. M Sagwe Advocate of the law firm of S. M Sagwe & Co. Advocates by whom the agreement is shown to have been drawn came to attest it on 13th June 2014. The parties signing the agreement are shown to sign the agreement in the presence of S. M. Sagwe Advocate who has counter signed and indicated the date of signing to be 13th June 2014. The date of attestation is repeated in the document 3 times denoting that it could

not have been accidental and/or a mistake and thus puts to question whether the exhibited agreement is authentic and/or is a reproduction of the agreement. The agreement in the face of such inconsistencies in my view would be valueless in as far as evidence of an agreement is concerned.

8. Secondly, the applicant has contended that the respondent has not acquired title of the suit land by adverse possession and that he was not been in possession of the suit land when he instituted the suit and further that it is the applicant who is in effective possession of the suit land. The respondent admits that the alleged agreement of sale gave him permission to take possession of the suit property and therefore if there was possession of the suit property by respondent, the possession was with the permission and consent of the applicant and such possession could not be said to be adverse. I may mention that other than the agreement and the assertion by the respondent that he has been in possession since 1980 there is nothing else to evidence such possession or occupation. Even if the respondent was in possession, the applicant by admission of the respondent regained possession in April 2015. In my view sections 37 and 38 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya envisaged a situation where a party seeking to be declared as owner of land by virtue of adverse possession, that such party is infact in possession. Where the registered owner of the land has regained possession, then there can be no adverse possession.
9. In order for a litigant to be successful in a claim founded on adverse possession the court must determine whether the applicant has demonstrated peaceful, open, exclusive possession of the suit property as of right without interruption from the registered owner for a period of more than 12 years either after having dispossessed the owner or after the owner discontinuing possession on his own volition. Black's Law Dictionary 9th Edition defines adverse possession thus:

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious.”

10. In the case of **Wambugu –vs- Njuguna [1983] KLR 172** the Court of Appeal stated that in order to acquire land by virtue of the statute of limitation, the claimant must show that the owner has lost his right to the land upon being dispossessed by the adverse possessor or by the owner discontinuing possession by his own volition. The court of appeal stated in that case as follows:-

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant (owner) in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

11. Similarly in the case of **Samuel Miki Waweru –vs- Jane Njeri Richu C. A No. 122 of 2001 (UR)** the court said:

“It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in **Jandu –vs- Kilipal [1975] E. A 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of **Sisto Wambugu –vs- Kamau Njuguna [1982-88] 1 KLR (172)**seems to be that a purchaser of land under a contract of sale in possession of the land with the permission of the vendor (can lay a claim for possession of such land) only after the period of the validity of the contract unless and until the contract has been repudiated adverse possession starts from the date of the termination of the contract.”**

12. Having considered what amounts or constitutes adverse possession, the court will now turn to the question of whether or not the applicants claim of occupying the suit land is adverse or not. In the present case, the applicant has presented a sale agreement as exhibit “**IMO-2**” between himself

and the respondents. The said sale agreement is dated 13th June 2014 though the applicant contends that the sale agreement was entered into sometime in the 1980's. As clearly demonstrated above by the authorities referred to above ownership of land by adverse possession has to be free, open and without consent from the owner of the land with an intention to completely possess the land to the exclusion of the owner.

13. In the present case, it seems that the applicant's relationship with the respondent stemmed out of a land sale agreement. From the facts as presented by both parties the sale agreement is dated 13th June 2014 contrary to the respondent's contention that the sale took place sometimes in 1980's. As expressed in the **Samuel Miki** case (supra) even if there was a sale agreement existing between the applicant and respondent, the applicant's occupation if any of the suit land would only be adverse possession after the contract between him and respondent was repudiated (and there is no evidence of repudiation) and the applicant continued to occupy the suit premises freely, openly and uninterrupted and without consent of the respondent for at least 12 years from the date of any such repudiation.
14. There is a misconception that in cases where possession is granted pursuant to an agreement of sale that becomes void for failure of the parties to obtain the land control board's consent pursuant to the provisions of the Land Control Act, Cap 302 Laws of Kenya, that the continued possession becomes adverse immediately after the expiry of six (6) months period within which the consent of the land control board should be sought and obtained. I wish to make it clear that where the possession is with the consent and/or permission of the vendor pursuant to the agreement, the possession does not become adverse unless and until the contract is formally rescinded and/or terminated and/or the permission or consent withdrawn. Adversity starts to run from the date the agreement is rescinded and/or permission withdrawn. The respondent has not demonstrated he was in adverse possession of the suit land for any length of time and I am constrained to agree with counsel for the applicant that the respondents suit is frivolous and is otherwise an abuse of the due process of the court and is therefore unsustainable.
15. In the premises I find and hold that the applicant's Notice of Motion dated 15th October 2015 has merit and I accordingly strike out the respondent's originating summons filed herein on 11th May 2015. I award the costs of the struck out originating summons and the instant application to the applicant/ respondent.

Ruling dated, signed and delivered at Kisii this 23rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the applicant

..... for the respondent

..... for the Court Assistant

J. M MUTUNGI

JUDGE