



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 12 OF 2011 (OS)

IN THE MATTER OF REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA

AND

IN THE MATTER OF LIMITATIONS OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA

BETWEEN

BENSON OGUTU OGERO APPLICANT

VERSUS

ELLY CHEKATA AMBANI 1ST RESPONDENT

ROBERT NYAKUNDI MANDIEKA 2ND RESPONDENT

BEATRICE DALISU NYAKUNDI 3RD RESPONDENT

TRUPHENA MORAA MBUTA 4TH RESPONDENT

JUDGMENT

1. The applicant by an originating summons dated 25th January 2011 brought the instant suit seeking the determination of the following questions:-

1. Whether or not the applicant has acquired adverse possession over all that Plot known as Kisii Town/Block I/196 (hereinafter referred to as “the suit property”) having been in peaceful and uninterrupted occupation of the same for now a period of 22 years.

2. If the said applicant has so acquired the said adverse possession then the rights and interests of the said respondents over the said suit property has been defeated and hence the applicant should be registered as the proprietor of the said suit property.

3. Whether or not the applicant is entitled to costs of the suit.

2. The originating summons is premised on the supporting affidavit sworn by Benson Ogutu Ogero, the applicant herein on 24th January 2011. The applicant depones that the 4th respondent is the current registered proprietor of the suit property having acquired the same from the 3rd respondent in or about August, 2010. The applicant states the 3rd respondent had in turn acquired the suit property from the 1st

respondent in the year 2004 and that the 1st respondent had been registered owner of the suit property since the year 1987. The applicant further states that prior to 1998 the 1st respondent had sold the suit property to the 2nd respondent who is husband to 3rd respondent. The applicant further states that in the year 1998 the 2nd respondent held himself out as the beneficiary of the suit property having bought the same from the 1st respondent and sold the same to the applicant for a consideration of kshs. 400,000/= which sum the applicant paid to the 2nd respondent.

3. The applicant claims that since 1998 he took occupation and control of the suit property, erected a perimeter fence, dug and constructed a pit latrine and started cultivating food crops thereon. The applicant asserts his possession and occupation has been continuous and uninterrupted for about 21 years and thus claims he has acquired ownership of the suit property by adverse possession and seeks the court's declaration in that regard.

4. The 2nd respondent Roberts Nyakundi Mandieka swore a replying affidavit in opposition to the originating summons on behalf of the respondents. The 2nd respondent avers that he and the applicant had a verbal agreement for the sale of the suit land but states the applicant only paid kshs. 12,000/= but totally failed to pay the balance of kshs. 500,000/=. The 2nd respondent denies the sale was for kshs. 400,000/= as alleged by the applicant. The 2nd respondent denies that the applicant has paid him kshs. 400,000/= as claimed and states the purported receipts of payment acknowledgement attached to the applicant's affidavit have been manufactured and are forgeries, as he is not the one who signed them in acknowledgement of the payments. The 2nd respondent states the applicant never paid the balance of kshs. 488,000/= and avers that the applicant has never taken possession of the suit property. The 2nd respondent further states he is the one who fenced the suit property and was using the same until the 3rd defendant transferred the property to the 4th defendant who is presently the owner and is in occupation of the suit property.

5. The applicant vide an application for injunction dated 24th March 2014 sought to have the respondents restrained from entering, clearing, cultivating and/or erecting any structures and/or in any manner interfering with the suit property pending the hearing and determination of the suit. **Okong'o, J.** after interpartes hearing of the application in a ruling delivered on 16th May 2014 stated thus:-

“In the present application, the applicant has not placed any evidence before the court to prove that he has been in occupation of the suit property. The applicant has not demonstrated that he has a perimeter wall around the suit property. There is also no evidence of the alleged pit latrine and the food crops which the applicant claims to have been cultivating on the suit property. The photographs which have been exhibited by the applicant depicts undeveloped parcels of land which has been cleared recently. It is contested whether the trees shown to have been cut in the photographs belongs to the applicant or not. From the totality of the evidence presented to court, I am doubtful whether the applicant has had continuous possession of the suit property since 1998 as he has claimed. In the same breath, I am doubtful whether the applicant has a prima facie case against the respondents based on adverse possession.”

6. On 4th December 2014 the parties by consent agreed that the originating summons shall be heard by way of viva voce evidence and the court gave directions to that effect. The originating summons was listed before me for hearing on 4th November 2015 when again the parties by consent agreed to have the originating summons disposed on the basis of the affidavit evidence and written submissions whereupon the court gave directions in regard to the filing of written submissions. The applicant filed his submissions on 19th January 2016 while the respondents filed their submissions on 29th February 2016.

7. I have in outline summarized the applicant's and the respondents' cases earlier in this judgment and I have further considered the submissions by the parties. The issue for determination is whether the applicant has proved that he has been in adverse possession of the suit property for a period in excess of

12 years and whether by reason of such adverse possession he has acquired ownership rights to entitle the court to declare him as owner and therefore entitled to be registered as the proprietor.

8. The question that the court must ask itself is whether the applicant has proved he was in adverse possession of the suit property continuously and uninterrupted for a period of more than 12 years as he claims. The burden of proving that he was an adverse possessor lay with the applicant and whether or not adverse possession is proved is a matter of evidence. The Court of Appeal in the case of **Wambugu –vs- Njuguna [1983] KLR 172** established the general principles for the court to consider in determining whether adverse possession is established. Inter alia the court held:-

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.”

The court further held that:

“The Limitation of Actions Act, on adverse possession, contemplates two concepts:- dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

9. The applicant in the present case states that he took possession of the suit property in 1998 following an agreement of sale made with the 2nd respondent. The 2nd respondent denies there was such an agreement or that the applicant took occupation or possession of the suit property. The 2nd respondent admits an oral agreement but does not agree the terms were as claimed by the applicant and whereas the 2nd respondent denies being paid the sums the applicant states he paid him, the applicant points to various petty cash vouchers annexed to the supporting affidavit but which the 2nd respondent refutes and states they are manufactured and are forgeries as they are not signed by him. The 2nd respondent further claims he is the one who was using the land until the 3rd respondent sold and transferred the suit land to the 4th respondent in 2010. The 2nd respondent further stated in his affidavit that it is the 4th respondent who is now in possession of the suit property as the registered owner.

10. The court earlier in this judgment referred to the findings of fact by **Okong’o, J.** when he delivered his ruling on the injunction application where he held that the applicant had not proved he was in adverse possession of the suit property or shown that he had fenced the property or had been using the property. Given the parties did not offer or tender any further evidence and opted not to have the originating summons heard viva voce, the court did not have the benefit of having the parties evidence tested by way of cross-examination meaning the evidence remains the same as had been reviewed and evaluated by **Okong’o, J.** The applicant has asserted one thing and the respondents have refuted and/or denied the assertions. In those circumstances, I cannot hold that the applicant has proved he has been in adverse possession of the suit property. Between the period the applicant states he has been in adverse possession the suit property has changed hands twice. In 2004 the 1st respondent transferred the property to the 3rd respondent and in 2010 the 3rd respondent transferred the same to the 4th respondent. There is no evidence that the applicant dispossessed the respondents of the land for any period leave alone for 12 years. There is equally no evidence the respondents discontinued possession of the suit property for any period.

11. Taking a close look at the photographs annexed in support of the application for injunction which **Okong’o J.** ruled on it is evident that the same depict a parcel of land that had been left fallow over a considerable period and there is no evidence of any use by anybody which would appear to dispel the

applicant's claim of possession and use of the suit property for cultivation.

12. Having considered the material and evidence presented to the court by the parties, I am not persuaded that the applicant has proved his claim of adverse possession of the suit property on a balance of probabilities. There is no evidence that the applicant has been in adverse possession of the suit property and it is my finding that he has not. I accordingly find and hold that the applicant's suit lacks merit and I order the same dismissed with costs to the respondents.

13. Orders accordingly.

Judgment dated, signed and delivered at Kisii this 30th day of September, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Otieno for Soire for the applicant

N/A for the 1st to 4th respondents

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE