



**Ochola (Suing as the Administrator of the Estate of Obadia Osiolo Ochola
- Deceased) v Obura & 2 others (Environment and Land Case Civil Suit
30 of 2018) [2024] KEELC 4857 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 30 OF 2018
SO OKONG'O, J
JUNE 19, 2024**

BETWEEN

**OBADIA OSILO OCHOLA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF OBADIA OSILO
OCHOLA - DECEASED**

AND

**SAMSON AMBASA OBURA 1ST DEFENDANT
TABITHA AYITI OKWOKU 2ND DEFENDANT
PATRICK MWENJE APOLO 3RD DEFENDANT**

JUDGMENT

1. Obadia Osiolo Ochola, deceased (hereinafter referred to as “the deceased”) instituted this suit by way of Originating Summons dated 18th June 2018. The deceased died on 15th May 2019 and was substituted in the suit by his wife and administrator of his estate, Esther Obadia Osiolo(hereinafter referred to only as “the Plaintiff”) on 3rd December 2020. The Originating Summons was amended on 18th March 2021 to effect the substitution. In the amended Originating Summons, the Plaintiff sought the determination of the following questions;
 1. Whether the Plaintiff purchased the original land parcel Kisumu/ Marera/687(hereinafter referred to as “Plot No. 687”) now subdivided to create land parcel No. Kisumu/Marera/4544 (hereinafter referred to as “Plot No. 4544”) and Kisumu/Marera/4545 (hereinafter referred to as “Plot No. 4545”) from the 1st Defendant.
 2. Whether the Plaintiff had continuously, openly and without any interruption by any person occupied and possessed the said Plot No. 687 for more than 12 years.



3. Whether the Plaintiff had acquired an overriding interest under Section 28(h) of the [Land Registration Act](#) 2012 on Plot No. 687.
 4. Whether the Plaintiff had in the foregoing circumstances acquired title to Plot No. 4544 and Plot No. 4545 by way of adverse possession.
 5. Whether the court should order the registration of the Plaintiff as the proprietor of Plot No. 4544 and Plot No. 4545.
 6. Whether the Plaintiff was entitled to the costs of the suit.
2. The amended Originating Summons was supported by the affidavit of the Plaintiff, Esther Obadia Osiolo sworn on 18th March 2021. The Plaintiff averred as follows: The Plaintiff's deceased husband purchased land parcel No. Kisumu/ Marera/ 376 (hereinafter referred to as "Plot No. 376") from the 1st Defendant. The location of what was thought to be Plot No. 376 was pointed out to the deceased by the 1st Defendant. After payment of the purchase price in full to the 1st Defendant, the 1st Defendant transferred Plot No. 376 to the deceased. The deceased had since then been residing on the said property with his family.
 3. The Plaintiff averred that in 2018, the 1st Defendant tried to evict them from the parcel of land on which they were residing on the ground that that was not the parcel of land that he had sold to the deceased. The 1st Defendant claimed that the parcel of land on which they were residing was Plot No. 687 and not Plot No. 376. The Plaintiff averred that the parcel of land on which they were residing was the land that the 1st Defendant misrepresented to the deceased as Plot No. 376 at the time of the sale transaction.
 4. The Plaintiff averred that they had resided on Plot No. 687 and enjoyed peaceful, quiet and uninterrupted possession since 1983. The Plaintiff averred that they had cultivated the property for over 34 years. The Plaintiff averred that they had occupied the said parcel of land to its full extent and dimension for the entire period they had been in possession. The Plaintiff averred that she conducted a search on Plot No. 687 which revealed that the same had been sub-divided to create Plot No. 4544 registered in the name of the 1st Defendant and Plot No. 4545 registered in the names of the 2nd and 3rd Defendants. The Plaintiff averred that the said subdivision was done sometime in September 2018 after the filing of this suit and service of summons upon the 1st Defendant. The Plaintiff urged the court to find that they had acquired Plot No. 687 by adverse possession since they had resided thereon for over 12 years.
 5. The 1st Defendant opposed the Originating Summons through a replying affidavit sworn on 23rd July 2018. The 1st Defendant denied selling Plot No. 376 to the deceased. He stated that if there was any sale transaction between him and the deceased which he denied, it was over Plot No. 376 and not Plot No. 687. He stated that Plot No. 376 was registered in his name jointly with the deceased. He denied that the deceased had occupied Plot No. 687 or any portion thereof for the alleged period of 34 years. He stated that he was the one in occupation of Plot No. 687. He stated that the deceased's claim was frivolous, scandalous, misconceived and an abuse of the process of the court and should be dismissed with costs.
 6. The 2nd and 3rd Defendants opposed the Originating Summons through a joint replying affidavit sworn on 3rd August 2021. In the affidavit, the Defendants stated as follows: The 2nd Defendant was the widow of the late Edward Apolo Omolo while the 3rd Defendant was their son. The 2nd Defendant was married sometime in 1981 and together with her deceased husband, they established their matrimonial home at Ebusakami. In 1986, her deceased husband bought a parcel of land known as Kisumu/ Marera/686



- (Plot No. 686) which bordered the 1st Defendant's Plot No. 687. In 1989, they built their matrimonial home on Plot No. 686 where they lived until the death of her husband in 2016. Plot No.686 was small in size. They leased a portion of Plot No. 687 from the 1st Defendant for cultivation so that they could provide the family with food.
7. After leasing the said portion of Plot No. 687 from the 1st Defendant for about 2 years, the 1st Defendant subdivided Plot No. 687 into two and sold to them a portion thereof known as Kisumu/Marera/4545(Plot No. 4545). Plot No. 4545 was lawfully transferred and registered in their joint names. They followed due process in acquiring Plot No. 4545.
 8. The 2nd and 3rd Defendants averred that neither the Plaintiff nor any member of her her family had occupied Plot No. 687 or its subdivisions namely; Plot No. 4544 and Plot No. 4545. They averred that the Plaintiff's adverse possession claim had no basis. The 2nd and 3rd Defendants averred that after the death of the 2nd Defendant's husband, she moved her home to Plot No. 4545 which she had occupied since 2019.
 9. At the trial, the Plaintiff, Esther Obadia Osiolo(PW1) adopted her affidavit in support of the Amended Originating Summons as her evidence. She stated that the 1st Defendant sold to them Plot No. 687 but gave them erroneous particulars of the land. She stated that the 1st Defendant told them that the land sold to them was Plot No. 376 which was the land reference used in the agreement of sale. She stated that they took possession of the land in 1983. She stated that they used the land for cultivation. She stated that they learnt later that the land they had purchased was Plot No. 687 and not Plot No. 376.
 10. PW1 produced a copy of the agreement of sale between the deceased and the 1st Defendant as P.EXH 1, copies of the Green Cards for Plot No. 376 and Plot No. 687 as P.EXH. 2 and P.EXH. 3 respectively. PW1 stated that the 1st Defendant sold a portion of Plot No. 687 to the 2nd and 3rd Defendants after the 1st Defendant subdivided Plot No. 687 into Plot No. 4544 and Plot No. 4545. She produced the certificates of official search on the two plots as P.EXH. 4 and P.EXH.5 respectively. PW1 stated that the 2nd and 3rd Defendants put up a home on the portion of the suit property which they purchased from the 1st Defendant after the filing of this suit. PW1 stated that they occupied the suit property openly. She urged the court to grant the reliefs sought in the Originating Summons.
 11. After the close of the Plaintiff's case, the 1st Defendant, Samson Ambasa Obura (DW1) gave evidence. DW1 adopted his witness statement dated 12th October 2020 as part of his evidence in chief. He produced as a bundle the documents attached to his list of documents filed on 20th October 2020 as D.EXH.1 save for the title deed for Kisumu/Marera/376 which was missing from the bundle. DW1 stated that whereas, Plot No. 687 is situated at Sunga Sublocation, Marera location, Kisumu County, the deceased Obadia Osiolo Ochola was staying at Musunga sublocation in Vihiga County where he was also buried. DW1 stated that the deceased had never occupied Plot No. 687. The 1st Defendant called, Hezekiah Hosea Ayiecha(DW2) as his witness. DW2 adopted his witness statement dated 12th October 2020 as his evidence in chief.
 12. The 2nd Defendant, Tabitha Ayiti Okwoku (DW3) was the next to give evidence. DW3 stated that she was living at Marera in Kisumu County. She stated that she moved to the area in 1996. She stated that initially her family lived at Ebusakami near Luanda. She stated that her husband bought the parcel of land, Kisumu/Marera/686 in 1996 and not in 1986 as stated in her witness statement. She stated that they built a house on the land which they occupied until 2016 when her husband died. She stated that one of her neighbours was the 1st Defendant. She stated that in 2018 the 1st Defendant sold to her and the 3rd Defendant a portion of Plot No. 687.



13. DW3 stated that she conducted a search on the title of Plot No. 687 and confirmed that there was no encumbrance registered against the property. She stated that the said portion of Plot No. 687 was registered in their names and there was no objection to the transaction until they were served with summons issued in this suit. She stated that Plot No. 687 was being leased out to different people for cultivation and that it was vacant when they purchased a portion thereof. She stated that the land would be under cultivation at times while at other times it would be fallow.
14. DW3 stated that she did not know the Plaintiff or her deceased husband. She stated that she came to know the Plaintiff in court. She stated that she was not aware that the Plaintiff had been cultivating Plot No. 687. DW3 adopted her witness statement filed on 18th February 2022 subject to the amendment of paragraph 4 thereof by deleting the year 1986 and replacing it with 1996. DW3 produced copies of the agreement of sale dated 8th October 2018 between them and the 1st Defendant as D.EXH.5, the transfer as D.EXH.6 and the title deed for Plot No. 4545 as D.EXH.7. She stated that Plot No. 4545 did not belong to the Plaintiff. The last witness was the 3rd Defendant, Patrick Mwenje Apolo (DW4). DW4 stated that he was the son of the 2nd Defendant. He adopted his witness statement dated 18th February 2022 as his evidence in chief.
15. After the close of the evidence, the parties made closing submissions in writing.

The Plaintiff's submissions

16. The Plaintiff framed the following issues for determination by the court;
 - a. Whether the Plaintiff entered into a land sale transaction in respect of Plot No. 376.
 - b. Whether the Plaintiff acquired registrable interest in Plot No. 687 before its subdivision into Plot No. 4544 and Plot No. 4545 by the 1st Defendant.
 - c. Whether the Plaintiff is entitled to the orders sought for in the Originating Summons.
17. On the first issue, the Plaintiff submitted that the 1st Defendant sold to the Plaintiff's deceased husband (the deceased) land that was identified on the ground and that the Plaintiff produced in evidence a copy of the agreement for sale between the parties which referred to the land as Plot No. 376. The Plaintiff submitted that although the 1st Defendant initially disputed the existence of Plot No. 376, the Plaintiff produced evidence which showed that Plot No. 376 existed and that it was registered in the name of the 1st Defendant before it was transferred to the deceased. The Plaintiff submitted that she had established that there was an agreement of sale between the 1st Defendant and the deceased in respect of Plot No. 376.
18. On the second issue, the Plaintiff submitted that they moved to Plot No. 687 in 1983 after they were shown the same by the 1st Defendant and cultivated the same until 2018 when the 1st Defendant asked them to vacate the same on the ground that they were on a wrong parcel of land. The Plaintiff submitted that they refused to vacate Plot No. 687 and instituted this suit for adverse possession. The Plaintiff submitted that they had enjoyed quiet and uninterrupted possession of Plot No. 687 for over 12 years. The Plaintiff submitted that the 2nd and 3rd Defendants acknowledged the use by the Plaintiff and her family of Plot No. 687 before it was subdivided and a portion sold to them.
19. The Plaintiff submitted that she was not claiming specific performance of the agreement of sale between the deceased and the 1st Defendant. The Plaintiff submitted that she had only relied on the said agreement of sale as evidence to prove the date when they took possession of Plot No. 687. The Plaintiff submitted that her claim over Plot No. 687 was based on adverse possession. The Plaintiff cited several cases in which an agreement of sale was relied on in proof of adverse possession. The Plaintiff



cited; *Public Trustee v. Wanduru* [1984] KLR and *Richard Satia & Partners and Another v. Samson Sichangi*, C.A Nakuru Civil Appeal No.164 of 1995. The Plaintiff also cited; Kisumu HCC No.177 of 2009, *Ghazi Abdul Hamad v. George Awiti Omoro*, Kisumu ELC HCC Misc. No. 212 of 2012, *Zaida Begum Shaffir Rai v.Caleb Ottieno Orwa & 2 others* and Kisumu ELC No. 32 of 2017(O.S), Aloys Odiango Olande v. Samuel Amon Siaji.

20. The Plaintiff submitted that the 2nd and 3rd Defendants had no defence to her claim since a purchaser's title is subject to an adverse possessor's overriding interest. The Plaintiff cited *Public Trustee v. Wanduru (supra)*, *Peter Thuo Kairu v. Kuria Gacheru* [1988]2KLR and *Samuel Miki Waweru v. Jane Njeri Richu* Nairobi C.A 122 of 2001 in support of this submission.
21. On the last issue, the Plaintiff submitted that she had demonstrated that she had been in continuous and uninterrupted occupation of Plot No. 687 before its subdivision into Plot No. 4544 and Plot No. 4545 for over 35 years and that the 2nd and 3rd Defendants' interest in Plot No. 4545 was subject to her registrable interest in the said property that had accrued. The Plaintiff submitted that she was entitled to the reliefs sought in the Originating Summons. The Plaintiff urged the court to declare her an adverse possessor of Plot No. 687 and make an order cancelling its resultant sub-division into Plot No. 4544 and 4545.

The 1st Defendant's submissions

22. The 1st Defendant filed submissions dated 22nd January 2024. The 1st Defendant framed three issues for determination by the court namely; whether the Plaintiff purchased Plot No. 687 which was subsequently subdivided into Plot No. 4544 and Plot No. 4545, whether the Plaintiff had openly and continuously possessed, occupied and utilised Plot No. 687, and whether the Plaintiff was entitled to the reliefs sought in the Originating Summons.
23. The 1st Defendant submitted that Plot No. 687 and Plot No. 376 were distinct parcels of land. The 1st Defendant submitted that Plot No. 376 was registered in the names of the deceased and the 1st Defendant while Plot No. 687 was registered in the sole name of the 1st Defendant. The 1st Defendant submitted that Plot No. 376 was located about 2 Kilometers from Plot No. 687. The 1st Defendant submitted that he had denied any knowledge of Plot No. 376 and the alleged agreement with the deceased in relation thereto. The 1st Defendant submitted that he only became aware of Plot No. 376 upon the filing of this suit.
24. The 1st Defendant submitted that the Plaintiff's claim in relation to Plot No. 687 was based on both the purchaser's interest and adverse possession. The 1st Defendant submitted that no agreement of sale of Plot No. 687 was produced in evidence by the Plaintiff. The 1st Defendant submitted that the Plaintiff's claim over the suit property based on the purported agreement of sale was contrary to Section 3(3) of the *Law of Contract Act*. The 1st Defendant submitted that the Plaintiff's interest if any was over Plot No. 376. The 1st Defendant submitted that the deceased and the Plaintiff resided at Musanga Village in Vihiga County where the deceased was buried and not on Plot No. 687.
25. The 1st Defendant cited *Mtana Lewa v. Kahindi Ngala Mwangandi*[2005] eKLR, *Mbira v. Gachubi* [2002] EALR 137, *Maweu v. Liu Ranching & Farming Cooperative Society*[1985] eKLR, and *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR and submitted that the Plaintiff did not prove her adverse possession claim over Plot No. 687. The 1st Defendant submitted that the Plaintiff did not place evidence before the court showing that the deceased and she had been in occupation of Plot No. 687 openly and continuously for an uninterrupted period of 12 years before the filing of the suit. The 1st Defendant submitted that Plot No. 687 was always in the possession of the 1st Defendant save for the



few occasions when it was leased out to third parties. The 1st Defendant submitted that the Plaintiff had failed to prove her alleged possession of the suit property and as such her claim had no basis. The court was urged to dismiss the same with costs to the 1st Defendant.

The 2nd and 3rd Defendants' submissions

26. The 2nd and 3rd Defendants filed submissions dated 23rd January 2024. The 2nd and 3rd Defendants submitted that the Plaintiff had failed to prove her ownership of Plot No. 687 and its subdivisions namely, Plot No. 4544 and Plot No. 4545 owned by the Defendants. The 2nd and 3rd Defendants submitted that from the Plaintiff's pleadings and the evidence adduced at the trial, the Plaintiff was said to have purchased from the 1st Defendant Plot No. 376 in respect of which neither the 2nd and 3rd Defendants nor the 1st Defendant had any claim. The 2nd and 3rd Defendants submitted that the 1st Defendant denied ever selling any land to the deceased. The 2nd and 3rd Defendants submitted that the evidence adduced by the Plaintiff did not prove purchase of Plot No. 687 by the deceased. The 2nd and 3rd Defendants submitted that in the absence of evidence that the deceased purchased Plot No. 687, there was no proof of commencement of the deceased and the Plaintiff's alleged occupation of the suit property from which the period of 12 years could be reckoned.
27. The 2nd and 3rd Defendants submitted that the Plaintiff who claimed to have occupied Plot No. 687 for 35 years did not rebut the 1st Defendant's evidence that he had lived on the same property the whole of his life save for the 7 years that he was away in Nyakach. The 2nd and 3rd Defendants submitted that the 1st Defendant testified that it was upon coming back home to take care of his ailing brother that he found the deceased cultivating a portion of Plot No. 687 and reported him to the area chief. The 2nd and 3rd Defendants submitted that even the 2nd Defendant who was living next to Plot No. 687 did not see the deceased and the Plaintiff cultivating or occupying Plot No. 687. The 2nd and 3rd Defendants submitted that the Plaintiff had not proved the ingredients of adverse possession. The 2nd and 3rd Defendants submitted that no evidence was adduced showing that the deceased and the Plaintiff were occupying the portion of Plot No. 687 that was sold and transferred to the 2nd and 3rd Defendants before they purchased the same. The 2nd and 3rd Defendants submitted that the Plaintiff had no valid claim against the 2nd and 3rd Defendants.

Analysis and Determination

28. I have considered the pleadings, the evidence tendered and the submissions filed by the advocates for the parties. The Plaintiff's claim being largely that of adverse possession, the issues that arise for determination in my view are; whether the Plaintiff has established the elements of adverse possession of the whole of Plot No. 687 and its subdivisions; Plot No. 4544 and Plot No. 4545 which she is claiming, whether the Plaintiff is entitled to the reliefs sought in her Originating Summons, and who should bear the costs of the suit?
29. In *Gabriel Mbui v. Mukindia Maranya* (supra), the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
- a. He/she must make physical entry and be in actual possession or occupation of the land for the statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.



- c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, that is, without permission from the true owner of the land occupied.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 - g. The possession must be continuous, uninterrupted, and unbroken for the necessary statutory period.
 - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
30. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration.”

31. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated 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.”



32. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...

21. Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed: -“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

33. The Plaintiff’s case was that the 1st Defendant sold to her deceased husband Plot No. 376 in 1983 and had the said property transferred to the deceased. The Plaintiff contended that although the land sold to the deceased was Plot No. 376, the 1st Defendant instead of showing the deceased Plot No. 376, showed him Plot No. 687 which the deceased and the 1st Defendant took to be Plot No. 376. The Plaintiff contended that in 2018, the 1st Defendant informed the deceased that the land he was occupying was not Plot No. 376 that was sold to him and that the same was Plot No. 687 and asked him to vacate. In his affidavit sworn in support of the Originating Summons, the deceased stated that: “That he pointed out to me the land I have been living on all this entire time was Kisumu/Marera/687 and not Kisumu/Marera/376. Apparently, the Defendant is the one who pin-pointed to me Kisumu/687 and misrepresented to me during the purchase years ago as Kisumu/Marera/376.” The deceased went further to state that: “That I have been living on the said land parcel herein referred to as No. Kisumu/Marera/687 enjoying peaceful, quiet and uninterrupted possession since 1983.”

34. In her affidavit in support of the amended Originating Summons, the Plaintiff reiterated that the 1st Defendant sold to the deceased Plot No. 376 and that after paying the purchase price, Plot No. 376 was transferred and registered in the name of the deceased and they “began residing therein”. The Plaintiff reiterated that the location of Plot No. 376 was pointed out to the deceased by the 1st Defendant and that in 2018, the 1st Defendant sought to evict them from the parcel of land they were occupying on the



ground that that was not the land that he sold to them since they were occupying Plot No. 687 while the parcel of land that was sold to them was Plot No. 376. The Plaintiff stated as follows in relation to Plot No. 687: “That this is the parcel of land which the 1st Defendant misrepresented to my husband as land parcel No. Kisumu/Marera/376 at the time of purchase.” The Plaintiff stated further that: “That we have been residing on land parcel No. Kisumu/Marera/687 and enjoying peaceful, quiet and uninterrupted possession since 1983. We have been cultivating on the suit land for a period of over 34 years.”

35. From the evidence adduced by both parties, Plot No. 376 measures 0.11 of a hectare (approximately 0.272 of an acre). Plot No. 376 was registered in the name of the 1st Defendant through Change of Name on 25th February 1983. The land was initially registered in the name of one, Obura Abuso as the first registered owner on 22nd March 1974. It is not clear how the land that was registered in the name of a gentleman known as Obura Abuso could be transferred to the name of the 1st Defendant, Samson Ambasa Obura through a Change of Name. Anyway, on 19th December 1990, Plot No. 376 was transferred to the 1st Defendant and the deceased as joint owners. The consideration for the transfer was given as “GIFT”. The 1st Defendant and the deceased were issued with a title deed on the same date. The 1st Defendant denied owning Plot No. 376 and selling the same to the deceased.
36. The Plaintiff produced some documents in evidence to prove that the 1st Defendant sold Plot No. 376 to the deceased. See Plaintiff’s exhibit 1. The said exhibit has three pages. The first and second pages contain a narration or a story of how the writer started buying a piece of land from someone I can only guess was the 1st Defendant. The narration starts with the words “I started buying a piece of land”. The narration has a heading, “LAND TITLE NO. KISUMU/MARERA/376”. The document which appears to have been prepared after 19th December 1990 narrates how the writer paid a purchase price for a portion of the land while the other portion was given to him as “a Gift”. The writer then states that consent of the Land Control Board for the transaction was given on 27th September 1990 and a title deed for the parcel of land was issued in the names of Samson Ambasa Obura and Obadia Osiolo Ochola and handed over to the writer on 19th December 1990. The document which is not dated is signed by some unnamed person. At page 3 of the exhibit are two documents both dated 25th February 1983. The documents are neither in Kiswahili nor English and there is no interpretation. The court cannot make out what the two documents are all about. One of the documents is signed by one, S.A. Obura while the other is not signed. There is no doubt that the documents I have referred to above cannot constitute an agreement for the sale of land. There is therefore no evidence before me that the 1st Defendant and the deceased entered into an agreement for sale of Plot No. 376 in 1983.
37. Plot No. 687 on the other hand measures 0.42 of a hectare (approximately 1.038 acres). The parcel of land was registered in the name of Ambasa Obura as the first registered owner on 22nd February 1974. On 17th January 2017, the property was registered in the name of Samon Ambasa Obura, the 1st Defendant through a change of name. The 1st Defendant was issued with a title deed for the suit property on 19th January 2017. Plot No. 687 was subdivided around 19th September 2018 into Plot No. 4544 and Plot No. 4545. Plot No. 4544 measuring 0.12 of a hectare (approximately 0.297 of an acre) was registered in the name of the 1st Defendant on 19th September 2018 while Plot No. 4545 measuring 0.28 of a hectare (approximately 0.692 of an acre) was registered in the name of the 1st Defendant on 19th September 2018 and subsequently transferred to the name of the 2nd and 3rd Defendants on 12th November 2018.
38. As I have mentioned earlier in the judgment, the Plaintiff had contended that the deceased entered Plot No. 687 in 1983 because the 1st Defendant who allegedly sold and transferred to the deceased Plot No. 376 had misrepresented to the deceased that Plot No. 687 was the Plot No. 376 that had been



sold to the deceased. This story does not add up for several reasons. First, as I have mentioned earlier, there is no evidence of the sale and transfer of Plot No. 376 by the 1st Defendant to the deceased. There is no evidence of the sale agreement, there is no evidence of payment of the alleged purchase price of Kshs. 6000/-, and there is no evidence of transfer. What is there is an extract of the register showing that the 1st Defendant allegedly transferred Plot No. 376 to himself and the deceased with a “Gift” as the consideration. I wonder why the 1st Defendant who is alleged to have received the full purchase price would transfer Plot No. 376 to his name and that of the deceased as joint owners of the property. Secondly, I have noted that Plot No. 687 measured 1.038 acres while Plot No. 376 measured about ¼ of that at 0.272 acres. How can the deceased be believed when he claims that he was misdirected to a parcel of land measuring 1 acre and made to believe that it was the land that he had purchased that measured ¼ of an acre?

39. Assuming that the deceased entered Plot No. 687 through misrepresentation by the 1st Defendant as he claimed or honest mistake by the 1st Defendant having believed that indeed, Plot No. 687 was Plot No. 376, can the deceased claim Plot No. 687 by adverse possession? The answer in my view is in the negative for several reasons. First, the deceased was put on the land by the 1st Defendant. He entered the land with the permission of the 1st Defendant. He was not a trespasser on the land. A person entering and occupying land with the permission of the owner cannot claim the land by adverse possession until the owner withdraws the consent and he/she remains in occupation thereafter for the statutory period of 12 years. In this case, the 1st Defendant is said to have withdrawn his consent to the deceased occupation of Plot No. 687 in 2018 the same year the deceased brought this suit. The deceased claim has therefore not met the statutory threshold.
40. Secondly, for the entire duration of the deceased’s occupation of Plot No. 687, the deceased believed that he was occupying Plot No. 376 that was owned by him and not Plot No. 687 owned by the 1st Defendant. The deceased could not therefore be said to have occupied Plot No. 687 with the intention of excluding the 1st Defendant as well as other people from the land. In other words, there was no animus possidendi. In the absence of a clear unmistakable intention to exclude the 1st Defendant from Plot No. 687, the deceased’s occupation of Plot No. 687 could not support an adverse possession claim.
41. Assuming further that the deceased was a trespasser on Plot No. 687, did the Plaintiff prove that the deceased had occupied the property openly and continuously for an uninterrupted period of 12 years before the filing of this suit in 2018? Again, my answer is in the negative. The deceased claimed that he was “living” on Plot No. 687 from 1983. The Plaintiff on the other hand claimed that they were “residing” on Plot No. 687 and also “cultivating” the same since 1983. All the Defendants denied that the deceased and the Plaintiff had resided on or lived on Plot No. 687 from 1983. As for cultivation, the 1st Defendant stated that the deceased cultivated the land for some time while the 1st Defendant was away in Nyakach. The 1st Defendant stated that upon his return from Nyakach, he asked the deceased to surrender the land. The burden was on the Plaintiff to prove that the deceased lived on or occupied Plot No. 687 from 1983 to 2018 as she claimed. The Plaintiff produced no evidence of the deceased’s occupation of the suit property. There was even no evidence as to when the deceased first entered the suit property. When the deceased died, he was buried elsewhere. There was also no evidence placed before the court of continuous and uninterrupted cultivation of Plot No. 687 by the deceased. It is my finding that the Plaintiff did not prove that the deceased had open, continuous uninterrupted possession and use of Plot No. 687 for 12 years before he filed this suit.

Conclusion

42. For the foregoing reasons, I find the Plaintiff’s adverse possession claim not proved. The suit is dismissed with costs to the Defendants/Respondents.



DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF JUNE 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Omondi h/b for Mr. Odeny for the Plaintiff

Mr. Okali for the 1st Defendant

N/A for the 2nd and 3rd Defendants

Ms. J. Omondi-Court Assistant

