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Judge:	Roselyn Naliaka Nambuye
Citation:	NYANUMBA MONUBI v NYANSIANDO MOGOI [1993] eKLR
Advocates:	-
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**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 323 of 1989

NYANUMBA MONUBI.....PLAINTIFF

versus

NYANSIANDO MOGOI.....DEFENDANT

JUDGMENT

The plaintiff herein filed a plaint on 2-10-89 in which he averred that on 4-11-72 the defendant who was a share holder of Bochege Farmers Company Ltd a land buying public liability company sold all his shares worth Shs 1,700/- together with the interests and benefits accruing to the said shares inter alia the piece of land comprising approximately 17 acres known as Title No Molo South/Kersoi Block 1/76 to the plaintiff for Shs 1,700/- which the plaintiff has paid to the defendant in full. The said land buying company was authorized to alienate the said land to the defendant and or its assignee or nominee the plaintiff. That it was a further term of the said agreement that the plaintiff had to and did take up the repayment of the amount overdue by the defendant as other share holders in respect of the purchase loan from the said company. The plaintiff paid a total of Shs 6,687/- due in this respect and a further sum of shs 1,000/- being survey fees and the said payments were made by the plaintiff as the lawful and or beneficial owner. That the plaintiff took possession of the said piece of land and has been occupying it without any interruption from the defendant or anybody else.

That in breach of the said agreement the defendant has refused and or neglected to transfer the said shares and be beneficial interest arising therefrom and or piece of land and instead has fraudulently caused and or asked that the same be registered under his name. The plaintiff therefore sought a declaration that he is the absolute owner of all right title and interest in the shares in Bochege Farmers Company Ltd, an order that the defendant do forthwith transfer his shares in Bochege Farmers Company Limited together with the piece of land known title No Molo South/Kersoi Block 1/76 to the plaintiff failing which this court should do that on the defendant's behalf.

Alternatively a declaration that the plaintiff has acquired title to the said piece of land by contract and or adverse possession and that the Land Registrar should cancel the name of the defendant from the register and substitute therefore that of the plaintiff, damages for breach of contract, costs of the suit plus interest and any other relief that this court may deem fit to grant.

The defendant filed a defence on 12-1-90 in which the defendant denied having agreed with the plaintiff about payment of any of the sums alleged in paragraph 4 of the plaint and puts the plaintiff to strict proof thereof. He further denied knowledge of any payments made on his behalf by the plaintiff as alleged or at all and he puts the plaintiffs to strict proof thereof. That if the plaintiff has made any payments which is denied the same were made without the defendant's authority and the defendant thus denies liability thereof. In paragraph 5 thereof the defendant averred that he is the registered proprietor of land parcel in question and if the plaintiff has been in occupation thereof which is denied then such occupation has been wrongful and without the defendant's authority, knowledge or consent. The defendant therefore denies that the plaintiff has any right to have the land transferred to him as alleged in paragraph 6 of the plaint or at all and he puts the plaintiff to strict proof thereof and lastly he

prayed for the dismissal of the plaintiff's claim with costs.

Just before the commencement of the hearing the plaintiff put in an amended plaint by consent of both parties. No amended defence was put in. The fresh matters added by the amended plaint are that it was now specifically stated in paragraph 3 and 5 that the agreement of sale between the parties herein was on 24-11-72. In paragraph 6 particulars of fraud are set out namely "The defendant purporting to be still the beneficial and or legal owner of the said share stealthily paid the balance of the survey fees and caused the said piece of land to be registered in his name" and in prayer (b) further and that the defendant holds the said piece of land in trust for the plaintiff.

The parties adduced evidence. The sum total of the plaintiff's evidence is that the defendant herein who is related to him through his mother owned shares in Bochege Land Buying Company which he sold to the plaintiff. The defendant had not taken up possession of the suit land and it is the plaintiff who took up possession of the said land built houses for himself, his brothers and mother from 1972 to the present date. The agreement was in writing as per exhibit 1. He made payments as indicated and the balance was to go towards loan repayment. The plaintiff was to continue making other payments due to the company till full payment for the share which he did as per exhibit 2. He settled on this land together with his family on which he has lived ever since. All his dead relatives including his mother have been buried on this land without any objection from anybody. The plaintiff paid the amounts in the name of the defendant as he was informed that at the time of survey and issuance of title deed is when the shares or land would be changed into his names.

He paid the survey fees in his mothers name as he did not want his brothers to complain as he wanted the land to come out in his mothers name and then he would share it out to his brothers.

Later on the plaintiff realized that the defendant was turning against him and he took him to the District Officer who wrote exhibits 4a, b, c. The defendant came before the D.O. and disclosed that he had already taken the title deed and this is the time the plaintiff decided to sue him in court. He therefore seeks orders as prayed for in the amended plaint. When cross-examined the plaintiff was firm that he was not sold land but he refunded the defendant the money he had paid for his share in the said land buying company. That he requested for change of name but the directors told him that that would be done when survey of the land is done and the land subdivided. He was firm the defendant never entered the suit land, he has never build a house thereon, and it is him plaintiff and his family who have resided on the land since the date of agreement. He was firm he was shown where to reside by the Chairman of the farm. He was not a member but he had refunded a member his shares. He conceded most receipts are in the name of the defendant but this is because it was agreed that this would be changed later on. That he has no share certificate as these were issued along with title deeds. That when he bought shares he had in mind land in respect of these shares.

PW2 testified he is related to both disputants herein. He was aware to the transaction which led to the suit herein. That he was present when the defendant asked plaintiff to refund money he had paid for shares in a land buying company and take up these shares. Negotiations were carried out which culminated in exhibit 1 being written and he PW2 was a witness to that agreement and witnessed money change hands as per that agreement. He is aware the plaintiff and the rest of his family reside on this land. The plaintiff's mother died in 1991 and she was buried on this land. When cross-examined he was firm that the agreement he witnessed culminated into purchase of shares.

PW3 was an official of the land buying company in 1972 when the defendant brought his sister mother to plaintiff and presented her to the committee saying that he defendant was leaving his shares for her. The mother of plaintiff who had come from Tanzania settled on the land on which that family still resides

to date. That the defendant has never resided on this land as he went back to Kisii where he resides to the present day. He was aware the plaintiff mother used to plant pyrethrum and used the proceeds to pay off any expenses incurred by the company in respect of the said land. That the initial payment for one share was Shs 2,100/- but the defendant paid only 1,700/- from Kisii and the shortfall was paid by the plaintiff and his mother. That they made more payments, and that is why they were given bigger land of 17 acres.

Concerning registration and change of name he stated this was to come at the time of subdivision. The plaintiff paid survey fees but the clerk also accepted part of survey fees from the defendant. When he noticed this he called both parties to come before him to solve the problem but they did not come.

He has resided in Molo since 1971 and he has never seen the defendant come to the suit land requesting the plaintiff's family to move away from the suit land prior to 1988. He was firm at the time of issuing of title deeds the defendant was supposed to come and change the land into the name of the plaintiff but not to get the land registered into his name. He does not know how the defendant was issued with the title deed.

When cross-examined he was firm the defendant told the committee that he was leaving his shares for his sister the mother of the plaintiff. The place where the family settled is where they still reside to the present day. He had no idea as to why change of name was not effected but he took it that this was a transaction involving family members. That the name of original owner had not been substituted and that is why receipts had to continue appearing in the name of the original owner.

He was firm he did not sign the register for the release of title deed to the defendant as he knew he had sold his shares to his sister.

PW4 testified that he is the one who wrote exhibit I on behalf of both disputants. He witnessed their signatures and some of the payments. He added that part of the balance was to go towards payment of the tractor loan. He never heard the defendant tell the plaintiff that he plaintiff was to reside on that land at the will of the defendant.

The defendant gave evidence conceding that the plaintiff is his nephew. That he agreed to sell him shares but not land as that had not been subdivided. He was paid only 802/- and no other. There was an agreement of sale to that effect. He does not recall how much he was to pay in total for the one share. But he left flowers (pyrethrum) on the farm which the plaintiff was to sell and pay off the debt. He conceded the plaintiff continued paying on his behalf because there was no pyrethrum. That at no time did the plaintiff ask for his name to be substituted for that of the defendant. He does not know if the plaintiff used his own money to pay for the shares other than proceeds from the pyrethrum. When cross-examined he stated that the person who wrote the agreement is brother to the plaintiff and it was not read to him. He conceded he was selling land to the plaintiff which was in Molo comprising 14 acres but he was to sell after knowing the acreage. He conceded he did not tell the advocate that he was to sell the land after obtaining title deed. That he had a house on the land where the plaintiff was to reside and pyrethrum which the plaintiff was to sell and pay off the loan but he was not paying him for the services rendered but he had use of the house and balance from the proceeds of sale of the pyrethrum. He added that the amount for the share was to be fixed by the government and he was not informed of this amount and he does not know how much the plaintiff paid for this share. When pressed he conceded he had not been on the shamba since 1972 as he knew it was in safe hands. He conceded PW2 was present when the agreement was written but both PW2 and PW4 told lies when they said he was paid for the land.

At the close of the whole case the plaintiffs counsel submitted that the case is proved as per evidence that plaintiff paid for the share which gave rise to the suit land and have resided thereon since 1973 in the open and uninterrupted and qualify for entitlement both through purchase and adverse possession.

From the evidence on the record it is clear that there is no dispute that the defendant purchased shares in a land buying company based in Molo. It is apparent he himself never took up possession of the suit land. As at the initial stages the acreage was not known and dealing was in terms of shares.

It is also apparent that the plaintiff is the one who took possession of the suit land. The circumstances under which he came to take possession of the land vary from the version of both parties. The stand of the plaintiff and his witnesses is that he purchased the shares, paid balance of the loan after settling on the land with all his family members and dealt with it as a family land. The version of the defence is that he was permitted to reside there by the defendant and pay off the loan. The defendant does not know how much was to be paid for the share. Apparently he never paid any instalments himself as they allegedly came from sell of pyrethrum. The defendant has however not informed the court who planted the pyrethrum. He denied selling the land but conceded he was paid some money in pursuance of exhibit 1 only Kshs 802/-. He however denied that he was selling land. He agreed exhibit 1 was written in respect of the said land. Exhibit 1 is dated 24/11/72 and talks of sale of land in Molo. The defendant signed. There is conflict as to how much was paid and when but it is clear that some amount was paid to the defendant and the rest went to pay the tractor loan.

The contents speak for themselves. Although there was no demarcated land it can be deduced from the agreement that it related to the suit land. Following that agreement is when the plaintiff took up possession of the land and started residing thereon. The defendant signed exhibit 1 and he is bound by it. It is a contract for sale of land.

Concerning payment of the balance for the share the plaintiff produced receipts in his name and that of the defendant. He said (plaintiff) that he paid receipts in the defendant's name as the name had not changed to his. He explained that he was informed he would change the name during survey and subdivision. PW3 one of the company officials said that he does not know why the name was not change. The defendant conceded that he has not been on the land since 1973 as he knew it was in safe hands, he never made any payments as the plaintiff was to pay the same from proceeds from pyrethrum on the land and then make use of the balance. In his defence in paragraph 3, 4 and 5 the defendant has denied any payments made on his behalf by the plaintiff and if there were any these were made without his authority and consent. He has also denied occupation by the plaintiff and if there was such occupation the same was without the defendant's authority, knowledge or consent.

The defendant contradicted his pleadings by his evidence and the sum total of his evidence is that he allowed the plaintiff to settle on the said land, pay off the loan from proceeds of pyrethrum and never bothered about the land as he knew it was in safe hands.

The above shows that the plaintiff has resided thereon on the suit land with the consent and knowledge of the defendant.

The plaintiff has pleaded entitlement through both contract and adverse possession. The contract claim is based on exhibit 1. It is in respect of sale of land and as per provision of section 3 of the Law of Contract Act Cap 23 Laws of Kenya

acts in respect of disposition of an interest in land has to be in writing.

The 2nd aspect of this transaction is that it was in respect of agricultural land and therefore subject to the provisions of the Land Control Act Cap 302 Laws of Kenya. As required by the provision of section 6 of the said Act sale of agricultural land is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given consent in respect to that transaction. This was sale of shares in respect to Agricultural Land. It is not exempted from the provisions of the Act and as such consent was necessary. There was no such consent obtained. In such circumstances the purchase price is recoverable as a civil debt under section 7 of the same Act.

Therefore if the plaintiff relies on contract he cannot succeed as his only remedy is to recover what he has incurred in respect of the said land.

The plaintiff has pleaded in the alternative that he has resided on the suit land since 1973 or 72 for over a period of 12 years openly and uninterrupted for a period of over 12 years.

According to him title deeds were to be issued in 1998 and that is when the defendant came took the title deed secretly. A dispute was reported to the District Officer as per exhibits 4(a) (b) but defendant refused to attend and that is why he filed the suit. From 1973 to 1988 is a period of 15 years therefore in excess of the requisite 12 years period. The requirements for entitlement to land by virtue of adverse possession are set out in the case of Salimu Boyd and another (1971) EA 550 where it was held inter alia that the applicant must prove that he has had exclusive uninterrupted possession of the land for 12 years without fraud.

Further principles are set out in the case of Husea v. Njiru and others (1974) EA 526 where it was held inter alia that on payment of purchase price by a purchaser in occupation his occupation becomes adverse to that of the vendor, that the plaintiff had been in occupation of the land as owner for over 12 years, that at the expiry of the prescription period the registered owner holds the land in trust for the person who has prescribed ownership.

In the case before us the plaintiff has been in continued occupation of the suit land for a period of over 12 years uninterrupted with the knowledge of the defendant. The plaintiff paid part of the purchase price to the defendant and completed payment of instalments for the share of land. Upon that payment which the defendant accepted to have received of Kshs 802/- and further continued payments of the instalments which the defendant also accepted to have been made by the plaintiff the plaintiff acquired a prescriptive interest in the land.

The defendant alleges that the sale was to be completed when the acreage of the land was determined but this was not a term or condition in the sale agreement exhibit 1 which the defendant accepts to have been a party to. In any case if that were the position there was no justification for the defendant to process the title deed in his own name instead of proceeding with the sale as previously agreed.

The other point to be dealt with is the conduct of the defendant. From the evidence on the record is the conduct of the defendant in relation to the subject matter conduct of an owner or a claimer of an interest in land" The defendant alleges to have sold land to the plaintiff who went into possession, from 1973 he defendant has never stepped on to that land, he has no idea what the plaintiff does on that land, how many houses there are on that land or how many people reside there, he becomes aware that the plaintiff's mother has died and was buried on the suit land but he raises no objection, when the dispute is reported to the Directors PW3 invites him to come to the office with a view to solving the problem he does not turn up, the plaintiff reports the matter to the D.O. for a solution and he does not turn up when invited to do so, he gets the title deed into his name but files no action to evict the plaintiff

from the land. All the foregoing factors go to show that the defendant did not deal with the suit land as an owner. He recognized the plaintiff's claim over the same.

I believe the contention of the plaintiff that the defendant took advantage of the fact that the name of the plaintiff had not been substituted with that of the defendant and then proceeded to collect the title deed and share certificate.

The plaintiff pleaded fraud and gave its particulars as "the defendant purporting to be still the beneficial and for legal owner of the said share stealthily paid the balance of the survey fees and caused the said piece of land to be registered in his name".

The plaintiff produced receipts to show that he had paid for the survey fees. The defendant produced none although he claimed the plaintiff was paying on his behalf. This court has already dismissed his allegation that the plaintiff was under an obligation to sell pyrethrum and use the proceeds to pay the instalments as no reasonable man would allow this to happen without making the plaintiff account properly for the proceeds from the use of land.

Having found as a fact that the conduct of the defendant showed that he recognized the plaintiff's interest in the land and in the absence of a term in exhibit 1 to the effect that the sale was to be effected after the land was demarcated the defendant's action of going to process the title deed without resorting to the plaintiff or clearing that issue with him and then refusing to entertain any complaint from the plaintiff over the suit land amounted to fraud. This action was purportedly intended to defeat the plaintiff's claim over the said land and the same is void and cannot be recognized in law see the case of Suleiman Bin Abdullah Bin Mohamed El Kiyumi vs Azzan Bin Zah El Ruweli and Said Bin Azzan Bil Zahar El Ruweli (1958) EA 553. This court has found as a fact that the title deed was processed in the name of the defendant after the plaintiff's presumptive right to adverse possession had accrued. Section 28 of the Registered Land Act cap 300 Laws of Kenya states inter alia that "The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenance belonging there to free from all other interests and claims whatsoever provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee". Since the title was processed after the plaintiff's prescriptive right had accrued the defendant is deemed to hold the same in trust for the plaintiff. See the case of Hosea v Njiru and others (1974) EA 526. The aforesaid acquisition of title by the plaintiff through adverse possession accrued in 1985-86. The acquisition is enforceable in law and is not subject to consent from the Land Control Board of the area as per principle in the case of Gatimu Kinguyu v Muya Gathangi (1976) KLR 253 and Karanja Matheri v Kanji (1976) KLR 140.

I also refer to the case of Limuli v Marko Sabayi (1979) KLR 251 in which it was held that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land even if it is a first registration and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents.

For the reasons given in this judgment I find that the plaintiff has proved his case on a balance of probability and I enter judgment for him on the following terms:

1. A declaration be and is hereby given that the plaintiff is the absolute owner of all that piece of land known as Title No Molo South Kesoi Block 1/76 by virtue of adverse possession.
2. That the defendant holds the said title in trust for the benefit of the plaintiff.

3. That the said trust be and is hereby brought to an end from the date of this judgment.

4. The defendant shall forthwith execute a transfer of the suit land in favour of the plaintiff forthwith failing which the Deputy Registrar of this court be and is hereby authorized to execute the same on behalf of the defendant to effect transfer in favour of the plaintiff.

5. The plaintiff shall have costs of this suit.

Dated at Nakuru this 24th day of February, 1993.

R.N. NAMBUYE

JUDGE



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