



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC NO. 402 OF 2017**

**MARK OCHOGO ONGERA.....PLAINTIFF**

**=VERSUS=**

**BINDU SHANTILAL SHAH.....1<sup>ST</sup> DEFENDANT**

**CLAREMONT INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed an originating summons dated 16<sup>th</sup> June 2017 in which he sought the following reliefs:

- 1) That the Plaintiff MARK OCHOGO ONGERA be registered as the proprietor of NAIROBI L.R 214/555 which he possess and occupies absolutely as the proprietor.***
- 2) That the 1st and 2nd defendants be barred from ever claiming title to NAIROBI L.R 214/555 by virtue of the Limitation of Actions Act.***
- 3) That the Deputy Registrar to sign the transfer documents in favor of the Plaintiff.***
- 4) That the costs of this suit be provided for***

2. The Defendants were duly served through substituted service vide an advertisement in the Daily Nation of Friday 24<sup>th</sup> November 2017. They did not enter appearance. The Defendants were again served through an advertisement in the Standard Newspaper of 17<sup>th</sup> July 2018. Again they did not enter appearance. The originating summons therefore proceeded by way of formal proof.

3. The Plaintiff contends that he has been staying on the suit property since 2004 and that therefore he has acquired it by way of adverse possession. In the initial pleadings, the Plaintiff stated that he had been on the suit property since 2011 but on 28<sup>th</sup> November 2018, he orally applied for amendment to change to the year 2004 on the ground that that was a typing error. The amendment was allowed.

4. The Plaintiff stated that he has been growing vegetables on the suit property and that no one has ever come to claim the land. He states that the owner of the suit property was the 1<sup>st</sup> Defendant but that the property was later transferred to the 2<sup>nd</sup> Defendant. He stated that he conducted a search at the Registrar of Companies and established the directors of the 2<sup>nd</sup> Defendant.

5. The Plaintiff produced an extract of title to the suit property, CR 12 in respect of the 2<sup>nd</sup> Defendant and photographs of the suit property as exhibits. He also produced a copy of a Deed Plan in respect of the suit property.

6. I have carefully considered the evidence of the Plaintiff as well as the documents in support of the same. The Plaintiff is seeking to be registered as owner of the suit property by way of adverse possession. Black's Law dictionary 9<sup>th</sup> Edition defines adverse possession as ;-

***i. The enjoyment of real property with a claim of right when the enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.***

***ii. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time'.***

7. In Kenya, for one to succeed in a claim for adverse possession, he has to demonstrate that he has been in the property for a period of 12

years. The possession must be continuous exclusive, hostile, open and notorious. In the case of **Mtana Lewa Vs Kahindi Ngala Mwangadi (2005) eKLR** , the Court of Appeal stated as follows:

***“Adverse possession is essentially a situation where a person takes possession of land, assert rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period , in Kenya 12 years”.***

8. It is in light of the statutory period of 12 years that I will determine whether the Plaintiff’s claim will succeed. The Plaintiff produced an extract of title (Exhibit 1) According to this title, the suit property that is LR No. 214/555 was transferred to the 1<sup>st</sup> Defendant on 11<sup>th</sup> February 1978. the same property was transferred to the 2<sup>nd</sup> Defendant on 20<sup>th</sup> February 2008.

9. The Plaintiff states that he started occupying the suit property in 2004. By 20<sup>th</sup> February 2008, the property had been transferred to the 2<sup>nd</sup> Defendant. This therefore means that he had been in possession of the suit property for a period of close to 4 years. He therefore had not been in adverse possession for a period of 12 years as against the 1<sup>st</sup> Defendant.

10. The Plaintiff has tried to argue that the transfer to the 2<sup>nd</sup> Defendant was erroneous. This argument does not help his claim of adverse possession. Had the Plaintiff been in occupation for 12 years prior to the transfer of the property, then his claim would not have been affected by the transfer as the title of the 1<sup>st</sup> Defendant would have been extinguished.

11. The Plaintiff cannot claim adverse possession against the 2<sup>nd</sup> Defendant. The Plaintiff filed this suit on 11<sup>th</sup> August 2017. The 2<sup>nd</sup> Defendant was registered as owner of the suit property on 20<sup>th</sup> February 2008. This means that he has been on the suit property for slightly over 9 years. He cannot therefore claim to have been in continuous possession for the required twelve years.

12. It is clear from the above analysis that the Plaintiff has failed to prove his case of adverse possession against both Defendants. The Plaintiff’s case is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF NOVEMBER 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual absence of parties who were aware of the date of the Judgement.

Court Assistant: Mercy

**E.O. OBAGA**

**JUDGE**