



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ORIGINATING SUMMONS NO 1 OF 2012

**IN THE MATTER OF LAND PARCEL NO. NTIMA/ NTAKIRA/2735 REGISTERED IN THE
NAME OF DANIEL AVOGA**

DANIEL KIRIMI JULIUS.....APPLICANT/PLAINTIFF

VERSUS

DANIEL ANAYA AVOGA.....RESPONDENT/DEFENDANT

J U D G M E N T

1. This suit was commenced by way of Originating Summons dated 3rd January, 2012 and filed on 5th January, 2012. The Originating Summons is said to have been brought to Court Under Section 38 of the Limitation of Actions Act Cap 22, Under Order 37 Rule 7. 1 of the Civil Procedure Rules 2010 and Sections 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and other enabling provisions of the law.

2. The application states:

“LET DANIEL AMAYA AVOGA of Ntakiira Location P.O Box 1041- 60200 Meru County Imenti North District, the Respondent herein within (15) days of service of this Summons inclusive of the day of such service enter appearance to this Summons which is issued on the application of DANIEL KIRIMI JULIUS of Ntakira Location in Imenti North District who prays the Honourable Court for the determination of the following questions:-

1. *Has the Plaintiff occupied land parcel No. NTIMA/NTAKIRA/2735 for more than 12 years?.*
2. *Has the Plaintiff's occupation been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years?.*
3. *Has the plaintiff been in occupation of the suit land since his birth in the year 1977?.*
4. *Has the Plaintiff become entitled to the whole of the suit land by way of adverse possession?*
5. *Has the Defendant ever occupied the suit land?.*

3. The Plaintiff prays for orders:-

1. *A declaration that DANIEL KIRIMI JULIUS the Plaintiff herein has become entitled by adverse possession to the whole of that parcel known as LR NO. NTIMA/NTAKIRA/2735 comprising in measurement 0.057 Hectares or thereabout registered in the name of DANIEL ANAYA AVOGA.*
2. *An order that the said Plaintiff be registered as sole proprietor of the whole of that parcel known as LR. NO. NTIMA/NTAKIRA/2735 in place of DANIEL ANAYA AVOGA.*
3. *An order that the Defendant herein do execute all the requisite instruments and/or documents to effect transfer to the Plaintiff of land parcel L.R. NO. NTIMA/NTAKIRA/2735 and in default this Honourable Court do empower his (sic) Deputy Registrar to execute the same.*
4. *This Honourable Court do make such further or better orders it might deem fit and expedient to meet the ends of justice.*
5. *Costs of this be borne by the Defendant.*

4. The application is supported by the affidavit of the Plaintiff, Daniel Kirimi Julius and has the following grounds:-

- a. *THAT the Plaintiff has been in exclusive, open and uninterrupted occupation of land parcel NO. NTIMA/ NTAKIRA/2735 since birth in the year 1977.*
- b. *THAT the Plaintiff has made substantial developments on the suit land , to wit, built a homestead, planted trees, interred the remains of his grandmother TABITHA MWARI BAIMUNYA (deceased) the Administrator of the estate of his late grandfather M'MUNYA KAREMA (deceased) and do (sic) subsistence farming for himself and his family.*
- c. *THAT the Plaintiff lives with his family on the suit land for a time running to over 34 years.*

5. Through an application dated 9th January, 2012, the Hon Lady Justice Lesiit granted an order that ordered the registration of an Inhibition against land parcel No. NTIMA/NTAKIRA/2735 pending the hearing and determination of this suit.

6. The parties tendered oral evidence in support of their assertions. The Plaintiff's case is that the suit land belonged to his grandmother Tabitha Mwari Baimunya and that he was born on the suit land and still lives there. He says that through a succession cause, the land in dispute, was registered in the name of his mother after Sub-division of his grandmother's land. He claims that his mother sold the land to the defendant secretly.

7. The Plaintiff during Cross-examination denied that he had a right to another parcel of land belonging to his father. He reiterated that he had always lived on his mother's side of the family. He termed his mother as a peripatetic phenomenon.

8. The plaintiff told the Court that he had sued the defendant because he had bought the land secretly. He did not explain why he had not found it necessary to enjoin his mother in the suit.
9. PW 2, Stella Mucece Baimunya, testified that he was a sister to the mother of the Plaintiff. She testified that the Plaintiff was born on the suitland and had always lived there. She said that she was married but left her husband along time ago and lived at Magundu.
10. PW 2 told the Court, her mother's land was Sub-divided. She said that the Plaintiff's mother was supposed to take care of his interest in the land. She reiterated that the Plaintiff had always lived on the suitland.
11. During cross-examination, PW 2 said that since the suitland was family land, the Plaintiff's mother held it in trust for all her children.
12. PW3 testified that she was the Plaintiff's cousin. She told the Court that the plaintiff had all along lived on the suit land with his grandmother. In cross-examination, she told the Court that she was married elsewhere, far from where the suitland is situated. She said that she sometimes visited the area where the suit land is situated and lived with the Plaintiff's grandmother.
13. PW 3, Sabera Kariro, testified that the Plaintiff was born and grew up on the suit land . She told the Court that he used to take care of his grandmother and buried her on the suitland. She also admitted that she did not know the date when the Plaintiff was born attributing her lack of that knowledge to her being uneducated. She also told the Court that she did not know the registration number of the Suitland. She also told the Court that she did not know when and if the land had been sold to the defendant.
14. PW4, Joshua Mukiira, testified that he was an elder around the area the suitland was situated and that the Plaintiff was born and was still living on the suitland. He told the Court that the land was Sub-divided into three portions which were shared out to the children of the Plaintiff's grandmother. He testified that all developments on the suit land belonged to the Plaintiff who had lived on the suitland with his grandmother.
15. DW 1 testified that he bought the suitland from the Plaintiff's mother and paid a sum of Ksh 250,000 as the purchase price. He produced the apposite sale agreement. He said that he obtained the consent of the land Control Board and the land was registered in his name.
16. He told the Court that the Plaintiff was not living on the suitland when he purchased it. He conducted a search at the lands office and satisfied himself that the seller, Jane Mukiri Baimunya, was the registered owner. He told the Court that he only learnt that the Plaintiff was interested in the suit land when he served him with the suit documents. He asked the Court to adopt his witness statement dated 3/3/2013 as his evidence for the purposes of this suit.
17. The Defendant told the Court that the structures the Plaintiff claimed to have constructed on the suitland were there when he bought the land. He said that when he bought the land, it was the Plaintiff's mother who was living there. He further testified that when he bought the land, the Plaintiff's mother told him that her children, including the Plaintiff, were living with their father.
18. He reiterated that since he bought the land and followed all the required procedures, the Plaintiff's suit should be dismissed.
19. DW 2, Jane Mukiri Baimunya, testified that she was the Plaintiff's mother. She told the Court that she had 8 children but one was deceased. She told the Court the Plaintiff was born at his father's place and all the other children were born at her father's and mother's place. She reiterated that she lived with her other children except the Plaintiff who was born at his father's place.
20. She told the Court that the Plaintiff never lived on the suitland for more than 12 years and that he

was in the habit of moving in and moving out of the suitland. She claimed that the Plaintiff was in cahoots with his father to deny her peace. She said that the Plaintiff's father, one Julius, had caused her problems.

21. DW 2, told the Court that the disturbances the Plaintiff caused upon her were reported to police. She claimed that the Plaintiff chased her away from her home and took away her identity card, her handbags and everything she had. She said that the Plaintiff had physically assaulted her and in one instance near a Mosque, he almost killed her. She told the Court that she rues the fact that she brought the Plaintiff into this world.

22. During Cross-examination, DW 1 insisted that the Plaintiff stayed with his father. She denied the Plaintiff's claim that he had stayed on the suit land for over 12 years. She also told the Plaintiff that his Identity Card proved his nexus with his father. She asked the Plaintiff to claim land from his father. In an emotional state, she told the Plaintiff that he was cursed and that God would handle him appropriately.

23. I have carefully considered the pleadings of the parties, the evidence they and their witnesses tendered and the Submissions they filed. I have also considered the two authorities proffered by Advocate Kaimenyi on behalf of the defendant.

24. This suit is predicated upon the doctrine of adverse possession. Adverse possession is a mechanism which allows a trespasser to acquire title to land and to displace the rights of the registered owner. Adverse possession entails the occupation of land belonging to another against his wish and in opposition to his title if the possession continues without interruption for a period of over 12 years.

25. The defendant has proffered two authorities in support of his assertion. The first one is *HIGH COURT AT NYERI CASE NO. 16 OF 2004-HENRY MWANIKI KIARA VERSUS RACHEL NYAMBURA KIMANI & 4 OTHERS*. In this case the court found that the Plaintiff had not satisfied the requirements for adverse possession. The second one is *HIGH COURT AT NAIROBI ELC CIVIL SUIT NO 490 OF 2010 -SOPHIE WANJIKU JOHN VERSUS JANE MWIHAKI KIMANI (2013) e KLR*. In this case the Court found that the Plaintiff was a bona fide purchaser who had a good title which had not been fraudulently obtained and that his rights were protected under Section 24 and 26 of the Land Registration Act, 2012. I opine that both authorities are relevant to the facts and circumstance of this suit.

26. The claim for adverse possession is filed against the Defendant who is the registered owner of the suitland. The defendant was registered owner of the land on 10th August, 2011. This suit was filed on 5th January, 2012. This was less than 6 months after the defendant was registered owner of the suitland. This period does not satisfy the requirements for an order of adverse possession.

27. The Plaintiff and his 3 witnesses merely testified that the plaintiff had lived on the suitland for a long time since he was born. Their evidence suggests that the Plaintiff was a licensee, firstly of his grandparents and later on of his mother. A licensee can not stake a claim predicated upon adverse possession. Indeed the Plaintiff's witnesses testified that they did not know that the land had been sold and that it was registered in the name of the defendant. Thus, they did not know when time necessary for adverse possession started to run as against the defendant.

28. The defendant's evidence is relevant, I find that he validly obtained the title to the suitland. He observed all required procedures and paid a consideration of Kshs. 250,000 to the Plaintiff's mother.

29. The evidence of DW2 is relevant in that it supports the defendant's assertion that as against him, the Plaintiff has not been in occupation of the suit land for over 12 years. Her claims that the Plaintiff has been in the practice of beating her and that the Plaintiff has been misused by his father to deny her peace, are not relevant to the determination of this suit. And so are the other things she has said, including saying that the Plaintiff is a cursed person and that she rues the fact that she brought him into this world.

30. The Plaintiff says that he is staking a claim against the defendant, for among other things, because he bought the land secretly. He does not claim that the defendant was guilty of committing a fraudulent act. Even if he did so, his claim would have best been canvassed through a normal plaint. I opine that as against the defendant his claim for ownership of the suit land under the doctrine of adverse possession fails.

31. I find that the defendant has a proper title, legally and validly obtained and that his rights are protected under Sections 24 and 26 of the Land Registration Act.

32. I answer the Questions framed by the Plaintiff in his Originating Summons as follows:-

1. ***As against the defendant, the Plaintiff has not occupied land parcel No. NTIMA/NTAKIRA/2735 for more than 12 years.***
2. ***As against the defendant, the Plaintiff's occupation has not been open, unhindered, notorious, undisturbed and uninterrupted for over 12 years.***
3. ***As against the defendant, under the doctrine of adverse possession, question 3 is irrelevant.***
4. ***The Plaintiff is not entitled to the whole of the suit land by way of adverse possession.***
5. ***Question 5 is nebulous. As against the defendant whether or not the Plaintiff has ever occupied the suit land does not entitle him ownership of the suitland by way of adverse possession.***

33. I grant the following orders:-

1. ***This suit is dismissed.***
2. ***Costs are awarded to the defendant.***
3. ***The Plaintiff should vacate Land Parcel NO. NTIMA/NTAKIRA/2735 within ninety (90) days and should he not do so, it is ordered that he be evicted by a Court bailiff with the assistance of the O.C.S for the area where the suit land is situated.***

DELIVERED IN OPEN COURT AT MERU THIS 21ST DAY OF APRIL, 2016 IN THE PRESENCE OF:-

CC: Daniel/Lilian

Daniel Kirimi for the Plaintiff

D.J Mbaya h/b Kaimenyi for the Defendant

P.M. NJOROGE

JUDGE