



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
HCC NO.37 OF 2011 (OS)

ELMARD OCHIENG OULO.....PETITIONER

VERSUS

JEREMIA FRANKLIN NYANSIKERA MUNINDA.....RESPONDENT

J U D G M E N T

1. This suit is unopposed and the judgment herein follows hearing the plaintiff's side without the benefit of defendant's input. The plaintiff - **ELMARD OCHIENG OULO** – filed the suit on 23/3/2011 vide an originating Summons application dated 21/3/2011.

Three questions were proposed for determination.

The questions are:

- (1) Whether by virtue of having been in open, peaceful, and uninterrupted occupation of Land Parcel No. **KISUMU/WATHOREGO/57** for a period of 32 years, the plaintiff is entitled to have the same registered in his name.
- (2) Whether the defendant – **JEREMIAH FRANKLIN NYANSIKERA MONIDA** – ought to be ordered to transfer the said land into the name of the plaintiff and failing which the Deputy Registrar of this Court do sign such transfer documents in favour of the plaintiff.
- (3) Whether the defendant ought to be ordered to pay the costs of the suit.

2. A story emerges from both the application and the Supporting affidavit accompanying it. The story is this: The plaintiff bought land parcel **KISUMU/WATHOREGO/57** (Suit land hereafter) from the original owner. This happened when the area in which the suit land is situated was still under adjudication. The plaintiff then went ahead to occupy the land and develop it. He put permanent structures photographs of which are availed as annexures (marked E))1).

3. A time then came when the plaintiff decided to get the title deed. He went to the Land's office where he discovered that the suit land is registered in the name of the defendant. It appears clear that the plaintiff does not know the defendant. He has not been able to trace him either. The plaintiff says he enquired from the original owner whether he sold the land to the defendant. The answer was in the negative.

4. The plaintiff then came to court vide this suit seeking to be registered as owner by virtue of the longevity of his occupation. The plaintiff's story is that he has occupied the suit land for roughly 32 years. His occupation has been open, quiet and without interruption. In short, the plaintiff sees himself

as an adverse possessor.

5. When the matter was filed, attempts to serve the defendants personally were unsuccessful because the defendant was not traceable. According to the plaintiff, the defendant has never even gone to the suit land. The plaintiff's counsel then applied to have the defendant served by way of substituted service. Such request was granted on 23/1/2013. Such service was then done vide an advertisement in the Standard Newspaper of 13/6/2013. Even then the defendant didn't respond.

6. The court entertained hearing on 5/6/2014. The plaintiff's counsel gave some history and background of the case. The narrative was more or less as contained in the application. It would be largely superfluous to repeat it.

7. The law On adverse possession is clear in our jurisprudence. Its statutory anchor is to be found in Limitations of Actions Act (Cap 22).

Section 7 of that ACT provides:

“ An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

Here, it seems to me that the plaintiff is saying he occupied the suit land some 32 years ago. The defendant's right to claim it from him within 12 years is long gone. The plaintiff therefore wants to be declared as adverse possessor.

8. Section 13 of the same Act is instructive and the relevant part reads as follows:-

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is in this ACT referred to as adverse possession) and.....”

It seems to me the plaintiff has been in possession and occupation of the suit land. The information availed shows the plaintiff bought the land from the original owner in 1979. He started construction of permanent building in 1985. He entered the land without defendants permission and has been in possession for about 32 years.

9. Finally, Section 38 of the same statute entitles the plaintiff to come to this Court as he has done in this suit. And the procedure for coming to court is clearly provided for under order 37 rule 7 of Civil Procedure Rules, 2010.

10. The plaintiff then has the duty to prove that he has used the suit land. The manner and nature of use is captured in the maxim: **nec vi, nec clam, nec precario** (No force, no secrecy, no evasion)

The possession must be continuous. There should not be any interruption in possession. Any break in-between disrupts the period of limitation (See **WANYOIKE GATHURE V BEVERLY (1965) EA 514, 518, 519, per miles J**).

11. It seems clear that the plaintiff has fulfilled the conditions necessary for adverse possession. It is clear that his possession and occupation of the land has been uninterrupted, continuous, peaceful, open and without permission of the registered owner for over 12 years. I think then the answer to prayer 1 is Yes: The plaintiff has been in adverse possession of the suit land for the requisite period and can therefore be registered as owner. The answer to question 2 is also yes: The defendant, if found, should transfer the land to the plaintiff, but the deputy registrar of this court can also sign the necessary transfer documents if the defendant is not found, or refuses to co-operate if found. Question 3 will not be answered in the positive. In this suit, no costs have been visited on the plaintiff by the defendant. The plaintiff should therefore bear his own costs.

A.K. KANIARU – JUDGE

29/1/2015