



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.174 OF 2010

MARK OWUOR AGENG.....PLAINTIFF

VERSUS

PHILIP ODHIAMBO OGUTU.....DEFENDANT

J U D G M E N T

1. The plaintiff – **MARK OWUOR AGENG** – filed this suit here against the defendant – **PHILIP ODHIAMBO OGUTU** – vide an originating Summons dated 11/11/2010. The originating Summons (O.S hereafter) sought determination of the following issues:-

- (a) **Whether the plaintiff has occupied, used enjoyed peacefully and openly as of right and without interruption the whole of and/or a portion of land known as SIAYA/UMALA/505 size 1.4 ha, for a period of over 12 years.**
- (b) **Whether the plaintiff has thereby acquired or is entitled to title by adverse possession.**
- (c) **Whether the applicant should be registered as proprietor of the whole and/or part of the said parcel of land in place of the defendant presently registered as proprietor**
- (d) **Whether permanent injunction should issue restraining the defendant, his servants, agents, heirs, assignee, or any other persons acting on his behalf from interfering with plaintiff's enjoyment and use of the land.**

2. The grounds advanced stipulate that the defendant's title has been extinguished by virtue of the Limitations of Actions Act (Cap 22) and that the applicant has been in open occupation of the said parcel of land without respondent's consent.

3. The supporting affidavit provides some background and history. The plaintiff went into occupation of the land before 1998 and put up his home there in 1999. All along, he has peacefully lived there without interruption. To-date, such occupation has continued for over 12 years. According to the plaintiff, this entitles him to ownership of the land by adverse possession. The defendant is the current registered owner.

4. Records show that the defendant was served on 24/11/2010 at around 1.12p.m at Busia Bus stage. He was served by **SAMSON B A. OKALL** who described him as a **“small sized, dark skinned man with a lean face.”** There is an affidavit of service to that effect dated 25/11/2010.

5. Despite service however, the defendant didn't enter appearance or respond to the suit in any way. Subsequently, judgment was asked for and the same was entered against the defendant on 28/2/2011. The matter subsequently came for formal proof where the plaintiff (P.W.1) and his son (P.W.2) testified.

Their evidence confirms occupation and possession of the land for over 12 years without interruption.

6. Later, submissions were filed. The submissions were essentially a restatement and amplification of what the application and evidence contained. In addition the court was given the decided case of **GRACE WANJIKU VS MWAURA KINUTHIA: ENVIRONMENT & LAND NO 208/2010, NAIROBI**, to rely on.

7. This is an uncontroverted matter. It is as simple as it is straightforward. The plaintiff has demonstrated that he has had open, continuous and peaceful occupation and possession of Land parcel No. **SIAYA/UMALA/505** for a period of over 12 years. The defendant was registered as owner in 2001 but the plaintiff's occupation and possession predates that period. It seems to me that the land had another owner prior to defendant's registration as owner. But change of ownership does not stop the running of time. This is the position taken in the case of **KASUVE VS MWAANI INVESTMENTS LIMITED & 4 OTHERS (2004) 1KLR 1 & 4**. It was held in that case that the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession.

8. I need to point out the decided case availed by the plaintiff is not useful to the court. I have read the case and its contents are relevant. But it is an unsigned judgment and it is not clear as to the identity of the judge who wrote it. I think more care should be taken by counsels not to handle things too casually.

9. Where a claim of adverse possession is made, the plaintiff has to prove that he has used the land 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 purpose – see **KIMANI RUCHINE VS SWIFT, RUTHERFORD & CO. LTD (1980) KLR 10** and also **WANYOIKE GATHURE V BERVERLY (1965) EA 514**.

10. I have already observed that this matter is uncontroverted. The plaintiff has, on balance, demonstrated his open, continuous and peaceful possession for a period of over 12 years. Evidently, such occupation has been without force, secrecy or evasion.

11. The plaintiff is therefore entitled to the land by adverse possession. He should therefore be registered as proprietor in place of the defendant. And a permanent injunction is hereby issued restraining the defendant, his servants, agents, heirs, assignees or other persons acting on his behalf from interfering with plaintiff's enjoyment and use of the said land. **And I so HOLD.**

A.K. KANIARU – JUDGE

19/3/2015

19/3/15

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

No counsel present

Interpretation – English/Kiswahili

COURT: Notice for delivery of judgment in this matter was issued on 10/3/2015. A copy is in the court file. Accordingly, judgment in this matter is hereby read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015