



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO.77 OF 2010(O.S)**

**ABUYA OMWERI.....APPLICANT**

**VERSUS**

**KEIYAN GROUP RANCH.....RESPONDENT**

**JUDGMENT**

1. This suit concerns a claim over land by adverse possession. The applicant, Abuya Omweri brought the suit by way of Originating Summons dated 24<sup>th</sup> March, 2010 seeking the following reliefs against the respondent, Keiyan Group Ranch;

- i. A declaration that the applicant is the absolute owner of a portion measuring 10 acres or thereabouts (herein after referred to as **“the suit property”**) of all that parcel of land known as LR No. Trans Mara/Keiyan/5 (hereinafter referred to as **“Plot No.5”**) having occupied, possessed and used the same peacefully and openly for uninterrupted period of over 38 years.
- ii. An order that the respondent do execute all documents necessary to transfer the suit property to the applicant failing which the deputy registrar of this court do execute the same on its behalf.
- iii. An injunction restraining the respondent by itself or through its agents and/or servants from interfering with and/or in any manner dealing with the suit property.

2. The Originating Summons was supported by the applicant’s affidavit sworn on 24<sup>th</sup> March, 2010. In his affidavit, the applicant stated that the respondent was registered as the owner of all that parcel of land known as LR No. Trans Mara/Keiyan/5 (**“Plot No. 5”**) measuring 816.4 hectares during the process of land adjudication. The applicant stated that he has occupied a portion of the said parcel of land measuring 10 acres (**“the suit property”**) since his childhood. He stated that he has developed the suit property by putting up a homestead thereon with several houses. He has also utilized a portion of the said property for cultivation. He contended that he has occupied the suit property for uninterrupted period of over 38 years and as such has acquired title to the same by adverse possession.

3. The Originating Summons was opposed by the respondent through a replying affidavit sworn by Francis Ole Nkanai on 11<sup>th</sup> May, 2010. Francis Ole Nkanai who described himself as the vice chairman of the respondent stated that the applicant has never occupied any portion of Plot No. 5 as he has claimed or at all. He stated that the respondent has all along used the whole of Plot No. 5 for cultivation and as such there is no way in which the applicant could have occupied a portion thereof measuring 10 acres (the suit property) without any interference from the respondent. He termed the applicant’s Originating

Summons as an afterthought contending that the same was filed after an earlier suit by the applicant over the suit property was struck out.

4. On 13<sup>th</sup> May, 2011, directions were given that the Originating Summons be heard by way of viva voce evidence. At the trial, the applicant gave evidence but did not call any witness. The respondent on the other hand, called two (2) witnesses. In his evidence, the applicant stated as follows. His deceased father moved to the suit property in the year 1921. He was born on the suit property in the year 1933 and has occupied the same ever since. When his father died, he buried his body on the suit property. He has planted sugarcane, coffee, tea and bananas on the suit property. He has also put up ten (10) houses thereon. The respondent has never made any attempt to evict him from the suit property. He produced as exhibit, a copy of the register for Plot No. 5. In cross-examination, he reiterated that his deceased father entered onto the suit property in the year 1921 and that he was born on the suit property and has remained in occupation thereof to date.

5. The respondent's first witness was Thomas Leshan Maito (DW 1). DW 1 told court that; he was the secretary cum manager of the respondent. He took office in the year 2009. The applicant is known to him. The applicant had filed an earlier suit against the respondent over the suit property in the year 2006. In that case, the applicant obtained an order of injunction restraining respondent from evicting him from the suit property. The applicant had claimed in that case that he was the owner of the suit property. The case was dismissed on 4<sup>th</sup> March, 2010. DW1 stated further that the respondent had lodged a complaint with the police against the applicant's son one, Gideon Abuya and the applicant's wife one, Alice Kerubo following which complaint, the two were arrested and arraigned in court on a charge of trespass for which they were found guilty. After the said criminal cases, the respondent brought a civil suit against the said Gideon Abuya and Alice Kerubo for trespass claiming special and general damages. That suit which was filed in the lower court was determined in favour of the respondent. DW I stated further that, a group comprising of 589 people had come up earlier to claim the entire parcel of land that was owned by the respondent at Keiyan including the suit property. The group filed a suit against the respondent at the High Court in Nakuru namely, Nakuru HCCC No. 416 of 2003 against the respondent. That suit was dismissed. DW1 stated that the applicant who claims to have occupied the suit property since 1933 was not one of the plaintiffs in the said suit. DW I admitted that the applicant has a homestead on the suit property. He contended however that the said homestead was put up by the applicant on the suit property around the year 2006. DW I denied that the applicant has planted tea and coffee on the suit property. He denied also that the suit property measures 10 acres. He contended that the applicant occupies a portion of Plot No. 5 measuring about 2 acres only.

6. The respondent's second and last witness was Marero Oriambui (DW 2). He told the court that he is a member of the respondent and that the respondent is engaged in cattle rearing and cultivation on Plot No.5. DW2 admitted that the applicant is residing on the suit property. Like DW1, DW2 claimed that the applicant entered onto the suit property in the year 2006 after which he filed a suit against the respondent. The suit that was also referred to by DW1 was dismissed by the court in the year 2010. DW2 corroborated the evidence of DW1 that in the said earlier case, the applicant had obtained a court order restraining the respondent from evicting him from the suit property. He stated that the applicant has put up houses on the suit property and has also planted maize on a portion hereof. He stated further that the portion of plot No. 5 that is occupied by the applicant measures about 1 acre.

7. After the close of the respondent's case, the parties agreed to make closing submissions in writing. The respondent's advocates filed their written submissions on 10<sup>th</sup> April, 2012 while applicant's advocates did so on 9<sup>th</sup> May, 2012. I have considered the pleadings filed herein by the parties and the evidence that was adduced by the parties in proof of their respective cases. I have also considered the parties' respective closing submissions. The parties did not agree on the issues for determination by the court. In my view, only three issues arise for determination in this suit namely;

- i. Whether the applicant has acquired title to the suit property by adverse possession?
- ii. Whether the applicant is entitled to the reliefs sought in the Originating Summons?

iii. Who is liable for the costs of the suit?

## 8. The first issue:

Adverse possession claims are founded on the provisions of sections 7, 13 and 38 of the Limitation of Actions Act, Cap.22 Laws of Kenya (hereinafter referred to as “**the Act**”). Section 7 of the Act provides that no action may be brought to recover land after the expiry of 12 years from the date when the cause of action accrued. Section 13 of the said Act provides that a right to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run and that person must have taken adverse possession of the land. Section 38(1) of the Act on the other hand provides that any person who claims to have become entitled to land by adverse possession can apply to court for an order that he be registered as the owner thereof in place of the registered proprietor. The Originating Summons herein was brought under this latter section.

9. In the case of, **Salim vs. Boyd & another (1971) E. A. 550**, it was held that an applicant seeking to be registered as proprietor of land by adverse possession must prove that he has had exclusive uninterrupted possession of the land for 12 years without fraud. In the case of **Kimani Ruchine & Another vs. Swift, Rutherford Company Ltd.[1980] KLR 10**, it was held that the possession of the land must have been *nec vi, nec clam, nec precario*, that is, without any force, secrecy, or evasion. In their submissions, the applicant’s advocates agreed with the foregoing statements of the law. They stated as follows;

“It is settled law that in a case of adverse possession the following must be proved:

1. The plaintiff has been in possession of the land for more than 12 years.
2. That the said occupation is without the consent and/or permission of the owner (defendant).
3. That the said occupation has been open and uninterrupted”.

10. Applying the fore going principles to this case, the question that I wish to pose is; what evidence has the applicant placed before this court in proof of his claim that he has occupied the suit property continuously for uninterrupted period of over 38 years? Apart from his testimony, the applicant did not adduce any other evidence or material in proof of the fact that he has occupied the suit property since the year 1933. The applicant testified that he has occupied the suit property since he was born in the year 1933. The applicant also stated that he has put up houses on the suit property and planted sugarcane, bananas, coffee and tea on a portion thereof. Save for the fact that the applicant has a homestead on the suit property; these claims were denied by the respondent. The respondent led evidence that the applicant entered onto the suit property in the year 2006 and put up houses thereon in the same year. He thereafter proceeded to file a suit against the respondent claiming ownership of the suit property which suit was dismissed in the year 2010. The respondent denied that the applicant has planted coffee and tea on the suit property.

11. As I have stated above, the burden of proof rests with the applicant. Section 107 of the Evidence Act, Cap.80 Laws of Kenya provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 108 of the said Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. What I have before me is the testimony by the applicant that he has occupied the suit property since the year 1933 when he was born and the testimony from the respondent’s witnesses to the effect that the applicant entered onto the suit property in the year 2006 and had occupied the suit property for less than 5 years as at the time he brought this suit. The issue that I have to grapple with is; whose evidence is to be believed as between the applicant and the respondent? Although the applicant claimed that his deceased father settled on the suit property in the year 1921, died and was buried on the said property, no evidence was placed before the court in proof of these facts. The applicant had also claimed that he was born on the suit property in the year 1933 and that he has remained in occupation thereof to date. Again, no evidence was placed before the court in proof of the plaintiff’s date of birth and the fact that he was born on the suit property. The applicant did not also

tender any proof of the developments that he claimed to have carried out on the suit property.

12. It was admitted that the applicant has a homestead on the suit property. There was however a dispute as to when the said homestead was put up by the applicant. The applicant contended that his homestead has been on the suit property for the last 38 years. The respondent on the other hand contended that the applicant put up the said homestead on the suit property in the year 2006. The applicant did not place any evidence before court as to when the said homestead was put up. There is also no evidence that he had planted sugar cane, coffee and tea on the suit property. Although he claimed to have been selling tea to Ebereke Tea Factory, he could not remember his tea grower's number. He could not also come up with any proof of the payments that had been made to him by the said factory for the delivered tea. The same situation obtained with regard to his alleged coffee farm on the suit property. The applicant also failed to place any evidence before the court in proof of the existence of the 10 houses that he claimed to have put up on the suit property. When asked if he had any photographs of the said houses, his answer was in the negative. He stated that **"I do not have photographs of the houses but the court can go and see them."**

13. As I have stated above, that respondent has denied that the applicant has been in occupation of the suit property since 1933. The respondent has contended that if indeed that was the case, the applicant would have been registered as the proprietor of the suit property during the land Adjudication in the area that took place in 1970's. The respondent has also contended that a group of 589 people had sued the respondent at the High Court in Nakuru in the year 2003, in Nakuru HCCC NO. 416 of 2003 in respect of **L.R.NO. Trans Mara/Keiyan/1** that was later on subdivided to give rise to among others, Plot No.5 in which the suit property is comprised. The said group had claimed Plot No.1 by adverse possession. The respondent has contended that if it is true that the applicant was in occupation of the suit property when the said group filed the suit aforesaid, there is no reason why he could not have joined the said suit as a plaintiff. The respondent has also pointed out that the applicant's adverse possession claim herein is inconsistent with the claim that he had earlier brought against the respondent in Kisii HCCC No. 63 of 2006 that was dismissed on 4<sup>th</sup> March, 2010. In that case the applicant had contended that the respondent had fraudulently caused itself to be registered as the owner of the suit property which belonged to the applicant. The applicant had contended that since the respondent had been registered as the owner of the suit property wrongfully, the respondent held the said property in trust for him. The respondent has contended that the applicant who had claimed the suit property as of right cannot turn round and claim the same property by adverse possession having denied the respondent's title over the same.

14. On the material before me, I am inclined to believe the evidence of the respondent's witnesses as against that of the applicant. The respondent has mounted credible challenge to the applicant's claim that he has occupied the suit property since 1933. I can see no reason and none was proffered as to why the applicant was not registered as the owner of the suit property during the land adjudication at Keiyan in the 1970's if indeed he was in occupation of the said property at the material time. There has also been no explanation as to why the applicant did not join the suit for adverse possession that was filed at the High Court in Nakuru against the respondent by a group of 589 people who claimed to have been in occupation of the entire parcel of land that was comprised in Plot No.1 that gave rise to Plot No. 5 after subdivision. There is also the issue of the earlier suit that was filed by the applicant against the respondent namely, Kisii HCCC No.63 of 2006 in which the applicant had claimed title to the suit property as of right. I wonder why the applicant did not bring an adverse possession claim at the time against the respondent over the suit property if he was certain that the property belonged to the respondent and that he had occupied the same since 1933. These factors taken together with the applicant's failure to tender any credible evidence as to when he entered the suit property and the developments that he has carried out thereon, leads me to the conclusion that the applicant has failed to prove that he has occupied the suit property openly and continuous for uninterrupted period of 12 years. I therefore have to answer issue number one in the negative.

#### **15. The second issue:**

Having found that the applicant has not established the ingredients of an adverse possession claim, this issue must also be answered in the negative. The applicant has failed to prove his claim against the respondent and as such he is not entitled to any of the reliefs sought in the Originating Summons.

**16. Conclusion:**

In conclusion, it is my finding that the applicant has failed to prove his claim against the respondent to the required standard. The applicant's Originating Summons dated 24<sup>th</sup> March, 2010 therefore fails in its entirety. The same is accordingly dismissed with costs to the respondent.

**Signed at Nairobi this 15<sup>th</sup> day of September, 2015.**

**S.OKONG'O**

**JUDGE**

**Delivered and Dated at Kisii this 18<sup>th</sup> day of September. 2015.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of**

Mr. Soira..... For the Plaintiff

Mr. Ochivang..... For the Defendant