



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC CASE NO. 7 OF 2021 (OS)

STEWART JALANG'O AGOT.....PLAINTIFF

VERSUS

FREDRICK ODHIAMBO CHIAMBE.....DEFENDANT

JUDGMENT

Introduction

1. By way of an originating summons dated 16/09/2015, the plaintiff filed suit against the defendant claiming to be an adverse possessor of a portion of land parcel number SOUTH SAKWA/BARKOWINO/2730 [hereinafter the “suit property”]. He prayed for the court to; declare the suit property had devolved to him, direct the county land registrar Siaya to survey, ascertain and excise from the suit property the actual portion occupied and held by him and for him to be registered as the proprietor of this portion.
2. The defendant filed a response dated 27/10/2015 in which he contended; the plaintiff’s claim had not met the legal threshold of adverse possession, there was no connection between the suit property and SOUTH SAKWA/BARKOWINO/2677 [hereinafter “mother title”], in the absence of a Land Control Board Consent, the plaintiff’s agreement was null and void and that his father one Simon Chiambe Oloo purchased the suit property from one Peter Alego Omuya and that the suit property emanated from the subdivision of a suit property known as SOUTH SAKWA/BARKOWINO/2705. An amended originating summons and amended replying affidavit both dated 2/06/2016 were filed in court.

The plaintiffs’ case and evidence

3. The plaintiff’s case is contained in the amended originating summons dated 2/06/2016, affidavit in support of amended originating summons dated 2/06/2016, his witness statement, and documents produced as “Pexh 1 to 9” and oral evidence tendered in court during the hearing.
4. In the supporting affidavit and witness statement, it was the plaintiff’s case that he purchased a portion of the mother title measuring approximately 0.07 hectares from one Alego Omuya in 1982. He produced a sale agreement as proof of purchase. He stated the vendor showed him his portion of land together with marked boundaries and upon assurance that his portion would be registered in his name, he proceeded to construct a commercial building on the portion of land he had purchased.
5. In 1986, the vendor subdivided the mother title into several portions and the portion occupied by the plaintiff was registered as SOUTH SAKWA/BARKOWINO/2705 in the name Peter Alego Omuya who was a son of the vendor. When he confronted the vendor as to why he had transferred the portion of land he had purchased to his son, the vendor assured him that the property would be transferred to him.
6. In 1992, one Simon Chiambe Oloo [defendant’s father] notified him that he [plaintiff] was in occupation of his parcel of land. In 1995, Simon Chiambe Oloo transferred the suit property to the defendant and one Jenifa Akinyi Owino [his wife and since deceased]. At this time, the plaintiff’s property sat on SOUTH SAKWA/BARKOWINO/2730 which was a subdivision of SOUTH SAKWA/BARKOWINO/2705.
7. He averred that he was in occupation and possession of a portion of the suit property in a manner that was quiet and peaceful. He contended he had been in occupation of the suit property from 1982 which was a period of over 12 years.
8. In his testimony, he contended that he did not have a document to confirm that Peter Alego Omuya was the owner of SOUTH SAKWA/BARKOWINO/2705. He contended that according to the map, he produced as his evidence, his property lay on SOUTH SAKWA/BARKOWINO/2730. He asserted that Alego Omuya and Constajo Alego Muya were the same person and there was a change of name as a confirmation of this.

The defendant's case and evidence

9. The defendant's case is contained in his amended replying affidavit dated 2/2/2016, witness statements and documents produced as "Dex1- 5". He contended that in 1995, his father who was the then registered proprietor of the suit property transferred the property to him and his deceased mother.

10. In his testimony, the defendant stated that there were several houses on the suit property however, none of them were his and he had neither sought rent from the occupants nor confronted the persons who had constructed on his land. He contended he had not sued the persons who had occupied his parcel of land.

11. Apart from his testimony, the defendant led evidence by Simon Chiambe Oloo (DW2). He contended that he purchased the suit property from Peter Alego Omuya in 1989 for consideration. He stated that because of his ill health, he transferred the suit property to his son [defendant] and his deceased wife. A sale agreement was produced as proof of purchase. He asserted that apart from the plaintiff, other people had constructed on the suit property and they had equally sued him. He contended that they had built on the suit property without his permission and he had reported them to the chief.

The Plaintiff's submissions

12. The plaintiff filed written submissions dated 24/11/2021. He submitted that the plaintiff had met the ingredients of *nec vi, nec clam, nec precario*. He contended that the plaintiff had proved that he was in: open and notorious use of a portion of the suit property; continuous and exclusive use of the property and that his actual possession was non-permissive and hostile to the registered owner of the property. He placed reliance on the authority of **Koeh Kangongo vs Chebii Yego [2018] eKLR**.

The Defendant's submissions

13. The defendant filed written submissions dated 16/12/2021. He submitted that the plaintiff had good title to land and on this, he placed reliance on **Article 40** of the **Constitution** and **Section 21** of the **Land Titles Act**. Placing reliance on the Indian case of **Mohan Lal vs Irza Abdul**, he contended that the plaintiff could not predicate his case on adverse possession while pleading he acquired the suit property by virtue of adverse possession. He contended that the plaintiff had not produced photographs to prove he had built on the suit property or his tenants occupied the suit property.

Analysis and determination

14. I have considered the pleadings together with written submissions and evidence tendered. The key issue falling for determination is whether the plaintiff has established a claim of adverse possession.

I will proceed to analyse the legal and jurisprudential framework on the singular issue.

15. The legal framework for the doctrine of adverse possession is provided for within various statutory provisions including **Sections 7, 13, 17 and 38 (1) and (2)** of the **Limitation of Actions Act** and **Section 28 (h)** of the **Land Registration Act** and judicial decisions.

16. In the case of **Sammy Mwangangi & 10 others vs Commissioner of Lands & 3 others [2021] eKLR**, the Supreme Court of Kenya held that the principles of adverse possession are well settled. In the case of **Mtana Lewa vs. Kahindi Ngala (2015) eKLR**, the Court of Appeal held as follows:

"The process springs into action essentially by default or inaction of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act..."

17. The legal principles of adverse possession will be juxtaposed against the facts of this case.

18. The plaintiff asserted that he had been in continuous and uninterrupted possession of a portion of the suit property measuring approximately 0.07ha for at least 12 years. In his amended originating summons, the plaintiff contended he purchased a portion of the mother title in 1982. The sale agreement which was produced as "P.Exh 3" was never controverted either on allegation of fraud or otherwise and I am satisfied that the agreement is valid. From the evidence adduced, the last instalment was paid on 12/2/1982 and had the mother title been registered as at 1982, then time would have started running from the date of payment of the last instalment. In the case of **Wanyoike -Vs- Kahiri (1979) KLR** it was held thus;

"In a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase price."

19. However, "Pexh 4", shows that the mother title was registered on 18/11/1985 and time could only start running from the date the suit property was registered. This was the position of the Court of Appeal in the case of **Chevron (K) Ltd vs. Harrison Charo Wa Shutu (2016)** where the Court of Appeal stated as follows:

"It is a settled principle that a claim for adverse possession can only be maintained against a registered owner... The relevant period would therefore be between 1994, the date of registration of the Appellant as the proprietor and 2008 when the suit was

filed.”

It is the finding of this court that the plaintiff has proved that he has been in occupation of a portion of the suit property for a period of over 12 years and therefore succeeds on the 1st principle.

20. The 2nd principle is whether such possession has been open and notorious to the knowledge of the owner. The plaintiff contended that he had been in open and notorious possession of a portion of the suit property. Possession is a matter of fact and there must be actual possession which requires some sufficient degree of physical occupation. The case of **William Kipnyor Rotich v Paul Kiprof Karoney [2020] eKLR** cited with approval the case of **Ernest Wesonga Kweyu versus Kweyu Omuto CA Civil Appeal No. 8 of 1990** where **Gicheru J.A.** as he then was held thus on occupation and possession;

“there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and occupation must be shown.”

21. The plaintiff contended that he had built a commercial building on a portion of the suit property. **DW1** contended that though he is the registered owner, persons unknown to him had constructed on the suit property. **DW2** did confirm that the plaintiff has a structure on the suit property. This court is satisfied that the plaintiff has been in occupation and possession in a manner that demonstrates that he has been in open and notorious occupation to the knowledge of the owner.

22. It is trite law that an adverse possessor must prove that his act of possession was not as a result of permission or license given to him by the owner. The plaintiff testified that he entered the suit property by virtue of a sale agreement between him and Alego Omuya. **DW1** and **DW2** asserted that the plaintiff did not have their permission to occupy the suit property. The plaintiff succeeds on this 3rd principle.

23. The 4th principle is whether the plaintiff has asserted a hostile title to the owner of the property and has been in exclusive possession. Which in other words means that the plaintiff must prove that his act of possession involved rights irreconcilable with those claimed by the owner of the land such as to give the owner occasion to dispute that possession. The plaintiff contended that he had been in occupation and possession of a portion of suit property from 1982. He consistently stated that the portion he had occupied is approximately 0.07 acres and that he has been collecting rent from the tenants who occupied the premises he has constructed. **DW2** did confirm that the plaintiff was in occupation of a portion of the suit property. These actions by the plaintiff connote that the plaintiff has asserted a hostile title to that of the owner. The plaintiff succeeds on this 4th principle.

24. From the evidence produced in court, the suit property is traceable to the mother title; **SOUTH SAKWA/BARKOWINO/2730** was a subdivision **SOUTH SAKWA/BARKOWINO/2705** and **SAKWA/BARKOWINO/2705** was a subdivision of **SOUTH SAKWA/BARKOWINO/2677**. In the case of **Titus Kigoro Munyi vs. Peter Mburu Kimani (2015) eKLR** it was held as follows;

“It must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors.

25. It therefore follows from the provisions of **Section 7** of the **Limitation of Actions Act** and case law that one can claim adverse possession against the present holders of title.

26. It is trite law that if the essential elements of adverse possession are proved, the claim of adverse possession must succeed and it is my net finding that the plaintiff has proved his case on a balance of probabilities. Costs follow the event and in the absence of special circumstances, I award costs to the plaintiff.

27. Ultimately, I make the following disposal orders;

a) A declaration be and is hereby issued that a portion of land parcel number SOUTH SAKWA/BARKOWINO/2730 measuring approximately 0.07 acres has by adverse possession been devolved to the plaintiff.

b) That the plaintiff be registered as the proprietor of a portion of land parcel number SOUTH SAKWA/BARKOWINO/2730 measuring approximately 0.07 acres.

c) The County Land Registrar, Siaya or such other officer delegated by the County Land Registrar, Siaya within Bondo Sub County shall survey, ascertain and excise from land parcel number SOUTH SAKWA/BARKOWINO/2730 a portion measuring approximately 0.07 acres that is occupied by the plaintiff.

d) Costs to the plaintiff.

Judgment Delivered virtually

Dated and signed this 10th day of February, 2022

In the presence of:

Mr. Odongo for the Plaintiff.

Mr. .S.M Onyango for the defendant.

Court Assistant: Ishmael

HON. A. Y. KOROSS

JUDGE

10/2/2022