



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 12 OF 2021 (O.S)

IN THE MATTER OF

SECTION 28 (h) OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF

SECTIONS 7, 17, 37 AND 38 OF THE LIMITATION OF ACTIONS ACT, CAP, 22 LAWS OF KENYA

AND

IN THE MATTER OF

PARCEL OF LAND NO. KISUMU/KORANDO/801 AND KISUMU/KORANDO/802

AND

IN THE MATTER OF

AN APPLICATION TO BE REGISTERED BY ADVERSE POSSESSION.

SILPHER ACHIENG.....APPLICANT

VERSUS

FREDRICK OCHIENG JUMA (sued on his own behalf and on behalf of the estate of

OJWANG OGOL (Deceased).....1ST RESPONDENT

HESBORN OCHIENG (sued on behalf of the estate of

LUKE OGALLO ONDU (Deceased).....2ND RESPONDENT

JUDGMENT

The applicant came to court vide Originating Summons dated 8/4/2021 and filed on the same date. The applicant claims proprietary interest by way of adverse possession in a portion measuring about 0.09 Ha of the original land parcel nos. Kisumu/Korando/801 and Kisumu/Korando/802 and for determination of the following issues:-

- 1. Whether the Applicant had an overriding interest under Section 28 (h) of the Land Registration Act of a portion measuring approximately 0.0 Ha, falling within all those parcels of land known as Kisumu/Korando/801 and Kisumu/Korando/802.**
- 2. Whether the Applicant herein is entitled to portions of Land Parcel Nos. Kisumu/Korando/801 and Kisumu/Korando/802 that she presently occupies measuring approximately 0.09 Ha by reason of her adverse possession thereof for a period exceeding 12 years.**

3. Whether the Respondents' proprietary interest in the said portion or portions of land parcel nos. Kisumu/Korando/801 (subdivided into land parcel Nos Kisumu/Korando/5744 and Kisumu/Korando/5745); and Kisumu/Korando/802 had been/has been extinguished by the Applicant's adverse possession thereof and whether the Respondents are now holding the title to those portions in trust for the Applicant.

4. Whether the Honourable Court should now direct the Land Registrar to revoke and cancel the title deeds issued with respect to land parcel nos. Kisumu/Korando/5744 and Kisumu/Korando/5745 respectively, which arose out of the subdivision of land parcel no. Kisumu Korando/801 and a fresh subdivision be carried out so as to issue titles in the name of the Applicant for portion she occupies measuring approximately 0.09 Ha.

5. That costs of this Summons be provided for.

In the supporting affidavit, she states that parcel No. Kisumu Korando/5744, registered in the name of the 1st Respondent arose out of the subdivision of the original parcel, known as Kisumu/Korando/801. That on or about the 27th day of May 2005, the applicant entered into a land sale agreement with one James Ongonga Ogalo (deceased), an uncle to the 2nd Respondent, for the purchase of a portion measuring 55m by 16m to be hived off land parcel No. Kisumu/Korando/802 for a purchase price of Kshs. 70,000/=, which she paid in full. That soon after as the years progressed, she developed an interest in the adjacent parcel No. Kisumu/Korando/801 and when she approached the aforesaid James Ongonga Ogalo to show her the owner of the parcel, he revealed that the parcel belonged to his elder brother, one Luke Ogalo (deceased) who had purchased it from Ojwang Ogol (deceased) vide a sale agreement dated 4th November 1980, even though Ojwang Ogol had died without concluding the process of transfer. He showed her relevant agreement, which was made in Dholuo language, which convinced her that indeed that parcel was sold as he had stated.

That the aforesaid James Ongonga Ogalo (deceased) further convinced the applicant that since he would be the administrator of the estate of Luke Ogalo Ondu, he would sell for her the aforesaid portion at a cost of Kshs. 80,000/=, which fact was reduced into a written agreement between themselves on the 26th day of April 2008.

That it was a term of the agreement produced as SA6 above, that the vendor, James Ongonga Ogalo would take the necessary steps to have the parcels transferred to her name.

That as a matter of fact and in an attempt to solidify her belief in the transaction, the vendor, James Ongonga Ogalo showed her a letter of consent that purportedly would enable the transfer of the parcel from Ojwang Ogol to himself.

That the applicant continued with occupation of the suit parcel of land, built her house and grew vegetables therein. Since she had not involved an advocate in the transactions owing to the goodwill she had received from the vendor and his family members, reasonably she would never have suspected any fraudulent activity on the part of the vendor or his family members.

That after living on the parcel for about 4 years, and based on the fact that neither the 1st nor the 2nd Respondent had raised any objection to her occupation therein. She further asserted her occupation rights by entering into an agreement where she hived off and sold a portion of the suit land that she was already occupying, to Elizabeth Atieno Ayuo, on 8th August 2009, on the understanding that her land was in the name of Luke Ogalo Ondu but she would accordingly enable the transfer of the portion to the aforesaid Elizabeth Atieno Ayuo.

That both Elizabeth Atieno Ayuo and the applicant live on the parcel of land peacefully without any interruption for 14 years when sometime on or about the 26th August 2019, both of them received demand letters from the advocates representing the 1st Respondent asking them to vacate land parcel No. Kisumu/Korando/5744, purportedly belonging to the 1st Respondent.

That upon the receipt of the purported demand letter, the applicant embarked on a mission to find out the true position of the matter, whereby she found out that the 1st Respondent had apparently petitioned for Letter Administration which would later be confirmed to the effect that he became the registered owner of land parcel no. Kisumu/Korando/801 by transmission.

That further, the 1st Respondent had subdivided the property and transferred a portion, being land parcel No. Kisumu/Korando/5745 to a third party on 4th June 2018.

That when the supposed subdivision took place, an access road to land parcel No. Kisumu/Korando/5745 was created, which creation had the effect that their permanent dwelling houses which had been existing on the ground for more than 14 years were now on the road, hence exposing them to the threat of eviction.

That it appears that the surveyor who conducted the alleged subdivision did not visit the parcel of land because had he done so; he would not have missed to see that the road would be cutting through our dwelling houses.

That the applicant's occupation of the suit parcel of land, which is clearly identifiable on the ground since 2005, has been quiet, open, continuous and uninterrupted for more than 14 years.

That the applicant's possession of the portion measuring 0.09 Ha became adverse to the Respondents on the expiry of 12 years from 27th May 2005 when the applicant took possession thereof and in the circumstances the portions specified above should be transferred to me. The respondents did not file a replying affidavit despite being served. The applicant testified and relied on the statement. The applicant called Elizabeth Atieno Ayuo who relied on her affidavit sworn on 8/4/2021.

I have considered the evidence on record, the submissions of the applicant and do find that the applicant has been in possession of the suit property for more than 12 years. The possession has been open and notorious use of property, continuous exclusive and actual use of the property. She built the house that stands on the parcel of land in 2005, she sold a portion of the land. I do find that the applicant has satisfied this court on a balance of probabilities that she is in adverse possession of the suit property.

I do grand orders thus:-

- 1. The Applicant had an overriding interest under Section 28 (h) of the Land Registration Act of a portion measuring approximately 0.0 Ha, falling within all those parcels of land known as Kisumu/Korando/801 and Kisumu/Korando/802.**
- 2. The Applicant herein is entitled to portions of Land Parcel Nos. Kisumu/Korando/801 and Kisumu/Korando/802 that she presently occupies measuring approximately 0.09 Ha by reason of her adverse possession thereof for a period exceeding 12 years.**
- 3. The Respondents' proprietary interest in the said portion or portions of land parcel nos. Kisumu/Korando/801 (subdivided into land parcel Nos Kisumu/Korando/5744 and Kisumu/Korando/5745); and Kisumu/Korando/802 had been/has been extinguished by the Applicant's adverse possession thereof and whether the Respondents are now holding the title to those portions in trust for the Applicant.**
- 4. The Honourable Court directs the Land Registrar to revoke and cancel the title deeds issued with respect to land parcel nos. Kisumu/Korando/5744 and Kisumu/Korando/5745 respectively, which arose out of the subdivision of land parcel no. Kisumu Korando/801 and a fresh subdivision be carried out so as to issue titles in the name of the Applicant for portion she occupies measuring approximately 0.09 Ha. That costs of this Summons to the applicant. Orders accordingly.**

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23rd DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.