



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. E003 OF 2021 (OS)

FRANCIS ORANGA BARAZA.....PLAINTIFF/APPLICANT

VERSUS

FESTO OKER AWUOR.....DEFENDANT/RESPONDENT

JUDGMENT

Francis Oranga Baraza (hereinafter referred to as the Plaintiff) has come to court against Festo Oker Awuor, (hereinafter referred to as the Defendant) claiming that he is entitled to be declared as the sole proprietor of 0.07 Ha of land parcel number KISUMU/NYALENDA 'A'/1211 by virtue of Adverse possession for the period prescribed in the Limitation of action Act Cap. 22 Laws of Kenya having occupied the same since 1989 and has enjoyed a quiet, peaceful and continuous and or possession of the same with the Defendant's knowledge and/or notice.

The Plaintiff prays that he **be declared the sole proprietor of 0.07 Ha parcel of Land No. KISUMU/NYALENDA 'A'/1211 which he has occupied openly, exclusively, continuously and without interruption from 1989 to date, for a period over 32 years having acquired a bona fide title of the said land by adverse possession.**

He further prays that the Defendant be ordered to transfer 0.07 Ha of the whole of the said parcel No. KISUMU/NYALENDA 'A'/1211. In the default of the Defendants failing to transfer the said parcel to the Applicant, the Deputy Registrar to execute the necessary documents to effect the transfer of ownership of 0.07 Ha of land parcel number KISUMU/NYALENDA 'A'/1211 from the Respondent to the Applicant. Lastly, that the Defendant be restrained from entering, wasting, damaging and/or in any way alienating 0.07 Ha of land parcel Number KISUMU/NYALENDA 'A'/1211. The costs of this suit be awarded to the Plaintiff/Applicant.

The application is based on the grounds that **the applicant entered into land parcel number KISUMU/NYALENDA 'A'/1211 in the year 1989 and the Register indicates that parcel is currently is now registered in the name of the Defendant/Respondent and the applicant. The Applicant has been in solely quiet exclusive possession and occupation of the said portion land parcel number KISUMU/NYALENDA 'A'/1211 in its entirety for a period exceeding 32 years to date and has therefore acquired title by adverse possession. That the said occupation and use has been continuous and with the defendant's knowledge. That on the strength of grounds (a), (b), (c) and (d) the Plaintiff/Applicant is entitled to be registered as sole proprietor of KISUMU/NYALENDA 'A'/1211.**

In the supporting affidavit he states that sometimes on 14/07/1989 he got registered as proprietor of suit parcel No. KISUMU/NYALENDA 'A'/1211 jointly with one Festo Oker Awuor. That at the time of the said registration, the suit parcel was vacant. That before registration as proprietor in the year 1990 he proceeded and constructed his home on the said parcel.

That when his mother died in the year 1985, she was buried on the said land. That other than his house he fenced the entire parcel with Keyava trees with gate. That on the said parcel, he also had constructed several rental houses which are in use. The defendant has never done anything on the land since he was registered as a proprietor thereof. That the Defendant's interest in the land has been extinguished by virtue of the doctrine of adverse possession.

He prays that the name of the defendant be removed from the register and he remains the sole registered proprietor of the said parcel. The Defendant did not file a response. The plaintiff gave evidence that is not controverted by the defendant.

The courts have time and again applied the doctrine of Adverse Possession which is one of the ways of land acquisition in Kenya. Some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012; **Section 7** states that

“An action may not be brought by any person to recover land after the end of twelve 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”

Further in **Section 13**

“(1) A right of action 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 (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, **Section 38(1)** and (2) states;

“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The ultimate import of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property.

I do find that the plaintiff has satisfied this court that he has been in exclusive, quiet, non-permissive occupation of the suit property hence has acquired prescriptive rights to the property.

I do declare that **the plaintiff is the sole proprietor of 0.07 Ha parcel of Land No. KISUMU/NYALENDA ‘A’/1211 which he has occupied openly, exclusively, continuously and without interruption from 1989 to date, for a period over 32 years having acquired a bona fide title of the said land by adverse possession. I do order the defendant to transfer 0.07 Ha of the whole of the said parcel No. KISUMU/NYALENDA ‘A’/1211 to the plaintiff. In the default the Deputy Registrar to execute the necessary documents to effect the transfer of ownership of 0.07 Ha of land parcel number KISUMU/NYALENDA ‘A’/1211 from the Respondent to the Applicant. Lastly, that the Defendant is hereby restrained from entering, wasting, damaging and/or in any way alienating 0.07 Ha of land parcel Number KISUMU/NYALENDA ‘A’/1211. The costs of this suit are awarded to the Plaintiff.** Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16th 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.