



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 5 of 2009

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38
OF LIMITATIONS OF ACTIONS ACT

BETWEEN

PHILIP ODHIAMBO OBUOLO 1ST PLAINTIFF/APPLICANT

ALBERT RENE OBUOLO 2ND PLAINTIFF/APPLICANT

NOAH ODHIAMBO JUMA 3RD PLAINTIFF/APPLICANT

CALVINCE OCHIENG OUKO 4TH PLAINTIFF/APPLICANT

VERSUS

MATHEW ISHMAEL OUMA ACHIENG DEFENDANT/RESPONDENT

JUDGMENT

1. The plaintiffs herein instituted the suit by way of originating summons dated 12th January 2009 supported by the affidavit of the 1st plaintiff PHILIP ODHIAMBO OBUOLO with the authority of the 3 other plaintiffs. The respondent named in the suit is MATHEW ISHMAEL OUMA ACHIENG.
2. The plaintiffs' claims against the defendants were premised on **section 38** of the **Limitation of Actions Act Chapter 22** of the **Laws of Kenya** and **Order XXXVI Rule 3 D** of the repealed **Civil Procedure Rules**. The claims were for declarations and orders:-
 - 1) *That the Defendant's right to recover the whole of L.R. NO. WEST KASIPUL/KONYANGO KOKAL/322 is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 20 years.*
 - 2) *That the plaintiffs be registered as proprietors of the whole of L.R.NO. WEST KASIPUL/KONYANGO KOKAL/322 in place of the Defendant.*

3) *That the defendant be restrained from interfering with the plaintiffs' peaceful possession and occupation of LR.NO.WEST KASIPUL/*

KONYANGO KOKAL/322.

4) *Costs of the Originating Summons.*

3. The Originating Summons seeks both declarations (prayer 1) and orders in terms of prayers 2 and 3. The originating summons is anchored on the ground that the plaintiffs have continuously and without interruption occupied the suit land herein for a duration of over 20 years and the defendant's right to recover the same has been extinguished by effluxion of time. That though the defendant is the registered proprietor of the suit land, the plaintiffs have freely and continuously occupied and cultivated it for over 20 years. The plaintiffs aver that they were born on the suit land and even their deceased fathers MICHAEL OBUOL SIGU, PETER JUMA OBUOLO and JAMES OUKO OBUOLO respectively occupied, cultivated and were buried on the suit land. The plaintiffs thus aver that their occupation of the suit land has been adverse to the defendant's property rights, the defendant having not taken any precipitate steps to recover the same. The plaintiffs further contend that in the circumstances they have acquired prescriptive rights over the suit parcel of land herein.

4. The originating summons is supported by the affidavit of Philip Odhiambo Obuolo who has reiterated what is contained in the grounds on the face of the originating summons by stating that he and his co-plaintiffs have stayed on the said suit parcel of land for over 20 years and that the stay has been continuous, uninterrupted, peaceful and with the full knowledge of defendant. He has also stated that the defendant has always been aware of their stay on the said suit parcel of land where he has seen the burial of the plaintiffs' relatives thereon without raising any objections. The deponent also avers that by the time the defendant herein became the sole registered owner of the suit land in 1988 the plaintiffs were already in occupation of the same and were cultivating and had used the same for over 20 years without interference from the registered owner who is the defendant, and that it is therefore imperative that they be registered as the proprietor of the entire suit land in lieu of the defendant.

5. The application herein has been opposed by the defendant vide a replying affidavit dated 19th February 2009 in which he briefly states that he is the registered proprietor of the suit parcel No. WEST KASIPUL/KONYANGO KOKAL/322 which he has been cultivating since he registered it until December 2002 when the plaintiffs unlawfully entered the suit land and started cultivating on it. Arising out of the said trespass on the suit land, he (the defendant) filed a suit under certificate of urgency seeking restraining orders being **Kisii CMCC No.1179 of 2004**. That prior to 2002 the plaintiffs had never been in occupation of the suit land as alleged but had occupied and used their own suit parcel NO.WEST KASIPUL/KONYANGO KOKAL/320 which shares a common boundary with the suit land.

6. The defendant also states that sometime in December 1986 the plaintiffs crossed the boundary and started cultivating part of the suit land. He complained to the area Chief and District Officer who warned the plaintiffs to stop trespassing on the land. He has further stated that the plaintiffs' kinsmen as stated in the originating summons at paragraph 5 were never buried on the suit parcel as claimed but on parcel No. W.KASIPUL/KONYANGO KOKAL/320 the homestead of Obuolo Sigu the 1st plaintiff's father and the 2nd, 3rd and 4th plaintiffs' grandfather. He states that it is only the 1st plaintiff who forcibly constructed a house on the suit property in 2004 but the 2nd to 4th plaintiffs are staying on plot 320. He also says that in 2009 the 4th plaintiff commenced construction on the suit parcel of land. He also states that in April 1992, the plaintiffs' grandfather sued him vide **Kisii HCCC No.183 of 1992** seeking the suit land after he had locked them out.

7. The defendant concluded by saying that the plaintiffs have never been in continuous and uninterrupted occupation of the suit land for a period of over 12 years as alleged or at all and therefore the plaintiffs' suit and claim to the suit land by virtue of the doctrine of adverse possession lacks merit and is unmaintainable in law.

8. The parties on the 5th July 2010 agreed by consent that:-

(i) *the District Land Registrar Rachuonyo do visit parcel NOS. WEST KASIPUL/KONYANGO KOKAL/320 and 322 and while thereon to ascertain –*

(a) *whether the two parcels of land share a common boundary;*

(b) *the human habitation or occupation on the 2 parcels of land;*

(c) *the parcel of land where the homesteads of the plaintiffs are situate;*

(d) *whether there are cemented or maintained graves traceable on both parcels;*

(e) *the vegetation growing on both parcels.*

(ii) *Each party to be at liberty to retain a private surveyor to accompany the District Land Registrar in ascertainment of the issues above.*

(iii) *The District Land Registrar's charges to be shared by both sides and the report to be filed within 30 days.*

9. Thereafter directions were taken and parties agreed to canvass the originating summons by way of the affidavit evidence filed by the respective parties together with the annexures. It was also agreed that the report by the District Land Registrar dated 9th August 2010 be adopted as part of the record of this honourable court and as a common document to be relied upon by both parties. Leave was also granted to the defendants to file and serve a further replying affidavit and corresponding leave granted to the plaintiffs also to file supplementary affidavit to the further replying affidavit. Finally parties were to exchange their written submissions together with the authorities to be relied on which they confirmed having duly complied with.

10. In his submission counsel for the plaintiff canvassed the following four issues for determination:-

(i) *Whether or not the plaintiffs have been in occupation of the suit land?*

(ii) *Whether the said occupation has been continuous and uninterrupted for more than 12 years;*

(iii) *Whether the Defendant took steps to recover possession of the suit land and*

(iv) *Whether plaintiffs are entitled to the orders sought.*

11. Counsel for the plaintiffs urged issues 1 and 2 together and submitted that the suit land was first registered in the names of the defendant herein and one Peter Oroo Okumu way back on the 9th April 1975. Thereafter the suit land was transferred and registered in the name of the defendant herein on 29th November 1984 and the title issued to the defendant on 8th January 1988. He further submitted that the 1st plaintiff has adduced evidence that at the time of his birth his father Obuolo Sigu had a homestead on the suit land which still exists and is occupied by Siprina Obuolo and that he occupied the suit land together with his brothers namely JAMES OUKO and PETER JUMA OBUOLO now deceased the former being the father of the 4th plaintiff. It is the 1st plaintiff's evidence that he built his house within his father's homestead and in the year 1999 he moved out of his father's homestead and established his own homestead on the suit land currently consisting of two permanent houses.

12. Counsel further submitted that the 1st plaintiff has tendered evidence to show that even their deceased relatives have been buried on the suit land. Counsel has asked the court to take note of the

observations of the District Land Registrar, Rachuonyo District who noted that a total of 8 relatives of the plaintiffs have been buried on the suit land, the 1st burial having been undertaken in 1993. It was counsel's further submissions that the plaintiffs herein have also planted an assorted range of trees on the suit land surrounding the homesteads of the plaintiffs. That the presence of mature trees on the suit land denotes that the same were planted a long time back. In view of the foregoing counsel submitted that there exists sufficient evidence both in terms of the homesteads, graves and the trees which have been undertaken by the plaintiff and which confirm occupation and/or possession of the suit land by the plaintiffs. Counsel wants this honourable court to also note that when the plaintiffs' relatives were being buried on the suit land the Defendant herein was aware of the same, but took no steps to assert his right or interests over and in respect of the suit land. It is plaintiffs' submission that they have been in open continuous and uninterrupted occupation of the suit land ever since 1977 for more than 12 years. He has cited the following case law:-

*(a) **Githu –vs- Ndeete [1984] KLR pages 776-781** holding number 2 and 4 where the respondents therein were granted the declarations on grounds that they had been in continuous possession and in exclusive control of their respective portions. At Page 780 paragraph 30-40 of the judgment, the court quoted from volume 24 of Halsbury's Laws of England 3rd Edition at page 252: "To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it; fencing off is the best evidence of possession of surface of land; but cultivation of the surface without fencing off has been held sufficient to prove possession.*

*(b) **Peter Thuo Kairu –vs- Kuria Gacheru [1988] 2 KAR** pages 111-116 where it was held inter alia that the law relating to prescription affects not only present holders of the title but their predecessors (section 7 of Limitation of Actions Act).*

13. On issue No.3 it is the plaintiffs' counsel's submission that despite the fact that the defendant has been aware and/or knowledgeable of the plaintiff's occupation and possession of the suit land, the defendant has never taken any steps towards evicting the plaintiffs from the suit land; that the only action that has been undertaken by the defendant was lodging of a complaint with the District Officer Oyugis. That it is imperative to note that the defendant in the suit he filed was complaining against one HANA OUKO who had trespassed on to the suit land in 2002. The second suit filed by the defendant was to bar the 1st plaintiff from burying the remains of one HANAH OUKO but no suit has ever been filed by the Defendant against the Plaintiffs herein seeking to recover possession of the suit land in line with the provisions of **section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya**. In this regard, counsel submitted that the occupation by the plaintiffs of the suit land has never been interrupted by the defendants, and that mere correspondence does not terminate and/or affect the running of time for purposes of adverse possession.

14. Counsel further submits that the suits filed by the defendant did not concern recovery of the suit land and that in any event, they were filed after the 12 year period had lapsed.

15. In this regard counsel submits the plaintiffs have acquired and/or accrued adverse possession over and in respect of the suit land. He also submits that the defendant misled the court by stating that the graves were located on LR NO. WEST KASIPUL/KONYANGO KOKAL/320. On this issue counsel concludes by stating that the District Land Registrar Rachuonyo District has established and confirmed that the plaintiffs herein occupied the suit land herein. Counsel has relied on the following authorities:-

(a) Sections 7 & 37 of the Limitation of the Actions Act Cap 22 Laws of Kenya.

(b) Githu –vs- Ndeete [1984] KLR pages 776-781 holding number 3 also page 780 1-10.

(c) Njuguna Ndatho –vs- Maasai Itumo & 2 others Court of Appeal, Civil Appeal No.231 (unreported) pages 5-7 where the Court of Appeal considered the kind of actions that terminate the acquisition of adverse possession.

16. On issue number 4, counsel submits that the occupation of the suit land by the plaintiffs has deprived and/or dispossessed the whole of the suit land from the defendant and consequently the plaintiffs herein are entitled to the suit land. He concludes by stating that there is clear evidence of continuous and uninterrupted occupation of the suit land by the plaintiffs and that it is appropriate that the orders sought be granted and the plaintiffs be registered as the owners of the suit land in lieu of the defendant whose rights have terminated by effluxion of time.

17. In his submission counsel for the Defendant sets out six issues for determination:-

(a) Who was the first registered owner of the land now registered and known as Land Parcel No. WEST KASIPUL/KONYANGO KOKAL/

322?

(b) How and when did the Defendant acquire ownership of the suit land parcel?

(c) Whether the plaintiffs occupy the suit land or not? and if so when did such occupation commence and why?

(d) Whether there has been any disputes between the parties or any persons who derive rights and title through them? And what is the effect?

(e) What is and when does the doctrine of adverse possession arise? And is the same applicable in the instant case?

(f) Who is to pay for the costs of this suit?

18. On the 1st and 2nd issues, counsel for the defendants submits that in the first instance land parcel No. West Kasipul/Konyango Kokal was first registered in the name of Peter Oloo Okumu as sole proprietor sometime in 1968 and in 1973 the defendant purchased a portion of the land and as he was paying by instalments they became registered jointly as proprietors in common of undivided shares until 20th November 1975 when Peter Oloo Okumu surrendered his share to the defendant who thereafter became sole registered proprietor after paying the requisite fee and attending the Land Control Board and also executing the transfer on the 29th November 1984.

19. On issue No.3 counsel for the defendant submits that the land registrar's report together with the survey sketch maps show clearly that land parcel NO.WEST KASIPUL/KONYANGO KOKAL/320 and NO.WEST KASIPUL/KONYANGO KOKAL/322 are contiguous to each other but with no clear boundary fixed between them. Parcel NO.320 was registered in the name of OBUOLO SIGU as sole registered proprietor while No.322 was registered in the name of PETER OLOO OKUMU.

20. Counsel also submits that the infringement by the relatives of Obuolo Sigu into the suit land commenced in 1986 though the plaintiffs began building the houses thereon in the year 1999 although there were suits and disputes filed and pending in court when buildings were erected without knowing where the boundaries lay. It is counsel's submissions that buildings and burials listed in paragraph (c) of the investigation report took place between 1990 and 2002 when the said land was already registered in the name of the defendant as far back as 1984.

21. It was counsel's contention that from the foregoing the only logical inference that one can draw from the conduct of the plaintiffs and their kinsmen in entering the suit land and erecting houses thereon was for the following reasons:-

(a) Either the plaintiffs did not know where land parcel No.320 reached and as a result entered into land parcel No.322; or

(b) The plaintiffs knowingly and deliberately entered into parcel No.322 because they believed that since

the same belonged to Peter Oloo Okumu their kinsman they were the beneficiaries thereto.

22. On the 4th issue counsel for the defendant submits that in 1986 when Obuolo Sigu entered the land the Defendant asserted his title and the said trespasser was duly warned to stop his interference on the land. Between 27th April 1992 and 11th July 2001 there was a valid suit in a court of law to determine whether the defendant's title was obtained fraudulently and during the pendency of the said suit a court of law could not issue an order of eviction until such suit was determined. From 16th September 2004 to 7th March 2006 there was another suit in court between the defendant and Hannah Ouko who is another member of the family of Sigu Gaye as is Philip Odhiambo Obuolo, the grandson of Sigu Gaye and Obuolo Sigu. That the plaintiffs herein only started entering the arena of this dispute in the year 2008 when other senior members of Sigu Gaye's family had died and they had previously not challenged the defendant's title nor was their existence known to the defendant.

23. It was also contended that in light of the above facts, there has never been any peaceful occupation of the suit land if any, and that the defendant has all along been engaged in a legal battle with the family of Sigu Gaye and Obuolo Sigu in defending and asserting his legal rights of ownership.

24. On issue No.5 counsel for the defendant submits that the defendant clearly stated that the plaintiffs have all along occupied and used their own parcel of land being No.320 and that even the graves of the dead kinsmen of the plaintiffs were on the said parcel. An issue arose about the land on which the graves and buildings were which resulted in the consent order to have the issue solved by the surveyors who searched for non-existing boundaries between the two parcels. It is counsel's submission that the upshot of the above is that the defendant did not know that the plaintiffs were occupying and burying their relatives on a portion of his land. That even the plaintiff's grandfather did not know that he had occupied the defendant's land.

25. Counsel also submits that the element of knowledge of the possession by adverse party is paramount. He submits that the defendant did not acknowledge that the plaintiffs or any other member of the family were on his land until the same was established by the survey. The period would therefore begin to run as from August 2010 when the investigation report was signed and submitted to the court.

26. The defendant also states that he was cultivating the suit land and was not aware that the houses owned by the plaintiffs were on his land and he could therefore not sue for eviction of a person who to the best of his knowledge was not on his land. That the plaintiffs' grandfather also sued the defendant in 1992 claiming to be declared the owner and to nullify the defendant's title to the suit land.

27. Counsel further submits that the courts of Kenya and East Africa have defined the term adverse possession to consist of continuous and uninterrupted peaceful and open occupation and possession of the property of another for a period of twelve years or more.

28. It is counsel's submission that to determine the existence of circumstances constituting adverse possession as stated above, the following factors have to be established by evidence which includes:-

(i) *Whether there is factual occupation of the suit land with the full knowledge of the registered or rightful proprietor.*

(ii) *When the time starts to run for the acquisition of adverse possession.*

(iii) *Whether the occupation is continuous and uninterrupted.*

(iv) *Whether the registered proprietor has asserted his title or whether the said title has been acknowledged by the squatter or trespasser.*

29. Counsel cited the case of **Situma –vs- Cherango [2007] 2 KLR 84** where the court

stated that what constitutes adverse possession is a question of fact and degree which depends on all the circumstances of the case. In the said case, the Court relied on an excerpt from **Megary & Wade, the Law of Real Property 6th Edition** at paragraph 21-078 at page 1309 which states that **“once factual possession has been established, it will not be terminated merely because the true owner sends a letter to the squatter requiring him to vacate the premises. Time will continue to run in favour of the squatter unless and until he vacates the premises or acknowledges the true owners title.”**

30. Counsel submits further that the facts in this case, show that the suit land belonged to PETER OLOO OKUMU before and after registration of the same in accordance with the Registered Lands Act and also thereafter until the same was transferred to the defendant in 1984. That the plaintiffs are claiming title as beneficiaries of the estates of Sigu Gaye and Obuolo Sigu who had land cases with the defendant from 1986 upto 2001 and as relatives of Hanah Ouko who had a suit over the suit land from the year 2004 to 2006. Furthermore that in 1986 written notice was served upon the family of the plaintiff and in acknowledgement of the existence of the title of the defendant Sigu Gaye filed a civil suit No.183 of 1992 at the High Court Kisii. Furthermore to assert his rights the defendant filed civil suit No.1179 of 2004 against Hanah Ouko who was fronted by the plaintiffs’ family to trespass on the suit land.

31. It is also the Defendant’s case that the existence or filing of a suit in a court of law although it does not stop the fact of possession, however stops the time from running. It is counsel’s submission that because of the suits filed by both the defendant and the relatives of the plaintiffs herein there is no way time could run in favour of the plaintiffs or any of their kinsmen.

32. Counsel finally submits that burial of bodies or presence of graves cannot be regarded as possession for purposes of acquisition of title since the defendant was doing his cultivation with or without the alleged graves. That the defendant and the plaintiffs were not sure as to where the boundary between the two parcels of land lay and therefore the issue of acquisition of adverse possession by the plaintiffs does not arise.

33. Having read the submissions by both counsel, the affidavits together with the application and authorities cited I note that **Section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya** entitles a third party to be registered as proprietor of land instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be so registered on account of his or her occupation of the land openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner.

34. The above position is what the doctrine of adverse possession means and as was stated in **Amos Weru Murigu –vs- Marita Wangari & another – Nairobi HCCC NO.33 of 2002 (O.S)** in which the court also stated:-

“Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title, it may be a portion of it providing that the portion claimed is demarcated well enough to be identical. And as regards assertion of title, it is not enough for a proprietor of land to merely write to a trespasser. A letter even if through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does not interrupt and stop the time from running.

35. To prove adverse possession the person claiming ownership must show that his possession is actual, open, notorious, exclusive, hostile, under cover of claim of right and continuous and

uninterrupted for the statutory period.

36. On the basis of the decisions in **Situna –vs- Charango** and **Amos Weru Murigu cases** (above) there is ample evidence before me to show that the plaintiffs have proved their case against the defendant on a balance of probabilities. Though reports have been made, letters written and suits filed both by and against the plaintiffs, the period of adverse possession never stopped running. There is also evidence showing that the defendant had full knowledge of the fact that the plaintiffs and their relatives before them had actual possession of 2 acres of the suit land that was open, notorious exclusive, hostile which remained under cover of right, continuous and uninterrupted for the statutory period.

37. It is therefore my finding that the plaintiffs' occupation and possession of the suit land was adverse to the title of the defendant to the extent of the 2 acres occupied. It is also my finding that the title of the respondent to the suit land has been extinguished by the plaintiffs' possession and occupation only of the 2 acres occupied. It is further my finding that the defendant does not hold the title to the said 2 acres of the suit land occupied by the plaintiffs. It is also my finding that the plaintiffs are entitled to be registered as the proprietors of the said 2 acres of the suit land occupied by them in place of the defendant. On those grounds and findings the Originating Summons is hereby allowed only to the extent of the 2 acres occupied by the applicants. There shall be no order as to costs.

38. It is so ordered.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Ongoso for G.S. Okoth (present) for Plaintiffs

Mr. O.M. Otieno for Oguttu-Mboya (present) for Defendant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE