

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 214 OF 2016 (OS)

NICHOLAS ODERA SUMBA

(Suing as the Legal Representative of the

Estate of Bonface Sumba Oracha).....PLAINTIFF

VERSUS

SALEH BIN SALIM ALI EL-EYYAN.....DEFENDANT

JUDGMENT

(Claim of land by way of adverse possession; suit not contested; judgment entered for the applicant)

1. This suit was commenced on 4 August 2016 through an Originating Summons taken out pursuant to the provisions of Section 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya, and Order 37 of the Civil Procedure Rules. The subject matter is the land parcel LR No. 1414/VI/MN CR No. 11108. The applicant has filed this suit as the legal representative of the estate of Bonface Sumba Oracha (deceased). He has averred that the deceased, who is his father, died on 7 November 2001. It is the case of the applicant that his late father acquired the suit land in 1971 and that he put up a Swahili type house, which he rented out to tenants, while he himself used to live in Makupa at the Mombasa Railways Staff Quarters, for he worked for Kenya Railways Corporation. After his retirement, he used one of the rooms as his home while he still rented out the other rooms to tenants. Upon his demise, the tenants have continued to pay rent to his mother. The applicant states that when the deceased purchased the house, he used to pay rent to some persons in an arrangement that he is unable to understand, but he ceased to do so in the year 1979 and nobody has ever demanded rent since. He has averred that in the year 1994, he appointed an Advocate in Mombasa to be collecting rent on behalf of his father and he annexed some documents and correspondences from the advocate in respect of this. Subsequently, he was introduced to a property management company which thereafter took over the collection and management of rent. He annexed some receipts to support this averment. The applicant states that he later redeveloped the house on the land and made it permanent and the same is now leased to a church. He has annexed a lease agreement and rent deposit slips to demonstrate this. In the year 2012, the Municipal Council of Mombasa listed the property as one where there has been default in payment of rates. The applicant then proceeded to negotiate a reduction and paid Kshs. 42, 609/= to settle the rates up to August 2012. He has annexed a banker's cheque and receipt that shows that this money was paid. He has stated that since 1970 his father and his family have been in possession of the land since 1970 without interruption or interference from anyone.

2. The applicant applied for and was granted leave to serve the summons through an advertisement in the daily newspapers. An advertisement was placed in the Standard Newspaper of 2 March 2017. An appearance under protest was then entered for the respondent by the law firm of M/s Khatib & Company Advocates. The said firm claimed that the respondent is deceased and a preliminary objection to the suit was raised on this ground.

3. The applicant filed an application of his own to have expunged the Memorandum of Appearance on the basis that the said firm has no capacity to act for a person who is allegedly deceased without disclosing the instructing client. The preliminary objection and the application were heard together by Omollo J, who delivered a ruling on 19 July 2019. She dismissed the preliminary objection and allowed the application. She was not persuaded that there has been proof that the respondent is indeed deceased and she proceeded to allow the applicant's application to expunge the Memorandum of Appearance.

4. The position therefore is that there is no appearance entered for the respondent despite being served and the matter proceeded ex parte with the applicant giving evidence and calling one witness. The evidence is more or less in line with what I have set out above. Counsel for the applicant made written submissions which I have considered.

5. This is a claim for adverse possession. It is trite law, and I need not cite any authority, that to be successful in such suit, one needs to demonstrate quiet, open, and continuous possession of land that has remained uninterrupted for a period of 12 years. In this case, the applicant avers that his late father acquired the suit property in the year 1970 and built a Swahili house on it in the year 1971 which he rented to tenants. I have no reason to doubt this claim. I have evidence before me of payments of rent being made to the deceased and to the applicant. I have seen evidence showing that as at the year 1997, tenants were paying rent to Sifuna & Company Advocates, who had been instructed to collect rent on behalf of the applicant. Collection of rent was then taken over by Jongeto Enterprises in the year 1998. I have also seen that the applicant paid accumulated rates in the year 2012 and has continued to keep tenants on the suit premises to date. There is no evidence of any interruption from the respondent or any other person, and no evidence that the possession of the suit land by the applicant's late father and subsequently by himself, has not been quiet and peaceful. Certainly, more than 12 years of possession have lapsed before this suit was filed. The respondent did not oppose this suit.

6. Given the above, I do declare that the late Bonface Sumba Oracha had before his demise acquired title by adverse possession to the suit land and his estate is entitled to be registered as proprietor of the land parcel No. 1414/VI/MN (CR No. 11108). I issue an order to the Land

Registrar, Mombasa, to proceed and register the applicant as proprietor of the said land parcel No. 1414/VI/MN (CR No. 11108) as Legal Representative of the Estate of Bonface Sumba Oracha.

7. I make no orders as to the costs of this suit.

8. Judgment accordingly.

DATED AND DELIVERED THIS 13TH DAY OF APRIL 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA