



NO. 2817

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 17 OF 2008 (O.S)

HUNDSON ONGECHI MECHA.....PLAINTIFF

-VERSUS-

1. PETER NYANGARESI)
2. PETALIS MOCHAMA)
3. JOSEPH OBADIA)
4. NELSON NYABUTO MANGERA).....	DEFENDANTS

JUDGMENT

On 22nd February, 2008, **Hudson Ongechi Mecha**, *“the applicant”* took out this Originating Summons *“OS”* against **Peter Nyangaresi, Petalis Mochama, Joseph Obadia** and **Nelson Nyabuto Mangera** *“the respondents”* seeking the determination of the following questions;-

“1...Should the plaintiff be declared to have acquired or has become entitled by virtue of adverse possession for a period of more than 12 years to all that portion of land measuring approximately 2.0 Acres out of the said parcel of Land Registered under the Registered Land Act (Cap 300 laws of Kenya and comprising in the title MAJOGE/BOKIMONGE/297.

2. Should the plaintiff be declared legal owner of the portion of land measuring approximately 2.0 Acres out of parcel No. MAJOGE/BOKIMONGE/297?

3. *Should the defendants be ordered to transfer the portion of land measuring 2.0 acres which forms part of the parcel of land known as MAJOGGE/BOKIMONGE/297 and in default thereof the executive officer of this Honourable court be authorized to effect transfer.*

4. *Is the plaintiff entitled to any other relief (s) which this Honourable court may grant...?"*

The O.S was taken out by the applicant on behalf of the estate of his father, **Samuel Mecha Onchoncha**, deceased. It was taken out pursuant to the provisions of section 38 of the **Limitation of Actions Act** and the then order **XXXVI rule 1, 2 and 3D** of the **Civil Procedure Rules** and **all other enabling Provisions of the law.**

In support of the O.S, the applicant deponed that he was the administrator of the estate of the deceased who was his father. Sometimes back his late father was invited by the late **Haron Mangera Gecheo** and given a portion of land measuring approximately 2 acres, which portion had since been registered in the names of the respondents by way of transmission pursuant to a grant of letters of Administration intestate obtained by the respondents with regard to the estate of their father, the late **Haron Mangera Gecheo**. When the applicant was born, he found his deceased father utilizing the said portion of land and he had continued using the same peacefully until 2003 when the respondents wrongfully and without colour of right trespassed on the same and chased away, the people they had leased the suit premises on the ground that the land belonged to their late father. Efforts to resolve the dispute amicably through local provincial administration had come to nought. That the subsequent registration of the portion in the respondents' names was made after the applicant had acquired the said portion by way of adverse possession. He therefore sought that the said portion measuring 2 acres be registered in his names as the administrator of the estate of his father by way of adverse possession.

The O.S was served on all the respondents. However, none of them saw the need to file a response to the same. Accordingly, directions were given by **Muchelule J** on 18th January, 2010 that the O.S proceeds to hearing by way of oral evidence in a formal proof manner. The O.S was to be treated as a plaint.

On 5th May, 2011, the formal proof commenced before me. Only the applicant testified. He stated that he had sued the respondents as they are sons of the late **Haron Mangera Gicheo** who had sold a portion of his land to his late father; **Samuel Mecha Onchonga**. He had obtained a grant of letters of administration intestate to enable him do so. The parcel of land in respect of which he had sued was known as **Majoge/Bokimonge/297**. His late father had bought 2 acres out of the said parcel of land in 1961. Since then, they had been residing on that portion of the land. Though the land had since been transferred and registered in the names of the respondents, his family still utilizes their portion of the land. He thus prayed that the 2 acres out of the said title be surrendered and registered in his name by virtue of adverse possession since the respondents had refused to part with the same voluntarily. He also prayed for costs of the O.S.

As I understand it, in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for purposes for which he intends to use it for a period in excess of 12 years. So that a person relying on adverse possession must show; clear possession of the land, lack of consent of the owner in regard to that possession; occupation for more than 12 years before action and that the applicant had occupied a clearly demarcated portion. Indeed such possession must be continuous and uninterrupted for a period of 12 plus years. Occupation of land by descendants of the occupier should be considered as continuous possession for purposes of adverse possession. Finally, time however stops running for purposes of adverse possession when the owner asserts his rights to the land or when there is an admission by the other party. Assertion of rights occurs either when the owner of the land takes legal proceedings or makes effective entry in to the land. See generally **William Gathih Murathe V Gakuru Gathimbi**, Civil Appeal number 49 of 1996 (UR) and **Roberts s/o Nwamabo V Mwangela S/O Mbyoto (1969) THCD 11.**

All these considerations would have come into focus had this O.S. been defended. Since it was not, the evidence of the applicant on the same remains unrebutted and unchallenged. I therefore have no choice but to act on the same. From the uncontroverted evidence of the applicant, he is the descendant of **Samuel Mecha Onchonga**, who bought 2 acres out of **Majoge/Bokimogo/297**, sometimes in 1961. He was thereafter given his 2 acres which he proceeded to occupy. However, that portion was never transferred and registered in his name by the vendor, **Haron Mangera Gicheo**, the father of the respondents. In this case, time for purposes of adverse possession then started to run after the statutory period for obtaining the consent of land control board to the transaction had expired. In the sixties, that period was 3 months. From 1961 to the date when the O.S was filed on 22nd February, 2008, the applicant had been in continuous and uninterrupted occupation of the portion of the suit premises for a period in excess of 47 well beyond the threshold of 12 years. There is no evidence that the occupation was ever interrupted and or the respondent ever sought to assert his title to that portion of land. The fact that the respondents got registered as proprietors of the land by virtue of transmission did not effect or dim the applicant's entitlement to the land, courtesy of adverse possession.

In the result I answer question 1, 2 and 3 framed on the face of the O.S in the affirmative. The applicant too shall have the costs of the O.S.

Judgment dated, signed and delivered at Kisii this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE