



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 93 OF 2007

MOGOKO OMANWA.....APPLICANT/PLAINTIFF

-VERSUS-

NORAH K. NYAMBATI.....RESPONDENT/DEFENDANT

JUDGMENT

By an originating summons (“O.S”) dated 7th August, 2007 and filed in court on 14th August, 2007, **Mogoko Omanwa**, hereinafter “**the applicant**” prayed for the following orders against **Norah K. Nyambati**; hereinafter “**the respondent**”:-

“1. That the applicant be declared to have acquired or has become entitled by virtue of adverse possession for period of more than 12 years to all that portion of land measuring approximately 110ft by 162ft and 112ft by 162ft for the applicant (sic) or thereabout as occupied by the applicant out of the said parcels of land registered under the Registered Land Act Cap 300 Laws of Kenya (sic) and comprising in the title nos. NYARIBARI CHACHE/B/BOBURIA/5608 and 7676 respectively.

2. An Order that the Applicant be registered as the proprietor of the said portion measuring 110ft by 162ft and 112ft by 162ft of land parcel number NYARIBARI CHACHE/B/B/BOBURIA/5608 and 7676 respectively

3. That costs of this summons be provided for upon the grounds disclosed in the annexed affidavit of MOGOKO OMANWA and other grounds to be adduced at the hearing hereof.”

The “OS” was expressed to be brought under Order XXXVI rule 3 of the **Civil Procedure rules**. In support of the O.S the applicant swore an affidavit. In pertinent paragraphs she deponed that the respondent was the administratrix of the estate of the late **Nyambati Nyamwamu**, “**deceased**” who was her husband. In 1968, he purchased from the deceased a portion of land measuring 1.41 hectares and obtained title thereto as parcel number **Nyaribari Chache/B/B/Boburia/3111** during land Adjudication. Later in 1969 he once again purchased from the deceased an additional portion measuring 212ft X 162 ft. He thereafter planted on this portion of land 1,295 tea bushes and 49 coffee trees. This portion was however purchased after land adjudication but before registration. Nonetheless it was subsequently registered in the name of the deceased as **Nyaribari Chache/B/B/Boburia/6110**. A portion thereof was however registered erroneously under Gusii County Council as title no. **Nyaribari Chache/B/B/Boburia/3034**. Subsequent thereto, Gusii County Council rectified the title and caused the portion erroneously registered in its names as aforesaid transferred back to the respondent with the resultant title being **Nyaribari Chache/B/B/Boburia/7676**. This is the portion measuring 212 by 162 that

the applicant purchased from the deceased. Finally, he deponed that he had been in possession of the said portion long before land adjudication and was therefore rightfully entitled to the same by way of adverse possession.

On being served with the O.S the respondent failed to file any papers in opposition to the same if the affidavit of service dated 18th September, 2007 and filed in court by one, **Elijah Gekonge Nyangau**, a process server, is anything to go by. On 5th May, 2009 the O.S came up for directions as required by the legal provisions governing these kind of suits. **Mucheluel J.** then directed that the supporting affidavit to the O.S be treated as plaint and the O.S to proceed by way of **Viva Voce Evidence.**

The hearing of the OS started before me on 9th March, 2010. However, before the hearing could commence, **Mr. Bosire**, learned counsel for the applicant indicated to court that the applicant wished to abandon his claim of adverse possession in respect of land parcel **Nyaribari Chache/B/B/Boburia/7676.** However he was bent on pursuing the same in respect of **Nyaribari Chache/B/B/Boburia/5608,** hereinafter “**the suit premises.**”

In support of the claim aforesaid, the applicant testified. He testified that the respondent was the wife of one **John Nyambati Nyamwamu**-deceased. The deceased had sold him a plot in 1968. The plot was known as **Nyaribari Chache/B/B/Boburia 1508.** It is now registered in the name of the respondent. It was a subdivision from 3110. He was claiming 212 X162 ft thereof which he had bought and was currently in occupation. He had been in occupation of the portion since 1968 having put up his residence thereon. He tendered in evidence certified copies of abstract of title with regard to the two parcels of land. He therefore prayed that the said portion of land be transferred and registered in his name by way of adverse possession.

The respondent was present having been served with the hearing notice. However, she had no questions for the applicant. That marked the close of the applicant’s case.

Though the respondent had not filed any papers in opposition to the O.S I nonetheless allowed her to testify as she was present and the applicant did not object. She stated in her testimony that she knew the applicant as he had bought land from her late husband. The portion he had bought as aforesaid was given to him by the deceased. That is the same portion that he currently occupies. In this suit however he was claiming a portion of land which was never sold to him. The portion he was now claiming belonged to her and he does not occupy the same. She therefore urged me to dismiss the O.S with costs.

Cross-examined by **Mr. Bosire**, she stated that the suit premises measured ½ an acre. The applicant occupies the portion although it was hers. She could not recall when he started occupying it. However, he did so when the deceased was alive. He was not given that portion of land by the deceased though he utilizes it. That marked the close of the respondent’s case.

Thereafter both the applicant and respondent agreed to advance their case further by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them.

This O.S is bound to fail on two grounds. First and foremost, it is a mandatory requirement that under order **XXXVI, rule 3D of the Civil Procedure rules,** a claim for adverse possession based on section 38 of the Limitation of Actions Act, must be brought by way of O.S supported by an affidavit to which must be attached the abstract of title of the land adversely claimed. See generally **Eliud Nyongesa Lusenaka and another V. Nathan Wekesa Omocha, C.A.No. 134 of 1993(UR)** and **Lucky Summer Estate Company Ltd and others .V. Kariuki and Gathecha Resources Ltd NBI HCCC.no. 2578 of 1994(UR).**

In the circumstances of this case whereas the applicant has come to court properly by way of O.S as well as having the supporting affidavit, he nonetheless failed to annex to the said affidavit an abstract copy of the title that he was adversely claiming. The annexures to the supporting affidavit were however

in respect of land parcel numbers Nyaribari Chache/B/B/Boburia/3110,3034 and 7676 respectively. There is no abstract copy of land parcel Nyaribari Chache/B/B/Boburia/5608. Yet from the abstract copy of the said parcel of land which he tendered in evidence later, the suit premises is a subdivision of 3110. Indeed the title thereof was issued to the respondent on 13th may, 1996. This was long before, the applicant filed the O.S on 14th August, 2007. There is no reason therefore why the applicant could not have complied with the aforesaid mandatory provisions of the law considering that he specifically made reference to the suit premises in the O.S. Further I still think that if he had belatedly realized that omission, nothing stopped him from moving the court as appropriate to amend his pleadings. The applicant did not take this route either. Accordingly, the O.S is incompetent and bad in law for failure to comply with the mandatory requirements of Order XXXVI rule 3D of the civil Procedure rules.

Secondly, from the certified true copy of the original extract of title tendered in evidence with regard to the suit premises, the said suit premises were transferred and registered in the name of the respondent on 13th November, 1996. It is trite law that limitation period for the purposes of adverse possession only starts running after registration of the land in the name of the respondent. See Francis Gitonga Macharia .v. Muiruri Waithaka C.A.No. 110 of 1997(UR). Now the respondent having been registered as the proprietor of the suit premises on or about 13th May, 1996, and this O.S having been filed on 14th August, 2007, it is quite clear therefore that the threshold of twelve years, had not been attained to enable the applicant to pursue his claim based on adverse possession. Infact only eleven years had gone by.

The applicant did testify that he had been in continuous and uninterrupted possession of the suit premises since 1969. That cannot possibly be correct for in his own pleadings; he admits that at some point which he does not disclose, the suit premises were erroneously transferred and registered under Gusii County Council. That means that time for purposes of adverse possession stopped running in favour of the applicant at that juncture. Later Gusii County Council rectified the mistake and caused the portion to be re-transferred back in the name of the respondent. Though again he does not state when this was, my perusal of a copy of the extract of the original register shows that this was infact on 21st November, 2006. This was only a year or so before he commenced this suit. That again cannot find a claim for adverse possession. Perhaps this fact lends credence to the submission of the respondent that the parcel of land which was under Gusii County Council reverted to her deceased husband. It was Nyaribari Chache/B/B/Boburia/3034. A portion of the same was given to Rianyamwamu tea factory by the deceased. The said tea factory compensated her. If the applicant was really in possession as he claimed he could have been the person to be paid compensation. Thus this claim for adverse possession is clearly misguided.

The upshot of the foregoing is that the O.S has not been proved on the balance of probabilities. Accordingly it is for dismissal with no order as to costs as the respondent did not file any pleadings. It is so ordered.

Judgment dated, signed and delivered at Kisii this 17th Day of June, 2010.

ASIKE-MAKHANDIA
JUDGE