



REPUBLIC OF KENYA



KENYA LAW
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**Onyancha v Iminza & another (Environment & Land Case 39 of 2020)
[2022] KEELC 13759 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 39 OF 2020
EO OBAGA, J
OCTOBER 27, 2022**

BETWEEN

JOSEPH MANGARE ONYANCHA PLAINTIFF

AND

BENETTA IMINZA 1ST DEFENDANT

**ADMINISTRATOR OF THE ESTATE OF THE LATE ELIJAH MOSHI JOSPHAT
MUGO 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff filed this Originating summons in which he seeks the following orders: -
 - a. The Defendants/Respondents claim or interest to all that fenced land measuring $\frac{1}{4}$ acre or thereabout now falling under parcel 2413 of land parcel formerly plot No 206 Ilula Sttelement Scheme stands extinguished by lapse of time.
 - b. That the Plaintiff/Applicant has obtained title and ownership of all that portion of fenced land measuring $\frac{1}{4}$ acre or thereabout comprised in the parcel of land now falling under parcel 2413 and known as formerly Plot No 206 Ilula Sttelement Scheme by virtue of the Doctrine of Adverse possession.
 - c. That pursuant to the foregoing the Land Registrar Uasin Gishu County currently in lawful custody of land register in respect of land parcel plot No 206 Ilula Sttelement Scheme which is now subdivided into land parcels No 2413, 2414, 2415 be ordered to rectify portions of land parcels 2413 and land parcel 2415 specifically to render the land held and fenced by the Plaintiff intact as it is on the ground and to remove the names of Benneta Iminza and Josphat Mugo therefrom and have the same replaced with the name of the Plaintiff Joseph Mangare Onyancha and issue him with fresh title to the portion measuring $\frac{1}{4}$ acre or thereabout comprised in the said land.



- d. That pending the determination of this suit, this court be pleased to issue an order of temporary injunction restraining the respondents whether by themselves, their agents, servants, employees and or/or any other person claiming under them whatsoever from evicting the Plaintiff, encroaching upon the land, offering for sale, subdividing, processing title deeds, transferring, occupying, alienating, disposing or in any other manner dealing with that fenced and occupied portion of land measuring $\frac{1}{4}$ acre or thereabout comprised formerly of land parcel plot No 206 Ilula Settlement Scheme
 - e. For an order that the Applicant is entitled to costs of this suit.
 - f. Any order or other relief the honourable court shall deem fit to grant.
2. The Defendants who were duly served entered appearance but did not file any replying affidavit in opposition to the originating summons.
 3. The Plaintiff states that on April 6, 1997 he purchased $\frac{1}{4}$ of an acre from Elijah Moshi (Deceased). The $\frac{1}{4}$ acre was to be carved out of Ilula Settlement Scheme/206. He paid the entire purchase price of Kshs 25,000/= on execution of the sale agreement.
 4. The deceased showed him the extent of the $\frac{1}{4}$ acre which he fenced and has been residing thereon since 1997. When the deceased passed on, his wife who is the 1st Defendant subdivided plot 206 which resulted in parcel Nos 2413, 2414 and 2415. The Plaintiff's portion falls on parcel No 2413. The 1st Defendant has since sold $\frac{1}{8}$ of an acre on parcel No 2415.
 5. The 1st Defendant claims that the Plaintiff and his neighbour Abraham Simiyu Kituyi have each 3.5 meters in excess of their entitlement. The Plaintiff contends that he purchased the land on the basis of what he was shown by the seller and that he is not prepared to be moved.
 6. The Plaintiff testified that the deceased died around 2010. I have considered the evidence adduced by the Plaintiff. His evidence is not controverted. What is clear is that he purchased $\frac{1}{4}$ of an acre out of plot No 206. This therefore means that the portion which he purchased was well defined and known. The land had not been subdivided. It follows therefore that upon subdivision, he is supposed to have $\frac{1}{4}$ of an acre which he purchased and nothing more.
 7. The Plaintiff purchased $\frac{1}{4}$ of an acre on April 6, 1997. He paid the entire purchase price. He was put in possession and has since remained in possession. The deceased is said to have died around 2010. As at this time, the Plaintiff had been in continued possession of his $\frac{1}{4}$ of an acre for more than 12 years. As he had paid Kshs 25,000/= which was the entire purchase price, time for purposes of adverse possession started running on April 6, 1997.
 8. It is therefore clear that as at the time the deceased died in 2010, the Plaintiff had been in continuous and uninterrupted possession for a period of more than 12 years. In *Mtana Lewa Vs Kabindi Ngala Mwangadi* (2005) eKLR it was held as follows:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years”
 9. In *Kasuse vs Mwanani Investments Limited & 4 others* IKLR 184 it was held as follows:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of 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.”

10. The Plaintiff paid the entire purchase price on April 6, 1997. The deceased gave him possession on his own volition. The deceased therefore discontinued his possession willingly upon receipt of the entire purchase price. I therefore find that the Plaintiff is entitled to $\frac{1}{4}$ of an acre out of the portion he is occupying by way of adverse possession. The deceased had lost possession of the $\frac{1}{4}$ acre before he died and the fact that his wife took over did not affect what had already crystalized in favour of the Plaintiff.
11. The Plaintiff had no business dragging the 2nd Defendant into this suit. He is a purchaser just as the Plaintiff is. The Plaintiff is seeking adverse possession and cannot direct his claim against the 2nd Defendant. Had the Plaintiff's portion not been defined in the agreement of sale he will have been entitled to the portion he is occupying. If it be true that he is occupying more than what he bought, then there is no basis of claiming the extra acreage as the land was purchased subject to it being surveyed and a portion of $\frac{1}{4}$ of an acre marked for the Plaintiff.
12. From the above analysis, I make the following final orders:-
 1. The Plaintiff has obtained title and ownership of a portion measuring $\frac{1}{4}$ of an acre comprised in parcel No 2413 which was formerly known as plot 206 Ilula Settlement Scheme by way of adverse possession.
 2. The Land Registrar of Usain Gishu in conjunction with the County Surveyor are directed to curve out $\frac{1}{4}$ of an acre falling under parcel 2413 and have it registered in the name of the Plaintiff.
 3. The Plaintiff's claim against the 2nd Defendant is dismissed with no order as to costs.
 4. The Plaintiff shall have the costs of this suit to be paid by the 1st Defendant.

DATED, SIGNED and DELIVERED at ELDORET on this 27th day of OCTOBER, 2022.

E O OBAGA

JUDGE

In the virtual presence of;

Ms Munji for Mr Nyamweya for Plaintiff.

Court Assistant -Albert

E. O. OBAGA

JUDGE

27TH OCTOBER, 2022

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