

q When can one acquire land by adverse possession

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Civil Case 6 of 2004

SILVESTER BARASA ATARO.....PLAINTIFF

VERSUS

OJUMA OLUBAI OKEBO.....DEFENDANT

J U D G M E N T

The subject matter of this judgment is the originating summons dated 25th March, 2004 in which Silvester Barasa Ataro sought to be declared to have acquired L.R.NO.SOUTH TESO/ANGORMO/5033 registered in the names of Ojuma Olubai Okubo, the Respondent herein by adverse possession. He filed a supporting affidavit he swore on 25th March, 2004.

The originating summons plus the supporting affidavit was served upon the Respondent but the same did not elicit any response on the part of the Respondent. The Respondent appeared before this Court on 5th October, 2004 and was granted leave to file a reply to the originating summons within 14 days but still he did not file any. This prompted this court to grant the applicant leave to proceed for hearing exparte. This Court gave directions in this matter on 6th July, 2004 to the effect that the parties do rely on affidavit evidence.

The applicant averred that he purchased a parcel of land measuring 6 acres from one Barasa Olubai to be excised from L.R.NO.SOUTH TESO/ANGOROMO/1618 on the 3rd day of November, 1974. He claimed he paid a sum of Ksh.25,300/= to Barasa Olubai in the presence of Camulus Agola Olubai, Ojuma Okebo the respondent and petro Omolo Ekasiba after which he took immediate possession of his portion. It is further averred by the plaintiff that the boundary was fixed using Euphobia plants which exists up to now. The applicant further deponed in his affidavit that he erected houses on the land and cultivated maize, cassava, millet, cotton, sugarcane, nappier grass, oranges, mangoes, pineapples and other food crops.

He averred that he has enjoyed peaceful, quiet and uninterrupted occupation of his portion since 1974. It was further claimed that Baraza Olubai passed away and was succeeded by his son Ojuma Olubai Okebo the Respondent herein after taking up letters of administration in respect of his estate.

The applicant averred that the Respondent carried out sub division of the entire land and gave recognition of the portion he is in occupation measuring 6 acres given as L.R. NO.SOUTH TESO/ANGOROMO/5033. The applicant annexed to the supporting affidavit copies of the register in respect of L.R.NO.SOUTH TESO/ANGOROMO/1618 and L.R. NO.SOUTH TESO/ANGOROMO/5033 and the mutation forms and drawings. The applicant identified L.R.NO.SOUTH TESO/ANGOROMO/5033 as the exact land he has been in peaceful occupation since 1974. The annexure of the register shows that the Respondent registered himself as the owner of L.R.NO.SOUTH TESO/ANGOROMO/5033 which is a subdivision of L.R.NO.SOUTH TESO/ANGOROMO/1618. On 6th May, 1995. Unfortunately in this dispute, I have no benefit of the Respondent's side of the story. I have no reason to doubt what the applicant has deponed in his affidavit in support of the originating summons. The applicant set out the issues which this Court should determine on the face of the originating summons. The first issue is whether the applicant has been in open and notorious possession

of the said parcel of land for a period exceeding 12 years. I am satisfied from the averments contained in the supporting affidavit that the applicant was placed onto occupation of the suit land by virtue of a valid sale agreement of 3rd November, 1974. I have no reason to doubt that the applicant made immediate payment of the purchase price and that he was placed in occupation after the boundary was fixed using Euphorbia plants. I am satisfied on the basis of those averments deposed in the aforesaid affidavit that the applicant has been in open and notorious possession of L.R.NO.SOUTH TESO/ ANGOROM /5033. Consequently, the Respondent's title became extinguished after the lapse of 12 years from the date of occupation. The attempt by the respondent to transfer to himself L.R.NO.SOUTH TESO/ANGOROMO/5033 on 6th May, 1995 did not affect the applicant's rights to acquire the same parcel of land by adverse possession. I think I have answered the second issue as to whether the Respondent's title had been extinguished at the expiry of 12 years after the applicant's occupation.

The third issue put forward is whether the applicant has acquired the suit premises by adverse possession. This also has been answered in the affirmative.

The final issue is whether the Respondent's name should be cancelled and the applicant be inserted in his place. Obviously that is the end result when a litigant has acquired land by adverse possession. The Court of appeal in the case of **WAMBUGU VS NJUGUNA (1983) K.L.R P. 172** held inter alia:

That where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: The claimant's possession is deemed to have become adverse to that of the owner after the payment of the instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

In this case it is averred that the applicant paid in full the consideration on 3rd November, 1974. His right to acquire the land accrued on the 3rd day of November, 1986.

The upshot therefore is that I declare that Silvester Baraza Ataro has acquired by adverse possession L.R.NO.SOUTH TESO/ANGOROMO/5033.

I further direct that the name of Ojuma Olubai Okubo be cancelled from the register relating to the above parcel of land and in its place the name of Silvester Baraza Ataro be inserted as the new owner. It is directed that the Respondent do assist to effect the transfer and in default the Deputy Registrar of this Court is mandated to sign the necessary documents in place of the Respondent. The Respondent shall pay costs of the suit.

DATED AND DELIVERED THIS 8th DAY OF April 2005.

J. K. SERGON

JUDGE