



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ORIGINATING SUMMONS NO. 167 OF 2014

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES CAP 21 OF THE LAWS OF KENYA

BETWEEN

1. TERESIA MATOKE ANYOKA.....1ST APPLICANT

2. EVANS MOSAIGA RIOBA.....2ND APPLICANT

AND

1. DANIEL NYABURI.....1ST RESPONDENT

2. GIDEON CHANGAMU OCHWANGI.....2ND RESPONDENT

3. TUMBO GESAMI.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicants filed an Originating Summons under the Limitations of Actions Act Cap 22, the Land Registration Act No. 3 of 2012 and Order 37 rule 7 of the Civil Procedure Rules seeking determination of the following questions;

1. Whether or not the Applicants herein, Teresia Matoke Anyoka and Evans Mosaiga Rioba have acquired adverse possession over land parcel **NO. NORTH MUGIRANGO/ BOISANGA/776**

2. If the said Applicants, Teresia Matoke Anyoka and Evans Mosaiga Rioba have acquired adverse possession over land parcel **NO. NORTH MUGIRANGO/ BOISANGA/776** then the title to the same currently in the name of the Respondents has been extinguished and their names should be cancelled and in place thereof the names of the Applicants herein be registered.

3. Who should pay costs of this Originating Summons

2. The Summons are premised on the grounds cited in the Application and particularly in the Supporting Affidavit of the 2nd Applicant sworn on 24th April 2014. The 1st Applicant gave the 2nd Applicant authority to plead on her behalf throughout the Originating Summons.

3. From the record, service was effected on the Respondents on 21st May 2014, as evidenced by the Affidavit of service sworn on 22nd July 2014.

4. The 1st Respondent instructed a law firm by the name and style of Moturi Mbeche & Associates who filed a Memorandum of Appearance

on behalf of the 1st Respondent on 24th May 2014.

There is no response to the Originating Summons on record by any of the Respondents.

5. The court gave directions for the matter to proceed to hearing via *viva voce* evidence.

The Originating Summons and the suit proceeded undefended on 23rd November 2020 by way of *viva voce* evidence with the 2nd Plaintiff/Applicant testifying as the only witness. Documentary evidence was also given by the 2nd Applicant.

PLAINTIFF'S CASE

6. The 2nd Plaintiff/Applicant gave evidence and stated that he comes from Boisanga II Sub-location within Nyamira County. He stated that he knew the 1st Applicant as his aunt and that he also knew the Respondent.

7. It was his testimony that he stays on land parcel **NO. NORTH MUGIRANGO/BOISANGA/776** and that the said parcel is fraudulently and illegally registered in the name of Gideon Changamu Ochwagi and Tumbo Gesami (the 2nd and 3rd Respondents respectively) sometime in 3rd October 1977.

8. He stated that the registration of the title notwithstanding, the Respondents have not challenged the occupation of the Applicants families on the suit property and they have essentially been in uninterrupted occupation.

9. He testified that he is 54 years old and that he has been living on the suit property since he was born, they have their home on it and have ploughed the land for as long as he can remember.

He stated that the 1st Applicant also lives on the suit property and that they have lived peacefully for many years.

10. In his testimony, the 2nd Applicant prayed that the Applicants be declared as the owners of the suit property.

He produced an extract of the title in respect of the suit property as Plaintiff's exhibit 1.

11. The 1st Applicant relied on the evidence of the 2nd Applicant.

The 2nd Applicant's learned Counsel did not wish to file any submissions as he deemed the issues to be determined as 'pretty straight forward'.

DEFENDANT'S CASE

12. Regrettably the Respondents failed to file any response to the Originating Summons save for the 1st Respondent's Memorandum of Appearance filed on 24th May 2014. They all failed to appear during the hearing of the Originating Summons.

ISSUES FOR DETERMINATION

13. Having scrutinized the pleadings by the parties and the evidence presented before the court, the only issue that emerges for determination is:

Whether the Applicants have met the threshold necessary to implement the doctrine of adverse possession

ANALYSIS AND DETERMINATION

14. Whether the Applicants have met the threshold necessary to implement the doctrine of adverse possession

The law on adverse possession is well settled and the requisite threshold necessary to implement the doctrine well established.

15. Adverse possession is a situation where a person takes possession of land and 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 period of twelve (12) years.

Section 7 of the Limitation of Actions Act, provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 further provides that:

“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

16. In this matter, it is not in dispute that the suit property was initially registered to the 1st Respondent sometime in 1973 and later transferred and registered in the names of the 2nd and 3rd Respondents (albeit the Applicants claim that the same was done fraudulently and illegally).

17. The Applicants did not produce any evidence to substantiate their claim of fraudulent and illegal registration of the suit property and therefore the same must be presumed to have gone through the regular process and is therefore proof that the suit property is registered in the names of the 2nd and 3rd Defendants since 1977.

18. The registration of the suit property notwithstanding, the Applicants averred that they have lived on the suit property since 1978 without any interruption or interference.

19. In view of the foregoing and from the evidence on record, it is clear that the Applicants live on the land and have been in open, quiet uninterrupted possession and without the consent of the Respondent of the suit land. This is more than the requisite 12 year period.

20. There is no evidence to suggest that the Respondents sought or retook possession or the Applicants relinquished possession to the Respondents. Given that time stated running in 1978, it is clear that the Plaintiff has established that he has been in actual possession for 43 years or thereabout.

21. It is also on record that the Respondents have not challenged the possession leaving the Applicants to openly publicly occupy the suit property uninterrupted.

22. The fact that the Applicants have established their homes in the property and cultivated the suit property is a demonstration of **animus possidendi**, (intention to possess) to the exclusion of the Respondents.

23. In view of the foregoing, I have come to the conclusion that the Applicants have proved their claim for adverse possession and enter judgment accordingly in their favour. I therefore make the following final orders:

(a) The Applicants herein Teresia Matoke Anyoka and Evans Mosaiga Rioba have acquired title in respect of L.R No. NORTH MUGIRANGO/BOISANGA/776 by way of adverse possession.

(b) The title for the Suit Property currently held by the Defendants Gideon Changamu Ochwangi and Tumbo Gesami is hereby extinguished and their names shall be cancelled from the register and in their place the names of Teresia Matoke Anyoka and Evans Mosaiga Rioba shall be inserted.

Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered, at Kisii this 26th day of January 2021.

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J. M. ONYANGO

JUDGE