



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NUMBER 314 OF 2016 (O.S)
IN THE MATTER OF REGISTERED LAND ACT CAP 300

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, No. 3 OF 2012

AND

IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF PARCEL OF LAND NOS . KISUMU/KIT MIKAYE/107

AND

IN THE MATTER OF AN APPLICATION TO BE REGISTERED BY ADVERSE POSSESSION

VITALSI ONYANGO ODERO.....PLAINTIFF

VERSUS

LUCAS OCHIENG AGAN.....DEFENDANT

RULING

Vitalis Onyango Odero hereinafter referred to as the Plaintiff sued Lucas Ochieng Agan the Defendant under the provisions of Order 37 Rule 7 of the Civil Procedure Rules 2010 and Section 7, 17, 37 and 38 of the Land Action Act Cap 22 laws of Kenya and Section 28 and 30 of the Registration Land Act Cap 300 Laws of Kenya (repealed).

The Plaintiff claims to be in adverse possession of the whole land known as Kisumu/KIT Mikaye/107 measuring 0.05ha or thereabout.

The Plaintiff seeks the determination of the following questions:-

- 1. Whether the Applicant/Plaintiff herein is entitled to the whole land parcel No. KISUMU/KIT MIKAYE/107 measuring or estimated to measure 0.5ha. or thereabouts by reason of his adverse possession of the same for a period exceeding 12 years.**
- 2. Whether the Respondent/Defendant's proprietary interest in the said land parcel No. KISUMU/KIT MIKAYE/107 has been extinguished by virtue of the Applicant's adverse possession and whether the Respondent is now holding the title for parcel of land in trust for the Applicant.**
- 3. Whether the Applicant should be registered as proprietor of the said land parcel No. KISUMU/KIT MIKAYE/107 measuring or estimated to measure 0.05ha. or thereabouts in place of the Respondent.**
- 4. That costs of this summons be provided for.**

In the supporting affidavit the plaintiff claims that the respondent is the son of Agan Ojtunga from Karadigo village.

The disputed parcel of land is registered in the name of Oduko Ojunga a paternal uncle to the defendant. The defendant is the only surviving beneficiary. The Plaintiff's father bought the land from Oduko Otunga in 1996. His father and mother took possession of the whole parcel of land on 30/1/1986. The Plaintiff has been in possession for more than 30 years todate.

In the replying affidavit, the defendant denies that he is a surviving beneficiary of the late Oduko Ojunga.

He further states that he was not party to transaction. He admits that the applicant is in possession. He denies having trespassed in the suit land.

The Defendant has raised a Preliminary Objection that the Defendant is not the administrator of the Estate of the registered proprietor of Oduko Ojunga – deceased hence the summons is a nullity and pure abuse of court process.

I have considered the rival submissions and do find that the suit parcel of land is registered in the names of Oduko Ojunga deceased. The defendant is not the legal representative of the Estate of Oduko Ojunga.

The defendant has no capacity to be sued on behalf of the Estate of the deceased.

I do find that this suit is incompetent, void ab initio as the plaintiff has not identified the right person to be sued. The Preliminarily Objection is allowed. The suit is struck out with costs.

DATED AT KISUMU THIS 21st DAY OF JANUARY 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE