



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA**

**CASE NUMBER 314 OF 2017 (O.S)**

**SAMSON SULUBU TUVA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH PAUL MWANGOVYA.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. The Plaintiff instituted this suit by way of an Originating Summons dated 29<sup>th</sup> August 2017, laying claim on suit property Plot No MN/I/9112 NYALI by adverse possession. The Summons invited Court to make a determination of the following questions:

*a) Whether the Applicant himself, his ancestors and families be declared to have become entitled by virtue of adverse possession of 30 years of all that piece of land containing an area of 0.2649ha or thereabout registered under the Registration of Titles Act (Cap 281) Laws of Kenya in the name of Joseph Paul Mwangovya and compromised in Plot No MN/I/9112 NYALI.*

*b) Whether the Plaintiff/Applicant is entitled to be duly registered as proprietor of the suit land by adverse possession.*

*c) That costs of this application be provided for.*

2. The Originating Summons is supported by the affidavit of Samson Sulubu Tuva which states that the Plaintiff has been in actual possession of the land since 1985. The Plaintiff supported his claim with photographs showing the parcel of land and the structures on it, a certificate of postal search as at 19<sup>th</sup> July 2011 that shows the defendant as the registered owner of the suit premises as well as an encumbrance in form of a Charge of Kshs 550,000 dated 2<sup>nd</sup> May 1995 to the Industrial and Commercial Development Corporation, and a letter dated 17<sup>th</sup> December 2010 to the defendant inviting him for a meeting to discuss ownership of the suit property. That the Plaintiff efforts to reach out to the defendant though a letter for a discussion regarding the ownership of the said parcel of land had been futile.

3. The Plaintiff filed a list of documents dated 1<sup>st</sup> August 2019, that included photographs showing the parcel of land, a certificate of postal search as at 19<sup>th</sup> July 2011 and a letter dated 17<sup>th</sup> December 2010.

4. The defendant neither entered appearance nor did he file a defence. The Plaintiff proceeded to request court for an interlocutory judgement, cost of the suit and interest on 6<sup>th</sup> November 2018. On 16<sup>th</sup> September 2020, the Plaintiff's case proceeded by way of formal proof.

5. The Plaintiff gave oral evidence in court that he has lived in Plot No 9112/MN/I NYALI since 1985. He produced photographs showing his house, and some animal sheds as Exhibit No 1. He also produced the official search as Exhibit No 2. The Plaintiff also told court that he has lived in the suit property with his family and nobody has interfered with their stay ever since he entered. That he prays court to grant the prayers in the originating summons.

6. The Plaintiff's filed his written submissions on 30<sup>th</sup> November 2020. He reiterated that he and his family were in occupation of the suit premises continuously for over 12 years. He submitted to court that he deserved the said plot by way of adverse possession.

7. Having considered the Plaintiff's case and submissions on record and having taken consideration that the defendant has neither entered appearance nor has he filed a defence, I have the following issue for determination:

**a) Whether the Plaintiff has proved that his occupation of the suit premises is adverse to the title of the Defendant for the requisite period hence to be entitled to be declared owner of the suit premises as prayed in the originating summons.**

8. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya this doctrine is alive in **Section 7 of the Limitations of Actions Act** that states:

**“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.**

9. In **Alfred Welimo -v- Mulaa Sumba Barasa, CA No 186 of 2011**, the Court of Appeal expressed itself thus:

**“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalua scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land....”**

10. The Court of Appeal further held that, for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.

11. In **Wambugu –v- Njuguna, (1983) KLR 173**, the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

12. The Court of Appeal in **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR** established what a person who claims adverse possession must inter alia show:

- i. on what date he came into possession.**
- ii. what was the nature of his possession?**
- iii. whether the fact of his possession was known to the other party.**
- iv. for how long his possession has continued and**
- v. that the possession was open and undisturbed for the requisite 12 years.**

13. In the instant matter it has not been disputed that the Plaintiff has been in possession of the suit property continuously and uninterrupted for more than 12 years, since 1985 when he first possessed the land. It has not also been contradicted that his possession has been hostile to the defendant who is the registered owner as per the postal search dated 19<sup>th</sup> July 2011. In this context, "hostile" does not mean "unfriendly." Rather, it means that the possession infringes on the rights of the true owner. The letter dated 17<sup>th</sup> December 2010 is evidence that the defendant was aware of the possession and occupation of his land but did not take action to evict the plaintiff.

14. On the balance of probabilities the Plaintiff has proved to this court that his possession has been open and notorious. It was obvious to anyone who bothered to look that the Plaintiff was in actual possession of the suit property. The defendant, as the true owner was on notice that a trespasser was in possession of his land but neglected and or refused to take action against him. The pictures that the Plaintiff produced in court show developments on the land, which were done over the years to no challenge by the defendant who knew the Plaintiff was occupying the land.

15. The Plaintiff has tendered evidence that has not been challenged or controverted by the defendant that he does not share control of the suit property with anyone else other than himself. He uses the land at the exclusion of everyone else as if he is the actual owner. The Plaintiff has stated in his supporting affidavit that his family has been in exclusive possession of the suit premises since 1985.

16. Presented before this court is undisputed and undefended evidence by the Plaintiff. I find that the Plaintiff has on the balance of probability proved that he has a claim over the registered title of the defendant by way of adverse possession.

17. I find the Originating Summons dated 29th August 2017 has merit and is hereby allowed. I enter judgment as follows:

**i. That the Plaintiff/Applicant is hereby declared to have become entitled by virtue of adverse possession of all that piece of land containing an area of 0.2649ha or thereabout registered in the name of Joseph Paul Mwangovya and compromised in Plot No MN/I/9112 NYALI.**

**ii. That the Plaintiff/Applicant is entitled to be duly registered as proprietor of PLOT NO MN/I/9112 NYALI.**

**iii. Costs are in the cause.**

**DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 24<sup>th</sup> day of February, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**