



**Adorn v Abila & another (Environment & Land Case E039 of 2021)
[2023] KEELC 20650 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E039 OF 2021
SO OKONG'O, J
OCTOBER 5, 2023**

BETWEEN

SAMSON OTIENO ADORN PLAINTIFF

AND

MBOO ABILA 1ST DEFENDANT

ABICH ADENYO 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendants by way of an Originating Summons dated 15th November 2021 seeking the determination of the following questions;
 - a. Whether the Plaintiff has acquired all that parcel of land known as Title No. Kisumu/Kadongo/541 (hereinafter referred to as “the suit property”) by reason of adverse possession, having been in quiet, peaceful, continuous, and uninterrupted occupation thereof for a period in excess of 12 years.
 - b. Whether the Defendants' proprietary interest in the suit property has been extinguished by virtue of the Plaintiff's adverse possession, and whether they are holding the property in trust for the Plaintiff.
 - c. Whether the title in the names of the Defendants in respect of the suit property should be cancelled and the property registered in the name of the Plaintiff as the sole proprietor.
 - d. Whether the Defendants should be ordered to pay the costs of the suit.
2. The Originating Summons was supported by an affidavit sworn by the Plaintiff on 15th November 2021. The Plaintiff averred that his father, John Oriedo Agumba, deceased (deceased) took possession of the suit property in 1975 after the Defendants abandoned the same and started cultivating and taking care of the same. The Plaintiff averred that the deceased occupied the suit property peacefully



for a period of more than 10 years. The Plaintiff averred that after the death of the deceased in 1986, he took possession of the suit property and continued to cultivate the same. The Plaintiff averred that he had been in quiet and uninterrupted occupation of the suit property for 35 years. The Plaintiff averred that the Defendants' interest in the property had been extinguished by operation of law and that they were holding the suit property in trust for him. The Plaintiff annexed to his affidavit in support of the Originating Summons; a copy of an official search on the title of the suit property and a photograph showing the activities he was carrying out on the property.

3. The Defendants were served with the Originating Summons through substituted service. The Defendants did not enter appearance and as such did not defend the Originating Summons. The Originating Summons was heard by way of oral evidence. At the trial, the Plaintiff told the court that his father, Oriedo Agumba (deceased) took possession of the suit property in 1960 and cultivated the same until 1975 when he died. He stated that after the death of his father in 1975, he took possession of the suit property. He stated that he had remained in possession of the suit property since 1975 and was still in possession at the time he was giving evidence. He stated that a search that he conducted on the suit property revealed that the same was registered in the names of the Defendants. He stated that his occupation of the suit property had never been interrupted. He urged the court to grant the reliefs sought in his Originating Summons.
4. On examination by the court, the Plaintiff stated that the Defendants were unknown to him and that he had never met them. After the close of evidence, the Plaintiff's advocate told the court that she wished to rely entirely on the evidence on record.
5. I have considered the Originating Summons together with the supporting affidavit. I have also considered the evidence tendered by the Plaintiff in support of his case. In *Salim v Boyd and Another* [1971] E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

6. As I have stated earlier in this judgment, the Defendants did not defend the Originating Summons. This means that the evidence that was tendered by the Plaintiff as to the circumstances under which he entered the suit property and when he made the entry was not controverted. The averment that the Plaintiff took possession of the suit property in 1975 and had remained in possession since then was not disputed. It was also not disputed that the Plaintiff entered the suit property without the consent of the Defendants and that his occupation of the property was open, continuous and uninterrupted. It was also not disputed that the Defendants were the registered owners of the suit property and that as at the time of filing this suit the Plaintiff had occupied the suit property for over 12 years.
7. Although the suit was not defended, I have noted some discrepancies of concern on the dates when the Plaintiff's father is said to have died and when the Plaintiff is said to have taken possession of the suit property. In his affidavit, the Plaintiff stated that his father who was the first to occupy the property took possession of the property in 1975 and occupied the same until 1986 when he died. The Plaintiff stated in the affidavit that it was after the death of his father in 1986 that he took possession of the suit property. However, in his evidence at the trial, the Plaintiff told the court that his father took possession of the suit property in 1960 and occupied the same until 1975 when he died and that it



was after the death of his father in 1975 that he took possession of the suit property. I have considered whether I should reject the Plaintiff's claim on account of this discrepancy in the dates of entry into the suit property and I have decided against the same because first, whether the Plaintiff entered the suit property in 1975 or 1986, he had been in occupation of the property for more than 12 years as at the time he brought the Originating Summons herein. Secondly, the Originating Summons was not defended. I will however put a restriction on the title for some time to protect the interest of the current registered owners just in case, the court has not been given the correct information by the Plaintiff.

8. Save as aforesaid, I am satisfied that the Plaintiff has proved his adverse possession claim against the Defendants. I therefore enter judgment for the Plaintiff against the Defendants as follows;
 - a. I declare that the Plaintiff, Samson Otieno Adorn has acquired all that parcel of land known as Title No. Kisumu/Kadongo/541 measuring approximately 0.33 hectares by adverse possession.
 - b. The Deputy Registrar of this court shall execute on behalf of the Defendants all documents necessary to facilitate the transfer all that parcel of land known as Title No. Kisumu/Kadongo/541 to the name of the Plaintiff.
 - c. The Plaintiff shall pay all fees and other statutory charges required for the transfer of the suit property from the Defendants to the Plaintiff.
 - d. Immediately after registering the Plaintiff as the owner of all that parcel of land known as Title No. Kisumu/Kadongo/541, the Land Registrar shall place an inhibition on the register of the property inhibiting the registration of any dealings with the property for a period of 5 years from the date of registration of the inhibition.
 - e. Since the suit was not defended, each party shall bear its own costs.

DELIVERED AND SIGNED AT KISUMU ON THIS 5TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Ohayo for the Plaintiff

N/A for the Defendant

