



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 34 OF 2019 (O.S)

IN THE MATTER OF AN APPLICATION FOR

ACQUISITION OF TITLE BY ADVERSE POSSESSION OF

THE PARCELS OF LAND DESCRIBED KISUMU/MANYATTA “A”/863

AND

IN THE MATTER OF LIMITATION OF

ACTIONS ACT, CAP 22 LAWS OF KENYA

BETWEEN

AMOS ODHIAMBO JUMA.....PLAINTIFF/APPLICANT

-AND-

SHEM OWITI LIMBE.....1ST DEFENDANT/RESPONDENT

JAMES OGUMBO OMITTO.....2ND DEFENDANT/RESPONDENT

JUDGMENT

BRIEF FACTS

The plaintiff, AMOS ODHIAMBO JUMA has approached this Court by way of Originating Summons dated 23rd September 2019 and filed on 25th September 2019. The application is in respect of land parcel number KISUMU/MANYATTA “A”/863 (hereinafter ‘the suit property’) and the Applicant prays for the following orders;

- a) That the Applicant has acquired title approximately 0.08 hectares comprised in L.R. No. KISUMU/MANYATTA “A”/863 by Adverse Possession.*
- b) An order directing rectification of the register by deleting the names of SHEM OWITI LIMBE and JAMES OGUMBO OMITTO and substituting the names of AMOS ODHIAMBO JUMA as proprietor of the parcel of land described as KISUMU/MANYATTA “A”/863 measuring approximately 0.08 hectares and the Applicant/ Applicant be issued with the title deed in respect of the said parcel of land.*
- c) An order vesting title of that parcel of land described as KISUMU/MANYATTA “A”/863 measuring approximately 0.08 hectares in the names of AMOS ODHIAMBO JUMA as absolute proprietor and all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.*
- d) Costs of this suit.*

The suit is supported by the Applicant’s supporting affidavit dated 23rd September 2019 and filed on 25th September 2019 which the Applicant has deposed that;

1. That the parcel of land KISUMU/MANYATTA “A”/863 was first registered in the name of SHEM OWITI LIMBE during

adjudication and green card opened on 23rd November 1995 and later transferred in the names of JAMES OGUMBO OMITTO on 11th April 2012.

2. That land parcel number KISUMU/MANYATTA "A"/863 measuring about 0.08 Hectares is registered presently in the names of JAMES OGUMBO OMITTO but the said parcel of land was originally mistakenly registered in favour of 1st Defendant instead of my father's name being rightful owner of the land at the time of adjudication process of the area.

3. That he continued to openly reside and cultivate the whole land in total exclusion of SHEM OWITI LIMBE and JAMES OGUMBO OMITTO and their families and to-date the parcel still remains in his exclusive use, possession and enjoyment together with his family and siblings which is adverse to the interests of the respondents.

4. That the Respondents have never been in possession and or occupation of the disputed land unless they are mistake and are referring to a different parcel of land.

5. That he has resided on the parcel of land and has established a home since 1994 when his father relocated to Sakwa leaving him on the parcel of land where he has been staying and there have never been interruption of his occupation for the period of over 12 years.

6. That he has resided on the parcel since 1980, buried dead ones, built rental houses, collecting rent since 1994, planted trees, tilled the land openly and adversely and without interruption to date.

7. That having been in constant occupation, use, possession of the said land since 1994, and to date having no interruption of the occupation for a period 12 years, he has acquired the said parcel of land by adverse possession by operation of the law.

8. That SHEM OWITI LIMBE has never been their neighbor in the location and he has never known him nor interacted with him and as such the 2nd entry in the register which is the change of name is suspect and an elaborate scheme to falsify land registration with an intention to defraud.

The 2nd Defendant/Respondent filed a Replying Affidavit on 1st September 2020 where he deposed as follows:

1. That his true place of abode is within his parcel of land number KISUMU/MANYATTA "A"/863.

2. That the 1st respondent who is his late father died on 10th January 2014.

3. That his father was the 1st registered proprietor of land parcel number KISUMU/MANYATTA "A"/863 having ben registered on 23rd November 1995 and did a correction of name on 18th October 2011 to include his omitted name Owiti in the title as it appeared on his Identity Card.

4. That his transferred land parcel number KISUMU/MANYATTA "A"/863 on 11th April 2012 to his name and a title was issued

5. That the issue raised by the Appellant that there was a mistake during registration process in the Applicant's name.

6. That if there was a mistake then the Applicant was at liberty to lodge an objection before the registration process was completed as provided for under Land Adjudication Act which objection was never raised.

7. That the Applicant is a trespasser to the said land parcel and that he has tried to use diplomatic method and reasoning with the Applicant to vacate his parcel of land to no avail.

8. That the Applicant has not been in constant possession of the said parcel together with his father from 1980 as the adjudication process was completed vin 1994 and the title was issued in 1995.

9. That fraud is a criminal act prohibited by the penal code and as such if the applicant was of the opinion that a fraudulent transaction had been occasioned, he is at liberty to seek legal redress.

10. That the Applicant claim that he is collecting rent from the parcel of land since 1994 is not correct as the Applicant trespassed on the said parcel of land sometimes in 2013 and efforts to find an out of court settlement had been futile even with the intervention of the Local Administration Chief.

11. That his late father and him are not trustees and have never been trustees and are not holding the suit property in trust for anyone including the Applicant.

12. That paragraph 6 of the Applicant's Supporting Affidavit is denied in toto as the doctrine alluded by the Applicant is not tenable and logical in law.

13. That the court should dismiss the Application with costs as the Applicant is not only a trespasser but a 'busy body'.

On 19th April 2012 when the matter came up for Hearing, the Applicant adopted his Supporting Affidavit and the Supplementary Affidavit and Witness Statement as Evidence in Chief. PW2, Jane Njeri Juma also adopted her statement as Evidence in Chief. The court ordered that the Plaintiff to file Submissions within 14 days and the Respondents to also file and serve submission within 14 days of service.

APPLICANT'S SUBMISSIONS

The Applicant in his Submissions stated that the suit property was first registered in the name of SHEM OWITI LIMBE and is currently registered in the name of JAMES OGUMBO OMITTO. The suit property was mistakenly registered in the name of the 1st Respondent rather than the Applicant's father who was the rightful owner at the time of the adjudication process in the area.

The Applicant has been in possession of the suit property together with his father since 1980 when he was born up until 1980 when he was born until 1994 when his father relocated to Sakwa thereby leaving him in the suit property. The Applicant has been in possession of the suit property for a period of 12 years and he has built rental houses and has been collecting rent since 1994 and he has also planted trees.

The Applicant submitted that he has been in constant possession of the suit land together with his father since 1980 and after his father relocated to Sakwa, he continued to be in possession of the suit property. He also submitted that he has established a home in the suit property. He relied in the case of **Josinter Atieno Ouma & Another vs Joshua O. Omiti & Another (2018) eKLR** where the court held as follows:

“The possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner”.

On when time ceases to run under adverse possession, the Applicant relied on **Githu v Ndeete (1984) KLR** and submitted that the claim by the 2nd Respondent under paragraph 11 of his Replying Affidavit that the Applicant trespasses on the suit parcel in the year 2013 upon the demise of his father is false since the Applicant has been in possession of the suit property since his birth. The 2nd Respondent has never Taken necessary steps to dispossess the Applicant from the suit parcel of land. The Applicant in his Submissions further stated that although the 2nd Respondent had entered appearance and filed his response, he failed to show up on the hearing day. The Applicant prayed that he be granted orders sought in the claim.

RESPONDENT'S SUBMISSIONS.

The Respondents did not file Submission as ordered by the court.

ANALYSIS AND DETERMINATION

Section 7 of the Limitation of Actions Act provides;

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 38(1) of the same Act further provides;

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

The law on Adverse Possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by the courts. The Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** held that:

‘Adverse Possession is essentially a situation where a person takes Possession of land, 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 certain period, in Kenya 12 years.’

Similarly, the Court in **Mbira –v- Gachuhi (2002) IEALR 137** held that:

‘...a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....’

The Applicant has stated that he has been in occupation of the suit property since 1994 and that the said occupation and possession has been without any interference since then. That is a total of 25 years. The Applicant has clearly stated in his Supporting Affidavit that after his father relocated to Sakwa, he has been in possession of the suit property since 1994 and developed the property by establishing a home,

rental houses and planted trees. JANE NJERI JUMA, the Applicant's mother confirmed that he gave birth to the Applicant in 1980 and in 1994, the Applicant moved to stay with his father and the Applicant has been in possession of the property for over 12 years.

The 2nd Respondent in his Replying Affidavit stated that the Applicant is a trespasser to the suit property but did not adduce evidence to show how the Applicant trespassed the suit property. I am of the opinion that the Applicant has been living on the suit property and made developments on it over time and openly.

Based on the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the Applicant has proved his case on adverse possession a balance of probability. Based on the above I do declare that the Applicant acquired title approximately 0.08 hectares comprised in L.R. No. KISUMU/MANYATTA "A"/863 by Adverse Possession. I do grant an order directing rectification of the register by deleting the names of SHEM OWITI LIMBE and JAMES OGUMBO OMITTO and substituting the names of AMOS ODHIAMBO JUMA as proprietor of the parcel of land described as KISUMU/MANYATTA "A"/863 measuring approximately 0.08 hectares and the Applicant be issued with the title deed in respect of the said parcel of land. Lastly, I do grant an order vesting title of that parcel of land described as KISUMU/MANYATTA "A"/863 measuring approximately 0.08 hectares in the names of AMOS ODHIAMBO JUMA as absolute proprietor and all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement 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 2020.

ANTONY OMBWAYO

JUDGE