



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. E 12 OF 2020 (O.S)

**IN THE MATTER OF AN APPLICATION FOR DECLARATION OF EXTINCTION OF THE
INTEREST AND RIGHTS OF REGISTERED PROPRIETOR AND OWNER JOB OCHIENG OMBE**

IN A PORTION OF ALL THAT PARCEL OF LAND DESIGNATED AS PLOT NUMBER 1560

SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SODHO CENTRAL

IRRIGATION SCHEME) MEASURING APPROXIMATELY ONE (1) ACRE

REGISTERED IN THE NAME OF THE RESPONDENT

JAMES MAGAK OUMA.....APPLICANT

-AND-

JOB OCHIENG OMBE.....RESPONDENT

JUDGMENT

The Applicant herein has approached this Court by way of Originating Summons dated 13th October 2020 filed on 19th October 2020. The application is in respect of land parcel number 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME (hereinafter 'the suit property') and the Applicant prays for the following issues to be determined;

1. Is JOB OCHIENG OMBE the registered owner and /or proprietor of the said parcel of land known as 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME).
2. Has the Applicant been in actual, factual and active possession and in physical occupation and to date?
3. Has the said occupation and possession been peaceful, uninterrupted and has the same been known to or by JOB OCHIENG OMBE or any other person with an interest in the parcel of land.
4. What is the cumulative and or total period or duration of such occupation to date?
5. Was the entry or ingress into the said parcel of land with the permission of JOB OCHINEG OMBE or any person with an interest in the parcel of land.
6. Has the Application fulfilled all the singular requirements for a declaration to the extinction of the registered proprietor's interest in the said parcel of land and the registration of the same in his favour by virtue of the doctrine of adverse possession.
7. A declaration be made that the ownership and proprietary interests of the registered owner JOB OCHINEG OMBE be and is hereby extinguished.
8. A declaration be made that a portion of the parcel of land designated as plot number 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME measuring approximately one (1) acre be and is hereby ordered to be registered in the name of the applicant JAMES MAGAK OUMA.

9. The County Land Registrar, Kisumu County is hereby ordered to effect the change of ownership and proprietorship accordingly.

10. The Respondent to meet the costs of this suit.

The application is based on the supporting affidavit dated 13th October 2020 and filed on 19th October 2020 which the Applicant has deposed that;

1. That he is a resident of Kisumu County more particularly on land parcel number 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME).
2. That he has lived on the same plot since the year 1999.
3. That he knows that all that parcel of land known as 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME is currently registered in the names of JOB OCHIENG OMBE as per the copy of the title deed or certificate of official search.
4. That he has been actual, factual and active possession of the suit property ever since the year 1999.
5. That the said occupation and possession has been and still peaceful, uninterrupted and same has been known to the respondent hence he has never ever done development and or lived on the said parcel of land.
6. That the said occupation, possession and open use or settlement has been for accumulative and total period of over 12 years.
7. That the said occupation relates to a portion of the parcel of land and not the whole of it.
8. That having met all the requirements for a declaration of registered proprietor's interest and or rights, he prayed that the parcel of land be subdivided and the portion being occupied and utilized by the applicant be registered in his name as the owner.
9. That upon making the said declaration, the court should make an order that the County Land Registrar should alter the register to reflect that he is the registered proprietor of the land.
10. That the Respondent and his family have alternative parcels of land which they currently occupy.
11. That it is in the interest of and for the ends of justice to be met that the orders sought for herein be granted as prayed.

The matter came up for Hearing on 22nd September 2021 and it was noted that the Respondent had not replied to the Originating Summons. Despite the fact that he had been served with the Originating Summons and the Hearing Notice. The Respondent failed to attend the Hearing. PW1 the Applicant herein upon being sworn stated that he lives on the suit property and he would like his supporting Affidavit be adopted by the court as evidence in chief and the documents filed be adopted as exhibits. This court adopted the supporting affidavit as the plaintiff's evidence in chief and the annexures as the exhibits.

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 1999 and that the said occupation and possession has been without any interference since then. The Applicant in his supporting Affidavit has demonstrated that he has been in occupation of the parcel of land and his possession has been peaceful, uninterrupted. The Applicant in his Supporting Affidavit has stated that the parcel of land should be subdivided as he has been in occupation of a portion of the parcel of land and not the whole of it and has prayed that the portion being occupied and utilized by him be registered in his name. 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, the Applicant's suit is allowed and judgement is entered as follows:

- a) The Applicant acquired a portion of land parcel number 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME measuring approximately 1 acre by Adverse Possession.
- b) An order for the parcel of Land 1560 SIDHO WEST (KAMAGAGA NORTH/KAMAGAGA SOUTH/SIDHO CENTRAL IRRIGATION SCHEME be subdivided and the portion being occupied and utilized by the Applicant be registered in the name of JAMES MAGAK OUMA as the proprietor.
- c) The Deputy Registrar, Environment and Land Court to execute all relevant documents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF OCTOBER, 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 2020.

ANTONY OMBWAYO

JUDGE