



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 43 OF 2013 (O.S)**

**IN THE MATTER OF LAND PARCEL NO. KISUMU/DAGO/740**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 (1) OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**CHARLES OKONGO.....PLAINTIFF**

**VERSUS**

**MAURICE ODONGO AYUGI.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff, Charles Okongo, commenced these proceedings against Maurice Odongo Ayugi, the Defendant, through the Originating Summons dated the 18<sup>th</sup> February 2013 seeking to be declared the owner of land parcel Kisumu/Dago/740 that is registered in the name of the Defendant, but has been in his exclusive possession for over twelve (12) years. That filed with the Originating Summons is the Plaintiff's affidavit sworn on the 18<sup>th</sup> February 2013 to which is annexed a certified copy of the green card for Kisumu/Dago/740 measuring 0.47 hectares that was registered in the name of Maurice Odongo Ayugi under entry No. 2, on the 31<sup>st</sup> July 1989 and title deed issued on the same day. The record shows that the Defendant did not enter appearance, file replying affidavit or attend court to defend the proceedings despite being served.

2. The hearing started on 1<sup>st</sup> April 2014 when the Plaintiff testified in support of his claim as PW1. He later called Lucas Gura Kere, who testified as PW2 on the 17<sup>th</sup> April 2018, as his witness. The testimony of PW1 is that the parcel Kisumu/Dago/740, suit land, belongs to one Odongo Ochieng alias Maurice Odongo Ayugi and is about 200 metres from where he lives. That he has ***“used that land since 1992”*** with the Defendant seeing him but without asking him to stop. That he was last with the Defendant in August 2013. That the Defendant comes and goes and has never told him to move out of the land. PW2 told the court that he is the younger brother to PW1 and that he has seen the Defendant only once. That he lives on Kisumu/Dago/741 which he bought from Anyaso Myakwa for Kshs. 27,000/= but it has not been transferred to his name as he has only paid Kshs. 24,000/=. That PW1 had bought Kisumu/Dago/740 from the Defendant before 1977. That he does not know Robert Kaiko who is shown as the first registered proprietor of the suit land. During re-examination PW2 testified that he started living on parcel Kisumu/Dago/741 in 2000 while the Plaintiff (PW1) started living on Kisumu/Dago/740 in 1997.

3. That at the close of the oral testimony, the court directed that written submissions be filed in 30 days and the matter be mentioned on 17<sup>th</sup> October 2018. That however, no submission was filed and no party or Counsel attended court. The court fixed another mention for 20<sup>th</sup> February 2019 and directed the Deputy Registrar to notify parties and Counsel. That the mention notice dated the 17<sup>th</sup> October 2018 was served upon the Plaintiff's Counsel on the 18<sup>th</sup> October 2018, but come the 20<sup>th</sup> February 2019 no party or Counsel had attended and no written submissions had been filed. The court then fixed the matter for judgment today and directed the notice to be served.

4. The issues for determinations are as follows;

**a) Whether the Plaintiff has shown that he has been in adverse possession of the suit land for over twelve (12) years.**

b) Whether the Defendant's title to the suit land has been extinguished through prescription.

c) Whether the Plaintiff should be registered as proprietor of the suit land.

d) Who pays the costs.

5. The Court has considered the pleadings in the Originating Summons, the affidavit and oral evidence tendered by PW1 and PW2 and come to the following findings;

a) That from the testimonies of PW1 and PW2, and the documentary evidence in the form of copy of the green card for Kisumu/Dago/740, it is clear that the land was first registered in the name of one Robert Kaiko on the 23<sup>rd</sup> January 1973. That it was subsequently registered, probably through transfer, in the Defendant's name on the 31<sup>st</sup> July 1989 for a consideration of Kshs. 20,000/=.

b) That though the Plaintiff, (PW1), testified that he had been using the land without any interruption since 1992, his witness (PW2) contradicted him stating that the Plaintiff started using the suit land in 1997. The entire Originating Summons and supporting affidavit have not stated the year or date the Plaintiff started using the land. The fact that PW2 claimed in his testimony to be the younger brother and purchaser of the Kisumu/Dago/741, which borders the suit land, makes the court take him to be a person close enough to the Plaintiff to know when he settled onto the land. That the fact that PW1 and PW2 differs on the year that the Plaintiff started using the land cannot be ignored.

c) That tied to the finding in (b) above is the testimony of PW2 that the Plaintiff had bought the land before 1977. That means by then the suit land was registered in the name of Robert Kaiko, as the Defendant did not become the registered proprietor until 31<sup>st</sup> July 1989. That it surprises the court that the Plaintiff did not mention that fact in his pleadings, deposition and testimony in court. That if PW2 told the truth that the Plaintiff had bought the land before 1977, and that he started using it in 1997, then the Plaintiff needed to disclose to the court how his occupation started becoming adverse to the title of the registered proprietor. That this is because a purchaser's occupation to the land subject matter of the transaction cannot be adverse to the title of the vendor, as he takes possession with permission, and continues in occupation on the basis of entitlement as a purchaser. That such an occupation or possession that started with permission can however change to being adverse if the transaction (agreement) is voided, but possession is continued. Then in such a case the party basing their claim on such a situation would need to state through pleadings from when the occupation or possession started being adverse to the title of the registered proprietor. That in view of the testimony of PW2 that contradicts that of the Plaintiff in material aspects, and in the absence of the date or year that the Plaintiff occupation of the suit land started becoming adverse to the title of the Defendant, then the court finds that the Plaintiff has failed to prove that he has been in adverse possession of the suit land for over twelve (12) years.

d) That the Plaintiff's testimony before the court was that the suit land is about 200 metres from where he lives. That testimony raises questions on the pleadings in the Originating Summons, especially at ground 4, that he ***"has built residential houses which he occupies along with his family..."***, and PW2 testimony that PW1 started living on the suit land in 1997. The suit land cannot be about 200 metres from where PW1 lives if indeed he lives on it.

6. That for the foregoing reasons, the court finds that even though this suit was not defended, the Plaintiff has failed to prove his claim to the standard required and the suit is dismissed with no orders as to costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF JULY 2019**

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**