



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC MISC. APPLICATION CASE NO. 24 OF 2016 (FORMERLY HCC MISC. 243 OF 2011 (O.S))**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) LAWS OF KENYA**

**AND**

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

**BETWEEN**

**LUCCIA OWALLA AWINO.....PLAINTIFF**

**VERSUS**

**KILLION NASHON OCHIDO.....DEFENDANT**

**JUDGEMENT**

Luccia Owalla Awino (hereinafter referred to as plaintiff) has come to court against Killion Nashon Ochido claiming to be in adverse possession of Suit Parcel number North Nyakach/Middle Jimo/1447. The Plaintiff claims that her husband one Ignatius Owalla Awino (deceased) bought the parcel of Land North Nyakach/Middle Jimo/1447 in June 1971 from its original owner one Agalla Otieno (also deceased). According to the plaintiff, the Defendant acquired the suit land through fraudulent means. The Plaintiff asserts that she has an overriding interest under Section 30(a), (d) and (g) of the Registered Land Act (Cap 300) Laws of Kenya of the land parcel known as North Nyakach/Middle Jimo/1447. That she is an adverse possessor of the parcel of land NORTH NYAKACH/MIDDLE JIMO/1447. She prays that this court issues an order vesting the suit land to the plaintiff. The Kisumu District Land Registrar should be directed to register the rights and interests of the Plaintiff upon North Nyakach/Middle Jimo/1447. Lastly, the Plaintiff prays for cost of this application.

In the Supporting Affidavit the Plaintiff states that her late husband Ignatious Owalla Awino bought the parcel of land known as North Nyakach/Middle Jimo/1447 way back in June 1971 from one Agalla Otieno (deceased). The Defendant sometimes back in the 80's without their knowledge fraudulently acquired/obtained title to the suit land and transferred the same to his name. She is entitled to enjoy the benefits/fruits of the estate of her late husband having survived him after his death.

She stands to suffer irreparable damage if she is evicted from her land in that it is the same place where their matrimonial home stands and her deceased husband's grave is situate. She has been in constant occupation of the suit land without force, secrecy, without permissions and without interruption for a period exceeding 30 years and as such makes her an adverse possessor. She gives an undertaking as to damages in the event the suit fails.

In the replying affidavit Killion Nashon Oloo Ochido states that he bought the suit parcel of land from Nashon Okelo Orayo after he went to court and advertised the land for sale in 1986. The Plaintiff assisted him to buy the land. The owner of the land, Nashon Okelo Orayo went through the process of succession upto confirmation of grant.

When the matter came up for hearing, PW1, Lucia Owalla Awino testified that she is the first wife of Dr. Owalla Awino who is now deceased. She stated that the land in question was North Nyakach/Middle Jimo/1447. That her husband bought the parcel of land known as North Nyakach/Middle Jimo/1447 from one Agalla Otieno.

That the 1<sup>st</sup> agreement was in 1971 and immediately after paying for the land, she started tilling the and planting millet and grains and cotton. That she lives in the same land and has constructed a home built in 1989. That her husband was buried on the suit land in 1989. She produced a title deed showing that the defendant is a registered owner. She produced photos as of the funeral service, the grave and cut trees. The trees were allegedly cut by the defendant. She produced an official search as PEX9 in the name of Killion Nashon Ochido. She also produced the green card and certificate of death as PEX 10 and 11 respectively. She avers that the defendant did not get the land through a proper succession cause.

PW2, Gilbert Owuor the son to the late Dr. Owalla Awino states that his mother, PW1 came in possession in April 1971 when he was in class 7 and a C.P.E candidate. That his father obtained the land in 1971 and that his mother was left cultivating the land. That they cultivated the land in 1971 to 1978. The family moved into the land in 1978 and that they are still living in the land. His father was buried in the said land. He is aware that the suit land is in the name of the Defendant. That Agalla Otieno passed on in 1978. That thereafter his mother was in possession of the property.

PW3, Akinyi Owiti states that she knew the case of Lucia and Killion. That she was the fifth born of Lucia Owalla Awino. That her mother started cultivating the land in April 1971. That her mother moved to the place in 1978 to put up a homestead with her late father Dr. Owalla Awino. That she has known the place as a home for it is from there that she got married and dowries paid to her mother. That his late father Dr. Owalla Awino was buried on the same parcel of land. That her mother still stays on the same land with her two elder brothers.

DW1, the defendant herein states that he bought the land in 1985. However, before he bought the land, he took the owner to the Lands Office who was told to advertise in Kenya Gazette and that in 1986 the advertisement was done in the Kenya Gazette No. 25 of 13/6/1986. That he paid the purchase price in instalment and was issued with the title deed on 6/7/1981 and given authority to work on the land. In 1989 he received a verbal sermon from Dr. Owalla Owino that he should not work on the land. He claimed that he was in possession of the land parcel 1447. The green card and the certificate of official search indicate that he is the proprietor of the suit land. He claims to have entered the land in 1989 to date. That he has been in the land for 36 years and has been ploughing the same. He urged the court to dismiss the case and to remove the restriction from the land.

I have considered the evidence on record and do find that the plaintiff moved into the land in 1971 and has been in possession of the parcel of land since moving in in 1971. The Defendant was registered as proprietor of the suit land on 6/7/1987, 18 years after the plaintiff had moved into the land. When the defendant was registered as proprietor, the plaintiff had already obtained prescriptive rights in the suit property in 1984 as against the original owner as he had been in occupation for more than 12 years. The Succession cause did not affect the plaintiff's prescriptive rights as an adverse possessor on the property as the rights of the adverse possessor runs against the title and cannot be defeated by a grant of letters of administration intestate or the confirmation of grant of the letters of administration intestate. The defendant has slept on his rights from the 6<sup>th</sup> Day of July 1989 when he was registered as the proprietor of the suitland and has never filed any suit against the defendant to claim the land and therefore the plaintiff also obtained prescriptive rights of adverse possession against him.

Section 7 of the Limitation 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.”**

Further in **Section 13**

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

**Section 17** goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, **Section 38**(1) and (2) states;

“(1) 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

This court finds that the possession of the land by the plaintiff was without force, was open, and was well known to the defendant and un interrupted for more than 12 years to date. I do find that the plaintiff has acquired the land by virtue of adverse possession. The Land Registrar Kisumu District is hereby directed to register the Plaintiff as the absolute proprietor of the said land. The Plaintiff is awarded costs.

**DATED AT KISUMU THIS 18<sup>th</sup> DAY OF MAY, 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 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**