



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC O.S NO 39 OF 2018

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION OF

PLOT NO. KISUMU MUNICIPALITY BLOCK 12/2014

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF

ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULES 7 AND 14 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

SHEM ATHEMBO ONYURO.....PLAINTIFF

AND

FRANK RUSHTON.....1ST DEFENDANT

ARTHUR ERNEST TURNER.....2ND DEFENDANT

JAMES FREDRICK HUME HAMILTON.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU.....4TH DEFENDANT

JUDGMENT

The Plaintiff, one Shem Athembo Onyuro has approached this Court by way of Originating Summons dated 8th August 2018 and filed on 9th August 2018 on the basis of section 38 of the limitation of actions act and order 37 rules 7 and 14 of the Civil Procedure Rules, 2010. The application is in respect of PLOT NO. KISUMU MUNICIPALITY BLOCK 12/204 (hereinafter 'the suit property') and the plaintiff prays for a Declaration that the rights of Frank Rushton, Arthur Ernest Turner and James Fredrick Hume Hamilton have been extinguished and the plaintiff has acquired the same by adverse possession and an order directing the Land Registrar to register the same in favour of the plaintiff as the proprietor.

The applicant prays for the costs of these proceeding.

The application is supported by the plaintiff's supporting affidavit dated 08/08/18 and filed on 09/08/2018 and in which the plaintiff has deposed that that the plot/house no. KISUMU MUNICIPALITY BLOCK 12/204 is registered in the names of Frank Rushton, Arthur Ernest Turner and James Fredrick Hume Hamilton. That the plaintiff has been occupying the said plot since 1995 without any interference and has never known the real owners of the said plot since his occupation. That he spent over Kshs. 850,000/- to renovate the said house before moving in and all his efforts to contact the owners have not been fruitful.

That the rights of the registered owners had long been extinguished and the plaintiff is hence entitled to the orders sought. The applicant filed

a further affidavit dated 27/11/2020 on 30/11/2020 in which he annexed the registry index map in respect of the suit property. The applicant further asked the Court to take cognizance of the certified true copy of the official search in the absence of a certified copy of green card which he applied for but has never been availed to him despite various visits and inquiries at the Kisumu district land registry.

Following the Plaintiff's ex parte notice of motion filed on 21/12/2018 and the subsequent order issued on 14/03/2019, the Originating summons was served on the defendants by way of substituted service by an advertisement that appeared on the standard newspaper on 22/03/2019. An affidavit of service to that effect was filed on 01/04/2019. The defendants did not enter appearance and/or file a response within the stipulated time or at all.

When the matter came up for hearing on 14/12/2020, the plaintiff sought to rely on the affidavit attached to the originating summons. He further stated that he has been in occupation of the suit land from 1995 to date and prayed for judgement as per the originating summons.

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 plaintiff has stated that he has been in occupation of the suit property since 1995 and that the said occupation and possession has been without any interference since then. That is a total of 26 years. There was no evidence availed to contradict the plaintiffs' averments.

The plaintiff annexed to the supporting affidavit an official search confirming that the property is registered in the Defendants' names. He has also stated that he spent over Kshs. 850,000/- to renovate the said house before moving in. I am of the opinion that the renovation and/or developments must have been undertaken over time and openly.

Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the plaintiff has proved his case on adverse possession a balance of probability. Based on the above, a declaration is issued that the defendants right to recover the parcel of land known as PLOT NO. KISUMU MUNICIPALITY BLOCK 12/204 is extinguished under the Limitations of Actions Act Cap 22 Laws of Kenya and the title thereto is extinguished on the grounds that the plaintiff has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for exceeding 12 years.

Further, I do issue an order directing the LAND REGISTRAR KISUMU COUNTY to enter the name of the Plaintiff in the parcel register as the proprietor of the suit land.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16th DAY OF JULY, 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 2019.

ANTONY OMBWAYO

JUDGE