



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 35 OF 2012 (O.S)

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS ACTIONS ACT (CAP 21, LAWS OF KENYA)

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, (CAP 21 LAWS OF KENYA)

AND

IN THE MATTER OF THE LAND ACT (NO.6 OF 2012)

IN THE MATTER OF THE LAND REGISTRATION ACT (NO.5 OF 2012)

IN THE MATTER OF THE REGISTERED LAND ACT (REPEALED)

AND

IN THE MATTER OF SECTION 105 THE LAND REGISTRATION ACT (CAP 5 OF 2012)

AND

IN THE MATTER OF THE ACQUISITION OF LAND BY ADVERSE POSSESSION

BETWEEN

PAUL GOGO.....PLAINTIFF/APPLICANT

-AND-

ISAAC ISAIAH ONYANGO PANDE.....DEFENDANT/RESPONDENT

JUDGMENT

BRIEF FACTS

The plaintiff, PAUL GOGO has approached this Court by way of Originating Summons dated 22nd August 2012 and filed on 24th August 2012. The application is in respect of land parcel number KISUMU/WAWIDHI "A" 11/33 (hereinafter 'the suit property') and the Applicant prays for the following issues to be determined;

- a) Whether this Honourable Court should declare the plaintiff the owner of land parcel Number KISUMU/WAWIDHI "A" 11/33 by way of adverse possession.
- b) Whether this Honourable court should order the Defendant to execute all relevant conveyance forms relating to land parcel in favour of the Plaintiff.
- c) Whether in default of the Defendant/Respondent so effecting the requisite transfer, the Deputy Registrar of the High Court should be ordered to affect such transfer.

d) Whether the costs of this Application to be granted to the Plaintiff against the Defendant /Respondent.

The application is supported by the Applicant's supporting affidavit dated 22nd August 2012 and filed 24th August 2012 which the Applicant deposed that that the Defendant contacted him on or about September 1995 and offered to sell his suit property. That the Defendant showed him a Statutory Notice of Sale sent to him by the bank with regard to his indebtedness on plot number KISUMU/WAWIDHI "A" 11/790. He owed the bank Kshs. 335,470/= That the Defendant offered him Kshs. 150,000/= which sum would ensure that his plot 790 would not be sold by the bank. That he agreed to the proposal of sale of the suit property. That he took possession of the suit property and started cultivating it in October 1995. That the Defendant undertook to apply for and obtain the requisite Land Control Consent and to ensure that transfer into his name was effected. That he has continued to use the suit parcel as his property from October 1995 to date. That the Defendant never made any claim of the property. That in 2010, he decided to apply to court for a Declaration of ownership on the basis of adverse possession of the suit parcel for approximately 15 years. That upon apply for a copy of the Register from the land registry, he discovered that the Defendant had through fraudulent means obtained a fresh Title Deed issued to the Defendant on 6th December 2010. That he has had uninterrupted physical possession of the property since 1995.

The Defendant /Respondent filed his Replying Affidavit on 17th September 2012 and stated that sometimes in 1991, he charged his land KISUMU/WAWIDHA "A" 11/790 with National Bank Nakuru Branch for a loan of Kshs.100,000/= .That in 1995, he had defaulted in paying the said loan which had accrued interest which amounted to Kshs. 335,470/= and the bank wanted to sell the said property to realize the outstanding loan. That when he charged land parcel number land KISUMU/WAWIDHA "A" 11/790 as security for the said loan of Kshs.100,000/= the bank insisted that he also deposits with them the Title Deed in respect of land parcel number land KISUMU/WAWIDHA "A" 11/33. That when he defaulted, the bank refused to release title number land KISUMU/WAWIDHA "A" 11/33 unless he pays Kshs. 150,000/= and since he wanted to sell the said parcel of land to enable him raise funds to offset the loan and the Plaintiff wanted to buy the land. They agreed that he pays Kshs. 150,000/= to the bank to enable the bank release the title deed to him so that they could sign the Sale Agreement and the Plaintiff agreed to the proposal. That he wrote a letter authorizing the bank to release the title deed to the Plaintiff upon the Plaintiff paying the bank the sum of Kshs.150.000/=.

1. That prior to the Plaintiff paying the bank Kshs. 150,000/= they had agreed with the Plaintiff that the land would be sold to him at Kshs. 1,500,000/= less Kshs. 150,000/=. That after the Plaintiff paid the sum of Kshs. 150,000/= and obtaining the title deed from the bank, he refused to hand over the same to him or to sign any sale agreement in respect of the suit property and through a letter dated 8th March 2006, the Plaintiff stated that he does not know him. That the Plaintiff refused to purchase the suit land and the loan continued to accrue interest and by the year 2001, the outstanding loan amounted to Kshs. 1,339,000/= and the bank was threatening to sell the property to realize the outstanding loan. He decided to sell the suit property to KERINA MARYLINE AGUNDA and the suit property is registered in her name. That he has been in actual occupation and possession of the suit property, cultivating sugarcane therein until 2011 when she sold the land to KERINA MARYLINE AGUNDA. That the Plaintiff is spreading blatant lies when he says that he has been in actual occupation and possession of the suit land for over 16 years.

PLAINTIFF'S CASE

This matter came up for Hearing on 27th October 2014 where the Plaintiff PW1 upon being sworn in stated that he is currently residing in Mombasa. In early 1995, he started residing at Awasi. He became friends with the Senior Chief of Awasi location who later informed him that he had a gunshot wound on his neck and needed assistance. PW1 contributed Kshs. 100,000/= towards his treatment. Later on 21st September 1995 while at work in his Nairobi office he was informed by his secretary that the Senior Chief wanted to see him concerning a problem he had. The Senior Chief told him that he had a brother (the Defendant) who was almost losing his land to auctioneer for having defaulted in paying back a loan he had taken from the National Bank of Kenya Nakuru Branch.

PW1 was informed that the Defendant had by a letter dated 21st September 1995 already proposed to the bank an arrangement in which the Plaintiff was to buy the suit property from the Defendant by a private treaty. He paid to the bank the amount of Kshs. 150,000/= owed by the Defendant and the bank released to him the original title to the suit property. Thereafter the transfer forms were duly filled but the Defendant became evasive when he was asked to sign the land board consent. That in 2001 the Defendant wrote to him demanding back his title to the suit land and subsequently a meeting took place with the attendance of the District Commissioner (DC), District Officer (DO) and District Land Officer where the Plaintiff was advised to seek court's intervention.

That in the year 2010, the suit property was gazetted as having been lost in Kenya Gazette No. 7428 dated 2nd July 2010 issued by the District Lands Registrar, Nyando subsequently the Plaintiff filed this suit. The Defendant had not shown any Sale Agreement he had with KERINA MARYLINE AGUNDA has never been in possession of the land.

On cross examination, the Plaintiff affirmed that the Defendant had approached him with the offer of sale of the suit property and the same Defendant went to report to the DC that the title to the suit property was lost. The Plaintiff denied that there existed any arrangement whereby he was to pay Kshs. 1,500,000/= for the purchase of the suit land contending there was no written agreement to that effect and that he was only to pay Kshs. 150,000/= to get the title to the suit land and the get the land transferred to him. The Plaintiff reiterated that the Defendant refused to cooperate when the senior chief died and that he was still farming on the land.

JOSEPH OKINDA, PW2 testified and stated that PW1 was his friend and that the suit property was opposite his home but was separated by the Kisumu-Nairobi highway. PW2 stated that he knew the Defendant since they both attended Ayucha Primary School. That he had previously worked for PW1 in the suit property from 1995 to 2010 where PW1 had planted sugarcane. He affirmed that PW1 was the owner of the suit property.

On cross examination, PW2 stated that although he did not know the registration number of the suit property, he could point it out and he knew PW1 as the owner. That the Plaintiff had not leased the suit land and the Plaintiff has been in occupation of the suit property since 1995.

PW2 confirmed that he was not a party to the agreement between the Plaintiff and the Defendant. That he knew the location chief and the chief was a brother to the Defendant. PW2 reiterated that PW1 had bought the suit property from the Defendant and that currently there is somebody living on that land who is a woman.

TOBIAS OJUANG OJUKI, PW3 testified and stated that he is a sugarcane farmer from Ayucha sub-location, Awasi Location, Nyando Sub-County within Kisumu County and the secretary of Kue Farmers Society. That the Plaintiff has been a member of Kue Farmers Society since 1997. That the Defendant bought the suit property from his grandfather NYAUKE ONDIGO and the Defendant owned the suit property until 1995 when he sold it to the Plaintiff through National Bank of Kenya Nakuru Branch. That at some point the suit land was gutted with fire and he called the Plaintiff's wife to confirm if she was aware of what was happening and before she could act, the cane was harvested by unknown people and was taken to the factory. He stated that when he followed up the matter, he found out that the cane was registered in the name of TOBIAS JUMA OBONG'O. He wrote to Kibos Sugar Factory to inform them not to pay the said TOBIAS JUMA OBONG'O until the cane ownership issue was resolved and he informed the factory that the cane belonged to the Plaintiff who is the owner of the suit property since 1995.

On cross examination, PW3 affirmed that the Plaintiff was the owner of the suit property who bought it in 1995 before utilizing it in 1997. That the Plaintiff used the suit property until 2010 when his cane was burnt. Even if the Plaintiff was dispossessed of the suit property in 2010 his cane was still there. That the suit property is known by the locals to belong to the Plaintiff and the same was sold to the Plaintiff through the bank in 1995. The Plaintiff was a member of their Farmers' Society whose name was captured in the register but he did not have the register in court.

KEVIN OTIENO PEDO, PW4 testified that he is the farm manager of PW1 whose duties included managing the activities on the land as well as supervising casual labourers. That sometime in 2010, he was on his way to Chemelil Sugar Mills when he saw the sugarcane on the Plaintiff's farm on fire and he contacted the Plaintiff who was in Nairobi who informed him that he had not authorized the burning of the sugarcane. He stated that he talked with the Plaintiff's wife and together they went to the sugarcane farm where they found casual workers harvesting sugarcane and upon inquiring from them, he was informed that the Defendant had sent them to cut the sugarcane. That upon making further inquiries he found out that the cut sugarcane had been served upon Kibos Sugar Company Limited under the name of the Defendant. He informed the Plaintiff what he had found out that the Plaintiff took over the matter. That he had grown sugarcane on the farm from 1995 to 2010 and they had been selling the same in the name of the Plaintiff without interference from the Defendant or any other person.

On cross examination, PW4 confirmed that he was the farm manager of the Plaintiff and that the suit property is located around 1-2 kilometers from Awasi town in Nyando District. That he started working for the Plaintiff in the year 1995. He admitted that he knows the Defendant but not as the owner of the suit property since the Plaintiff introduced him to the farm where he was cultivating sugarcane. He stated that he was not staying on the farm. That on the day he saw fire on the farm, he called the Plaintiff's wife and they later found out that there were people cutting cane and they informed them that they were working under the instructions of the Defendant. He is not aware whether the Plaintiff reported the matter to the police.

DEFENDANT'S CASE

ISAAC ISIAH OPANDE, DW1 stated that he comes from Awasi location, Ayucha sub location, Nyando Sub-County and that he is a small scale farmer. He adopted his witness statement as well as his list of documents. That his Lawyer's received a letter dated 8th March 2006 concerning the suit property. That in 2014 the Assistant Chief Ayucha sub-location wrote to the court a letter dated 30th October 2014 on the status of the suit property. That between the Plaintiff and the late JOHN ODHIAMBO OPANDE who is DW1's brother is an application to transfer the suit land but his brother died before he could do so. He stated that he signed a new title and a copy of the Green Card shows the current registered owner. That the Plaintiff is not on the suit property and that KERINA MARYLINE AGUNDA is the new owner. He sold the suit property on 4th August 2011 and the Plaintiff had never taken possession of the suit property. That as concerns the loan agreement between the late JOGH ODHIAMBO OPANDE and the Plaintiff, the same was not in writing and the Plaintiff has been holding onto the title after the title was released to him by the bank. That he seeks the assistance of the court to solve the problem between him and the Plaintiff. He relied on documents that were marked as Dexh1-4.

On cross examination, the Defendant stated that he took a loan from Agricultural Finance Corporation (AFC) and that there are two parcels of land KISUMU/WAWIDHI "A"/790 that were charged and that the suit land KISUMU/WAWIDHI "A" 11/33 was not charged. On being asked about the title to KISUMU/WAWIDHI "A" 11/33, the Defendant stated that he did not produce in court as he had sold the land to KERINA MARYLINE AGUNDA. He confirmed that the Plaintiff was in possession of the original title deed. That he is the one who caused the suit property to be advertised in the Kenya gazette notice of 2nd July 2010 as being lost and a renewal needed to be done. That he did nothing wrong and admitted that the late JOHN ODHIAMBO OPANDE was his brother. He did not have his sale agreement with the alleged KERINA MARYLINE AGUNDA. That he lives in KISUMU/WAWIDHI "A"/790 where he has a home. That the alleged KERINA MARYLINE AGUNDA had the title deed to KISUMU/WAWIDHI "A" 11/33 in her name and that she was resident in the United States of America.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that he had openly and peacefully enjoyed occupation of the suit property for over 12 years preceding the presentation of the Originating Summons.

Section 112 of the Evidence Act provides that a court may presume the existence of facts which it thinks likely to have happened having regard inter alia to human conduct in relation to the facts of a particular case.

The Plaintiff submitted that he has been in occupation of the suit property for over 16 years and that the Defendant had never interrupted his possession save for one incident in which the Defendant sent cane cutters who cut the PLAINTIFF'S sugarcane and this was corroborated by PW4 who is his farm manager as well as PW2 who is his friend and landowner of parcel adjacent to the suit property.

The Plaintiff relied on the case of **Mbira Vs Gacuhi (2002)** where Kuloba J stated that:

....."a period of continuous adverse possession of not less than twelve years tolling, takes away or bars the re-entry of any person who had been dispossessed or whose possession has been discontinued or abandoned".

The Plaintiff submitted that he led the evidence to show that his use of the suit property had been open, without secrecy and without any interruption and/ or resistance during the entire period.

In the case of **Wambugu Vs Njuguna (1983) KLR 173**, the Court of Appeal held that **adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.**

The Plaintiff submitted that he has proved on a balance of probabilities that he has dispossessed the title holder being the defendant and has asserted a hostile title against the alleged KERINA MARYLYNE AGUNDA who is said to be staying abroad. That considering the totality of the evidence available in this case, and applying the legal principles as outlined above, the Plaintiff has proved his case on a balance of probability and has brought himself within the limits of the doctrine of adverse possession.

RESPONDENT'S SUBMISSIONS.

I have perused the Court file; the Defendant did not file Submissions 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 Defendant knew very well that the Plaintiff was in possession of the suit property but proceeded to sell it to KERINA MARYLYNE AGUNDA. The Defendant has not produced any Agreement for Sale signed between him and KERINA MARYLYNE AGUNDA. There is also no transfer document for registration of the suit property.

It is only after the Plaintiff refused to hand over the Original Title of the suit property that the Defendant proceeded to advertise via the Kenya Gazette Notice that the original title to the suit property was lost and needed to be replaced. To this extent, I find that the Plaintiff acted illegally knowing very well that the bank had handed over the Original title to the suit property to the Plaintiff. The evidence on record also shows that the Defendant had secured a loan from National Bank of Kenya Nakuru Branch however, when he testified, the Defendant stated that he had secured a loan with Agricultural Finance of Kenya.

Based on the evidence adduced before this court, the Plaintiff has clearly stated how he took possession of the suit property in 1995 and has been using the said parcel of land without force nor without secrecy. The Plaintiff has been in possession of the suit property for over 16 years where he has been growing sugarcane. I do find that the Plaintiff has had no interruption of the suit property for a period of 12 years.

In **Munyaka Kuna Company Limited- Vs- Bernado Vicezo De Masi (The Administrator of The Estate of Domenico De Masi (Deceased) (2018) eKLR**, the court while addressing the four ingredients stated as follows:

" To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*) for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted."

In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

"In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition".

Based on the evidence available 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.

CONCLUSION

Based on the above, I do find that the applicant has proved his case on a balance of probabilities hence the suit is allowed and judgement be entered as follows:

- a) That the Plaintiff is hereby declared the owner of land parcel Number KISUMU/WAWIDHI "A" 11/33 by way of adverse possession.
- b) That the Defendant /Respondent to execute all relevant conveyance forms relating to land parcel in favour of the Plaintiff/Applicant.
- c) That in default of the Defendant/Respondent so effecting the requisite transfer, the Deputy Registrar of the High Court is hereby ordered to effect such transfer.
- d) Cost of the suit are granted to the plaintiff

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 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