



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 84 OF 2021

(Originating Summons Sections 37 and 38 of the Limitation of Actions, Cap 22 of the Laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules, Cap 21 of the Laws of Kenya)

JOHN NYANG'AU MARAGIA.....PLAINTIFF

- VERSUS -

OGUTU MANG'ARE OSORO.....RESPONDENT

JUDGMENT

This is a case seeking ownership founded on the common law doctrine of adverse possession. The Applicant has moved this court by way of an Originating Summons dated 16/11/20 and filed in court on 1/12/20 for the determination of the following Questions: -

- a. Has the Applicant herein been in open, quiet and uninterrupted occupation and possession of a portion measuring **50 Feet by 100 Feet** in Land Parcel No. **EAST KITUTU/BONYAMONDO I/215** for a period of more than 12 years?
- b. If so, has the said open and uninterrupted occupation and possession of the said portion been adverse to a portion measuring 50 Feet by 100 Feet in the said land parcel No. **EAST KITUTU/BONYAMONDO I/215**?
- c. Has the Applicant therefore acquired Title for the said portion measuring 50 Feet by 100 Feet in the said land parcel No. **EAST KITUTU/BONYAMONDO I/215** under the Provisions of the Laws of Limitation of Actions Act, against the registered proprietor?
- d. Can the Respondent now be compelled to transfer the said portion measuring 50 Feet by 100 Feet in the said land parcel No. **EAST KITUTU/BONYAMONDO I/215** to the Applicant herein and in default can the Deputy Registrar of this Honourable Court be authorized to transfer the same on behalf of the said Respondent to the Applicant?
- e. Who shall bear costs of this suit?

On 22/3/21 the Honourable Lady Justice J.N. Onyango ordered that the suit do proceed to formal proof following the failure by the Respondent to defend the claim.

The Applicant's case was therefore heard in the absence of the Respondent. At the close of the case, I invited counsel for the Applicant to make submissions but he preferred to leave it to court.

From the evidence adduced in court by the Applicant who was the sole witness, the facts are as follows:

Before 2004 the suit land was being wholly occupied by the Respondent. Later, the Respondent sold a portion of the land to the Applicant with defined measurements of 100 X 50 feet at a consideration of Kshs. 200,000/=. The Applicant took possession of the said portion, put up a semi-permanent structure, planted bananas and nappier grass and also deposited building bricks thereon and started using the part of the suit land he had bought. This was some time in 2004.

In support of his case, the Applicant produced as Exhibit 1 a copy of the extract of Title (the green card) dated 29/10/2020 showing the entire land to be registered in the name of the Respondent. When the Applicant approached the Respondent in early 2008 for the latter to have the said portion transferred to him, the Respondent started dodging him. It is also the Applicant's evidence that the Respondent and his family reside on the suit land but not on the portion that he sold to the Applicant and that although he doesn't live on the suit land the Applicant visits the said land quite often and he always meets the Respondent on the rest of the suit land and there has never been any hostility between the two save that the Applicant feels aggrieved by the Respondent's failure to act as requested and give to the Applicant what is duly

his. The Applicant then decided to move the Court.

These are the facts that came out of the evidence in court.

A person who seeks to acquire Title to land through the doctrine of adverse possession by way of occupation of the suit land must establish that he has been in occupation *nec per vim, nec clam, nec precario*, a Latin legal term meaning 'without force, without secrecy, without permission' i.e. nonconsensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims, for the statutorily prescribed period without interruption. He must have the right intent to claim and hold the land in opposition to the rest of the world. He must show, on evidence, that the true owner or persons interested in the property have proper knowledge of the adverse assertion of ownership by the occupant who has no colour of right to the land and has the intent to hold it solely for himself (donated by the exercise of the act of dominion over the land, which includes making ordinary use and taking ordinary profit of which the land is susceptible in its present state).

From the evidence, it is not in dispute that the Applicant has been on the suit premises since 2004. The Applicant testified that after he bought from the Respondent part of the suit land he took possession of the same meaning that he dispossessed the Respondent. The possession must be adverse. Adverse possession is occupation inconsistent with the Title of the true owner; inconsistent with and in denial of the right of the true owner of the premises. The Applicant initially took possession of the 100X50 feet out of the suit premises with the permission of the Respondent.

When does permissive possession become adverse?

If occupation was originally taken with the permission or agreement or license of the true owner, then you must show that on a certain (stated) specific date after the permissive or consensual entry or occupation, the possession began to become adverse or that on such and such a date, the proprietor deliberately abandoned the land or is dispossessed or he discontinued his possession.

It is the Applicant's evidence that he has been using the 100X50 feet of the suit land and the Respondent deliberately abandoned and was dispossessed of his possession of that particular portion. The Respondent has therefore not been occupying the portion of the suit land claimed by the Applicant. It is therefore not in dispute that the Respondent has been dispossessed of the 100X50 feet of the suit land and has not been in actual occupation of the same since 2004. He was dispossessed of it, and did discontinue his possession of it. In the case of N'gati Farmers Co-operative Society Limited –vs- Codicillary Ledidi & Others the Court of Appeal held that: -

“.....the claim for adverse possession requires that the owner has been in possession but is now out of possession (either because he has been dispossessed or because he has simply discontinued possession).

It must be shown by the occupier, that there was dispossession of the proprietor, or discontinuance of possession by the proprietor. “Dispossession” means the adverse possessor comes in and drives out the person in possession from the possession of the land; while “discontinuance” is when the person in possession goes out and is followed into possession by another. And for this I wish to associate myself with the strong views of Chesoni JA (as he then was) in the case of Wanje –vs-Saikwa (No.2) Civil appeal Number 72 of 1982 [1984]KLR at page 288 quoting *Megarry's manual of the laws of real property*:-

“.....in order to acquire by the statute of limitations a Title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.....”

In Mbui vs Maranya Meru HCCC No. 283 of 1990, Justice Kuloba went to great heights to explain discontinuance or dispossession of the proprietor in order to found a claim for adverse possession by stating as follows: -

“..... An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession..... The adverse possession must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil.....there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by the incoming person. A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in Title against the past twelve or more years.”

The other thing a beneficiary of the doctrine i.e. the adverse possessor must show with exactness is the definite portion he occupies. **The land, or portion of land, adversely possessed must be a definitely defined or at least an identifiable portion, with a clear boundary or identification.** The portion given to the Applicant was by measurements and its acreage was very well defined. From the evidence adduced in Court, it is possible to ascertain what portion the Applicant occupies. As well as what acreage it is, 50X100 feet. The same has been fenced.

The upshot of the above is that the Applicant has occupied a well-defined and determinate portion of the suit land for a period of over 12 years, 17 years to be exact 13 of which were without the Respondent's permission and this permission thereafter came to an end in 2008 when the Respondent refused to transfer the same to the Applicant and therefore his use of the land was adverse to the owner's. He also occupied the suit land without secrecy, without permission' i.e. nonconsensual actual, open, notorious, exclusive and adversely and without interruption for the statutorily prescribed period of over 12 years.

The suit therefore succeeds, and judgment is hereby entered in favour of the Applicant in the following terms:

a. The Applicant has acquired Title for the portion measuring 50 Feet by 100 Feet in land parcel No. **EAST KITUTU/BONYAMONDO I/215** under the Provisions of the Laws of Limitations of Actions Act, against the Respondent.

b. The Respondent to transfer to the Applicant herein the portion of land measuring 50 Feet by 100 Feet in the land parcel No. **EAST KITUTU/BONYAMONDO I/215** within the next 60 Days from the date of this Judgment and in default thereof the Deputy Registrar of this Honourable Court is hereby authorized to transfer the same to the Applicant on behalf of the Respondent.

c. The Applicant shall have the costs of this suit which shall be borne by the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF OCTOBER, 2021

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa

Plaintiff's Counsel: Mr. Nyamwange for Mr. Soire

Defendants' Counsel: N/A