



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 19 OF 2020 (O.S)**

**IN THE MATTER OF LAND PARCEL NO. KISUMU/KADONGO/3105**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

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

**BETWEEN**

**PETRO ODONGO OMULO.....APPLICANT**

**VERSUS**

**OKINYA MBAJA**

**ONYANGO MBAJA**

**OUMA MBAJA (Sued as the administrators of the**

**estate of ELIJAH MBAJA).....RESPONDENTS**

**JUDGEMENT**

Petro Odongo Omolo (hereinafter referred to as the applicant) has come to court against Okinya Mbaja, Onyango Mbaja, Ouma Mbaja as the administrators of Elijah Mbaja by way of Originating Summons seeking orders that the applicant be declared to have acquired prescriptive rights over the entire parcel of land number KISUMU/KADONGO/3105 by way of adverse possession and that the Respondents do sign transfer and consent to transfer forms in favour of the applicant, failing which the registrar of the High Court be mandated to sign them. The costs of this suit be borne by the Respondents.

The Originating Summons is based on grounds that the applicant is the son of Omulo who died and left his sons Nichodemus Awala Omulo and Petro Odongo Omulo staying on land parcel no. KISUMU/KADONGO/3105. That later, Nichodemus Awala Omulo died in the year 1967 and left his brother Petro Odongo Omulo staying on land parcel no. KISUMU/KADONGO/3105. Petro Odongo Omulo has stayed on the suit parcel for all his life time and has a family of 12 children all of whom were born and are staying on the suit parcel of land.

Petro Odongo Omulo commenced the process of subdividing the land for his children because he is ageing but has discovered that the suit parcel of land is registered in the name of Elijah Mbaja who is his deceased nephew. That the respondents herein are administrators of the estate of Elijah Mbaja. That the said Elijah Mbaja has his own parcel of land that is different from the parcel of land that the applicant is staying on to wit, KISUMU/KADONGO/3105.

The applicant has had exclusive and uninterrupted use of the suit parcel of land for more than 60 years. That the applicant's use of the suit parcel of land has been open, without secrecy and without any interruption and/or resistance during the entire period.

That the registration of the defendant was due to a mistake on the part of the registry during the process of adjudication and/or fraudulent clandestine moves by the defendant.

That the period within which the defendant could claim the suit parcel back has run out. That it is in the interest of justice for the orders sought to be granted.

The Originating Summons is supported by affidavit sworn by Petro Odongo Omulo who reiterates grounds of the Originating summons.

When the matter came up for hearing, the applicant adopted the supporting affidavit and confirmed that he has lived in the land for more than 12 years.

Section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya 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 provides that: -**

“(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 16** provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

**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.

I do find that the applicant has satisfied the above sections of law and has proved that he has been in possession of the suit parcel of land for more than 12 years which possession has been hostile to the land owner and that his possession has never been interrupted by the defendants. Moreover, the applicant has a fully established home on the said parcel of land with a bubbling family.

The upshot of the above is that his suit succeeds and I do grant orders that the applicant be and is hereby declared to have acquired prescriptive rights over the entire parcel of land number KISUMU/KADONGO/3105 by way of adverse possession.

Further, I do order that the Respondents do sign transfer and consent to transfer forms in favour of the applicant, failing which the Deputy Registrar of the Environment and Land Court be and is hereby mandated to sign them. The costs of this suit be borne by the Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF OCTOBER, 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 2020.

**ANTONY OMBWAYO**

**JUDGE**