



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO. 13 OF 2020 (O.S.)

IN THE MATTER OF L. R. NO UYOMA / RAGENGNI/1731

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

AND

IN THE MATTER OF THE LAND ACT 2012

AND

IN THE MATTER OF ADVERSE POSSESSION

WILSON ARIKA OORO.....1<sup>ST</sup> APPLICANT

JAMES OORO ARUDHI.....2<sup>ND</sup> APPLICANT

-VERSUS-

MORDE KAI MWANGA NANDWA.....RESPONDENT

JUDGMENT

The applicants herein filed an originating summons dated 14<sup>th</sup> February 2020 and sued the defendant claiming that they had acquired parcel No. **UYOMA/RAGENGNI/1731** by way of adverse possession. The applicants sought for the following orders:

**1. THAT** this Honourable Court do order that the property known as **LR UYOMA/RAGENGNI/1731** be declared the property of the Applicants by adverse possession.

**2. THAT** this Honourable Court do order that the property known as **LR UYOMA/RAGENGNI/1731** registered in the names of **MORDEKAI MWANGA NANDWA** the Respondent herein be registered in the names of the 2<sup>nd</sup> Applicant and the register accordingly be amended to read **JAMES OORO ARUDHI** as the rightful owner of that parcel known as **LR UYOMA/RAGENGNI/1731**.

3. Any other relief as the court may deem just and fair to award as the circumstances of the case shall demand.

**4. THAT** the costs and interest of this suit be awarded to the Applicants.

The Originating Summons were served on the Respondent on the 26<sup>th</sup> February 2020 who entered appearance by filing a memorandum of appearance but neither filed a replying affidavit nor a defence

As a consequence, on the 28<sup>th</sup> May 2020 the applicants made an application requesting for interlocutory judgment which was entered by the Deputy Registrar and a date for formal proof was given for 27<sup>th</sup> October 2020. Subsequently the matter was heard during the service week in September 2020.

### **APPLICANTS' CASE**

**PW1 gave evidence and relied on his supporting affidavit in support of the case and his statement dated 14<sup>th</sup> February 2020. It was his evidence that the suit parcel of land LR UYOMA/RAGENGNI/1731 was registered in the name of the Respondent and a title deed issued on the 4<sup>th</sup> November 1987. The applicant produced a copy of the green card as an exhibit before the court.**

PW1 also stated that their ancestors and themselves have lived on the property since time immemorial and the parents of the 2<sup>nd</sup> Applicant respectively, being grandparents of the 1<sup>st</sup> Applicant namely: Mzee Arudhi Ochaka and Mama Margaret Arudhi died and were buried on the land in 1964 and 1987 respectively.

PW1 further stated that he was born in the year 1977 to the 2<sup>nd</sup> Applicant and Mama Margaret Adhiambo Ooro and have been on the land in non- permissive or non- consensual, actual, open, notorious, exclusive and adverse use without interruption and has never seen anybody claim the land or asked them to vacate.

**PW2 NICANOR ODHIAMBO** stated he was born in 1930 in Ragengni and all his life he has only seen the family of the Applicants residing and working on the land and their fore parents were buried there and that no one has come to claim the land.

The evidence of the Applicants was therefore uncontroverted by the Respondent.

### **APPLICANTS SUBMISSION**

Counsel submitted on the law of adverse possession and stated that a party claiming adverse possession must prove that there has been non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by the Applicant and those under whom he claims for the statutory prescribed period without interruption.

Counsel relied on the case of the Court of Appeal case of **MTANA LEWA VS KAHINDI NGALA MWANGANDI (2005) e KLR** where it was 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.”

Mr Odero further submitted that it is a well settled principle that a party claiming adverse possession ought to prove that his possession was **“nec vi, nec clam, nec precario,”** that is, peaceful, open and continuous. The possession should not have been through force, not in secrecy and without authority of permission of the owner.

Counsel also submitted that the applicants have demonstrated that they have been on the land as early as 1930 as supported by PW2 which is more than 12 years. That they have been in occupation and possession of the suit property openly as they live thereon and work on it continuously without interruption for that period. Further that there was no evidence availed to contradict the Applicants averments.

Counsel submitted that the applicants met the threshold by producing a copy of a green card and a certificate of official search confirming that the property is registered in the name of the Respondent.

Counsel cited the case of **CELINA MUTHONI KITHINJI(Suing on her behalf and on behalf of 5 others) –vs- SAFIYA BINTI SWALEH AND 8 OTHERS in ELC CASE NO. 248 OF 2016 AT MOMBASA** on the principles of adverse possession. Counsel further cited the case of **JAMES MAINA KINYA VS CHARLES KENDAKA a.k.a GERALD MICHAEL KWENDEKA ELC CASE NO. 323/2017OS, MURANGA** where the court held that:

“the person alleging the right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.”

Counsel therefore urged the court to find that the applicants have met the threshold to be declared that they have acquired the suit land by way of adverse possession.

### **ANALYSIS AND DETERMINATION**

The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held that:

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It

was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

The applicants must meet the criteria for being declared adverse possessors. The doctrine of adverse possession is a doctrine that takes away the rights of a legal owner when the ingredients are met. That is why the court must ensure that such criteria are present before it can take away legal right to land from a registered owner legally. If the ingredients are not met, then the court must dismiss such an application.

The issue for determination is whether the applicants have proved that they have acquired the suit land by way of adverse possession. In the case of **Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001**, the Court of Appeal held that :

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted.

The applicants stated that they have been on the suit land time immemorial and no one has ever claimed or asked them to move out of the land. Further that they have been in possession openly without secrecy for the period since 1930.

It is unfortunate the respondent was served, filed a memorandum of appearance but never filed a response to the claim. He also never came to court though served with a hearing notice. It seems he was not interested in defending the claim. This case therefore remains undefended.

I have considered the pleadings, the evidence submissions and the relevant authorities and find that the applicants' claim for adverse possession succeeds with costs.

**DATED and DELIVERED at ELDORET this 8<sup>th</sup> DAY OF October, 2020**

**DR. M. A. ODENY**

**JUDGE**