



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO. 258 OF 2016 (O.S)**

**IN THE MATTER OF ADVERSE POSSESSION**

**AND**

**IN THE MATTER OF LAND PARCEL NUMBER SOUTH MUGIRANGO/BOIKANG'A/3313**

**BETWEEN**

**PETER ONG'ONDI.....PLAINTIFF**

**VERSUS**

**CALEB NYABUTO NYAMONGO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff commenced this suit by way of Originating Summons dated 31<sup>st</sup> August 2016 brought pursuant to Order 37 Rule 1 of the Civil Procedure Rules 2010, Sections 7, 17 and 38 of the Limitations of Actions Act Cap 22 of the Laws of Kenya, section 28(h) and 30 of the Land Registration Act 2012 Laws of Kenya, Article 21 (1), 24(1) d, 25 c, 27(27), 28, 40(2) (a) and (b) and 47(1) of the Constitution seeking a determination of the following questions:

- (1) Whether the Plaintiff is entitled to a portion measuring 37.5 feet by 100 feet being part of land parcel number SOUTH MUGIRANGO/BOIKANG'A/3313 by way of adverse possession and whether the same parcel should be sub-divided and the plaintiff registered as absolute owner of his portion.
- (2) Whether an order of permanent injunction should issue to stop, prevent and/or restrain the Defendant from evicting or removing the plaintiff from a portion measuring 37.5 feet by 100 feet being part of land parcel number SOUTH MUGIRANGO/BOIKANG'A A/3313 or in any other way interfering with the plaintiff's quiet enjoyment and occupation of the suit land
- (3) Whether the plaintiff is entitled to the costs of this suit.

2. The Originating Summons was supported by the Plaintiff's affidavit sworn on the 31<sup>st</sup> August 2016. In the said affidavit he depones that he has an *Ad litem* grant in respect of the estate of William Ong'ondi-deceased who is his late father. It is his deposition that sometime in 1986 his late father bought a portion of land parcel SOUTH MUGIRANGO/BOIKANG'A /3313 which was initially known as land parcel No. 985. measuring 25 feet by 100 feet from the Defendant. He later bought an additional portion measuring 12.5 feet by 100 feet in 2000 to make a total of 37.5 feet by 100 feet. He further depones that his late father took immediate possession of the suit property, developed it and stayed thereon peacefully until his demise in 2007 but the Defendant never transferred the suit property to the deceased. After his father's death, the Plaintiff moved into the suit property and has been staying thereon to date. However, on 27<sup>th</sup> July 2016, the Defendant threatened to demolish the Plaintiff's house but he was stopped by the chief. He therefore claims that he is entitled to the suit property by adverse possession.

3. In his Replying Affidavit filed on 24<sup>th</sup> may 2017, the defendant depones that the Plaintiff cannot claim adverse possession on behalf of his late father. He states that the suit property was purchased more than 17 years ago and the Plaintiff's claim is therefore time-barred. He further depones that he was registered as the owner of the suit property on 15<sup>th</sup> March 2016 and a claim of adverse possession cannot be raised against a title which was obtained less than a year before the suit was filed.

## PLAINTIFF'S CASE

4. The suit proceeded by way of *viva voce* evidence and the Plaintiff testified along the lines of his affidavit. He then called two of his brothers Samwel Kennedy Makiya Ong'ondi and George Ong'ondi as PW 2 and PW 3. They stated that their late father had given the suit property to the Plaintiff as he was the least educated in the family and the land would therefore enable him earn a living. In addition to corroborating the Plaintiff's testimony PW2 and PW3 stated in cross-examination that they had learned that their mother had sold the suit property to the Defendant without taking out letters of administration in respect of their late father's estate and without their knowledge.

5. The Defendant called the Plaintiff's mother as DW1. She testified that she purchased the suit property jointly with her late husband though he she did not produce any document to prove that. She stated that she later sold the suit property to the Defendant at a price of Kshs.250,000 in order to settle her medical bills. She admitted that she sold the suit property without obtaining letters of administration and while the Plaintiff was in occupation thereof.

## DEFENDANT'S CASE

6. The Defendant testified as DW2. He told the court that he had sold the suit property to the plaintiff's father in 2000 although he did not transfer it to him. He later bought the same plot from the plaintiff's mother (DW1) in 2016 at a price of Kshs. 250,000. He then had it registered in his name in 2016. He said he did not involve the Plaintiff when he bought the suit property from his mother and that he was aware that the plaintiff's mother did not have a grant in respect of her late husband's estate.

7. DW3 who is one of the Plaintiff's brothers's corroborated the evidence of his mother (DW1). He confirmed that DW1 had sold the suit property to the Plaintiff.

Both parties filed their submissions in which they argued their respective positions.

## ANALYSIS AND DETERMINATION

8. Having considered the pleadings, evidence and parties' submissions, the issues that emerge for determination are:

- i. Whether the Plaintiff is entitled to a portion of land parcel No. SOUTH MUGIRANGO/BOIKANG'A /3313 measuring 37.5 feet by 100 feet by way of adverse possession.
- ii. Whether the suit property should be sub-divided and the Plaintiff registered as the owner thereof.
- iii. Whether the Plaintiff is entitled to a permanent injunction restraining the Defendant from interfering with the suit property.

9. Section 7 of the Limitations of Actions Act provides as follows:-

(a) *"An action to recover land 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"*.

10. After the expiration of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.

Section 38(1) of the Act states as follows;

*"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land."*

11. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

*"From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner"*.

12. It has been held that adverse possession can arise where the entry onto the suit property was consented to. In the case of **Public Trustee v Wanduru, (1984) KLR 314 at 319 Madan, J.A.** stated that *"adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run"*.

13. In the instant suit it is not in dispute that the Plaintiff is the registered owner of land parcel No. SOUTH MUGIRANGO/BOIKANG'A /3313. Even though the Defendant sub-divided the suit property and obtained a title for parcel No. 3313 in 2016 it is apparent from the Certificate of official search produced by the Plaintiff that the suit property was initially registered as parcel No .985. It is an uncontroverted

fact that the Plaintiff's late father purchased a portion of the suit property measuring 25 feet by 100 feet in 1986 and later added a portion measuring 12.5 feet by 100 feet on 25.10 2000 (making a total of 37.5 feet by 100 feet) from the Defendant after which he took possession thereof. The deceased was in continuous, open and uninterrupted occupation of the suit property from 1986 up to the time of his demise in 2007 leaving the Plaintiff in possession. It is also not in dispute that the Plaintiff has developed the suit property by constructing a permanent house, cow shed and toilet as shown in the photos produced by the plaintiff. It is common ground that the suit property was bequeathed the Plaintiff by the deceased as a gift *inter vivos*.

14. In the case of **Peter Mbiri Michuki v Samuel Mugo Michuki (2014) KLR** the Court of Appeal held as follows:

*“Possession of land or any property for that matter need not be actual and physical; possession can also be constructive. In the instant case, the record shows that the plaintiff entered the suit property in 1964; constructed a house thereon in 1970 and put his elder brother to live in the house and the plaintiff together with his wife occasionally visited and lived in the house. These facts on record not only prove actual possession but also constitute constructive possession of the suit property by the plaintiff. The elder brother of the plaintiff was in possession of the suit property by license and permission of the plaintiff. In law, actual possession of any property by a licensee is constructive possession thereof by the licensor”.*

15. The Court further observed that ...*“The record shows that the Plaintiff's possession of the suit property was nec vi, nec clam and nec precario; possession by the plaintiff continued uninterrupted and without force until his death on 25<sup>th</sup> December, 2002; after his death, possession by the plaintiff continued through his dependants and personal representative until 2011 when the appellant demolished the house that had been constructed on the suit property. Our analysis and appreciation of the facts established on the record leads us to conclude that the trial Judge did not error in finding that the 12- year period for adverse possession had been proved”.*

16. Similarly, in the instant suit the deceased was in continuous uninterrupted and open occupation of the suit property for a period of 21 years after which he left the plaintiff in possession for a period of more than 9 years adding up to a total of 30 years before the defendant attempted to evict him. The plaintiff has therefore acquired title thereof by way of adverse possession.

17. In **Mwangi & Another v Mwangi, (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse Possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership. Under section 28 (h) of the Land Registration Act the Plaintiff's rights are recognized as overriding interests that are attached to the land.

18. Perhaps it is in recognition of the fact that the deceased had acquired prescriptive rights over the suit property that the defendant purported to “buy back” the suit property from the Plaintiff's mother in 2016. However, as I mentioned earlier in this judgment, the Defendant did not produce any sale agreement to prove the alleged sale. The purported sale does not meet the requirements of section 38 of the Land Act which provides that a contract for the disposition of an interest in land must be in writing and must be signed by all parties thereto. In any event, by the time the Defendant purported to buy the suit property from the defendant's mother, the plaintiff's right had crystallized.

19. The Defendant's argument that he obtained a title deed in 2016 does not invalidate the Plaintiff's claim. I rely on the case of **Benson Mukuwa Wachira V Assumption Sisters of Nairobi Registered Trustees (2016) Eklr** where the Court of Appeal held as follows:

*“We have also found that adverse possession and running of time did not depend on the issuance to the appellant of a title deed of the suit land and that providing the suit land was registered under the Registration of Titles Act (now repealed) and the appellant (and not the Government or County Government) was its owner, the claim for adverse possession held good”*

20. In the instant case the defendant has not denied that he sold the suit property to the defendant's father in 1986 when it was known as parcel no 985. He could not have sold what was not his. The mere fact that he sub-divided the land after which he remained with the parcel known as SOUTH MUGIRANGO/BOIKANG'A/3313 measuring 12.3 hectares does not make it a different parcel of land. Indeed, the Certificate of official search clearly indicates that parcel no. 3313 is a sub-division of parcel no. 985.

21. Having arrived at the finding that the Plaintiff is entitled to a portion of land measuring 37.5 feet by 100 feet by way of adverse possession, it follows that the said portion should be excised from land parcel No. SOUTH MUGIRANGO/BOIKANG'A/3313 and the Plaintiff registered as the owner thereof. The Plaintiff is also entitled to an order of injunction to restrain the Defendant from interfering with the suit property.

22. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby made that the Plaintiff is entitled to a portion measuring 37.5 feet by 100 feet by way of adverse possession.

The said portion measuring 37.5 feet by 100 feet shall be excised from the defendant's title no. SOUTH MUGIRANGO/BOIKANG'A/3313 and registered in the plaintiff's name.

b) The Defendant shall within 45 days sign all the necessary documents to effect the said transfer failing which the Deputy Registrar, Kisii Court shall sign the necessary documents on behalf of the defendant.

c) A permanent injunction is hereby issued restraining the Defendant from interfering with the suit property.

d) The costs of this suit shall be borne by the Defendant.

**Dated, signed and delivered at Kisii this 3<sup>rd</sup> day of November 2020.**

**J.M. ONYANGO**

**JUDGE**