



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 13 OF 2019 (O.S)

HELLEN AUMA OJUOK.....PLAINTIFF

VERSUS

MARY OMOLLO ODONGO.....1ST DEFENDANT

APOLLO ODHIAMBO GUYA.....2ND DEFENDANT

JUDGEMENT

Hellen Auma Ojuok hereinafter referred to as the Plaintiff comes to this court against Mary Omollo Odongo and Appollo Odhiambo Guya to be declared proprietor of Kisumu/Karateng/1653 by virtue of adverse possession. She prays that the Registrar Lands to be directed that the order herein be the instrument of the transfer of ownership of the said parcel of land. In the supporting affidavit, it is stated that the plaintiffs husband (Patrick Joseph Ojuok) bought a portion of the parcel known as Kisumu/Karateng/35 from Gabriel Sule Obuny in 1973. The 1st defendant was the only child of the late GABRIEL SULE OBUNY. The 2nd Defendant is a cousin to the 1st defendant being that the father to the 2nd Defendant and the father of the 1st Defendant were brothers.

The plaintiff claims that they took possession of the parcel immediately and her husband fully paid for the portion of land and an agreement was entered by between himself and the vendor before the magistrate in Maseno in April 1973. Her husband died on the 16th November 1981.

The portion of land borders her late husband's paternal home which is Kisumu/Karateng/37 and they were working and staying in Nairobi; She allowed her mother in law, MIKAL OKELLO ONYINO, to use the above portion of the parcel of land between the years from 1973 to 1989 until her demise. Thereafter her mother in law passed on she asked her father in law, BOAZ ONYINO, to use the portion of the parcel of land then known as Kisumu/Karateng/35 from the years of 1989 to 1995.

She also allowed her brother in law JOHN OUMA KONYINO, to use this portion of land between the years of 1995 and 2000 before she retired from her work in Nairobi and came home. When she retired from work in Nairobi in the year 2000 she went home and took possession of the parcel. In 1985 a subdivision was done by the late Gabriel Sule Obuny to Kisumu/Karateng/35 to create parcel Kisumu/Karateng/1653 which was registered in his name and which the portion bought by her late husband is situated.

From the date her husband bought the parcel of land from the father of the 1st defendant- Gabriel Sule Obuny in 1973, they took possession and have since had peaceful occupation and use of the land through her family members and herself and has been in peaceful occupation and use of the land for subsistence farming since the year 2000 to date and she is fully dependent on it.

The 1st defendant took up letters of administration of her late father's estate and then transferred the portion known as Kisumu/Karateng/1653 into the name of the 2nd defendant. The parcel is now in the names of the 2nd defendant. Her husband passed on in November 1981 but she has continued to use and occupy the portion that the father to the 1st defendant sold.

According to the plaintiff, the parcel of land which was bought in Kisumu/Karateng/35, now Kisumu/karateng/1653 was approximately two (2) acres but in actuality it is 0.23Ha.

She prays that this court declare that she has been in peaceful occupation of this portion of land as drawn by the surveyor for over 45 years and declare that she has obtained it via adverse possession and title be issued in her name.

In the replying affidavit, Mary Omollo states that land in dispute was registered in the names of the father until his demise in 1993 and that upon his demise she was the only beneficiary. She did succession proceedings in 1998. Parcel of land number Kisumu Karateng/1653 was

registered in her father's name on 22/1/1983. The land was transferred to the 1st Defendant in the year 1999. She transferred the land to her cousin, the 2nd defendant on 21/6/2018. When the matter came up for hearing it was agreed that the matter be dealt with by way of written submissions.

I have considered the Originating Summons, Supporting affidavit and the replying affidavit and the rival submissions and do find that the plaintiff is in possession of a portion of land that initially belonged to Sule Obuny. According to the affidavit sworn by Sule Obuny and P. Joseph Ojuok in April 1973, Sule Obuny was the owner and proprietor of plot no. Kisumu/Karateng/35.

In the year 1973, the said Sule Obuny made agreement with Joseph Ojuok for purchase of a portion of the said land. Patrick Joseph Ouok paid Kshs 700 in full settlement of purchase price. It is admitted by the 2nd respondent that the plaintiff has been in possession of the land. In paragraph 12 of the replying affidavit the 2nd respondent states that the land was ***“Just given as a sign of help and as a result of the respondent's family good heart...”***

He does not state that it was given by who but it is assumed that it was given by the owner of the land Sule Obuny who had received Kshs. 700 in 1973 from Joseph Ojuok for purchase of a portion of the said land.

The 2nd Respondent does not state when the plaintiff's father was given the land.

According to the plaintiff, the portions of land was taken in 1973 there is no serious challenge on that allegation by the defendants.

In the supporting affidavit, **John Ouma Omollo** a resident of the area and brother to the late Patrick Joseph Ojuok who married the plaintiff, his brother bought a portion of land parcel number Kisumu/Karateng/35 and immediately took possession. The land has been used by the family members including the plaintiff.

David Otiande states that he was born in 1958 on ancestral land number Kisumu/Karateng/16 that borders the suit parcel. He states that the plaintiff's family has been using the land as it is in possession.

Amos Aringo Ajumbo born in 1974 and having lived in the area of the suit parcel since birth states that the plaintiff's family has been in occupation of the land.

The law on Adverse Possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by the courts. In **Wambugu –v- 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 requirements for Adverse Possession in Kenya has also been set out in the case of **Mbira –v- Gachuhi (2002) IEALR 137** in which the court held that:

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

Likewise, in **Jandu –v- Kirplal & Another (1975)EA 225**, it was held:

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

The ingredients were recently discussed by the court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR** 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 a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was *“nec vi, nec clam, nec precario,”* that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

I do find that the plaintiff has demonstrated to have been in possession of the suit land since 1973 until now. There has been no attempt to evict her. The Defendants have never come to court challenging her possession. The plaintiff has proved her case on balance of probability and therefore i do declare that she has been in peaceful occupation of this portion of land as drawn by the surveyor for over 45 years and

declare that she has obtained it virtue of adverse possession and title be issued in her name.

The Deputy Registrar Environment and Land Court Kisumu is hereby directed to execute the application for consent to subdivide and transfer the land to the plaintiff. Costs to the plaintiff. Orders accordingly.

DATED AND DELIVERED THIS 12th DAY OF MARCH, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the Presence of:

Mr Kobimbo for Qieu for plaintiff

M/S Owiro for the defendant

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE