



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 35 OF 2018 (OS)**

**BENARD OTIENO MOMANYI..... PLAINTIFF**

**VERSUS**

**PAUL OGANGO OGADA..... DEFENDANT**

**JUDGMENT**

The Plaintiff brought this suit by way of Originating Summons dated 25<sup>th</sup> July 2018, seeking a declaration that the Plaintiff has acquired title to Land Parcel SIAYA/KAKUM-KOMBEWA/1731 by way of adverse possession; and an order directing the Siaya Land Registrar to transfer the parcel to the Plaintiff.

The Plaintiff's case is that sometime in 2001, his uncles Stephen Ouma Ochieng and James Onyango Odongo alias Majimbo Osur bequeathed and gave him the suit parcel which his mother was entitled to and they allowed him to occupy and use the same. The Plaintiff stated that he took possession of the suit parcel from 2001 and has been tilling the land to date. That when the Plaintiff and his uncles went to establish the ownership of the land, they discovered that the suit parcel was registered as being owned by the Defendant.

The Plaintiff stated that to resolve the matter amicably, the Land Registrar wrote to the Defendant, who was served with the letter by the area chief, to attend a mediatory meeting at the Land Registrar's office but he declined to attend the meeting.

The Plaintiff asserted that he has continuously used the land since it was registered in the name of the Defendant for a period of more than 12 years and that he has used the land as the true owner. That the Defendant never resided on the land and has never raised any complaints or interference. That the Defendant has not made any developments and/or shown any interest over the suit parcel over the years. In support of his claim, the Plaintiff attached a copy of the green card and a copy of the letter from the Land Registrar.

In reply the Defendant stated that the Plaintiff is not in actual, active and physical possession of the suit parcel. That the Plaintiff, in cahoots with one Majimbo Odongo Osur, illegally entered in to the suit parcel in 2017 and planted seedlings in a bid to institute this suit. The Defendant asserted that the Plaintiff's claim does not meet the parameters/threshold for a claim to land on account of adverse possession. The Defendant attached to his replying affidavit a copy of a letter from the Assistant Chief Kakum-Kombewa Sublocation stating that the Plaintiff has never constructed any structure or settled on the suit parcel, and that the Assistant Chief came to know about the Plaintiff's interest when he brought the letter from the Lands office dated 24<sup>th</sup> April 2017. The Defendant also attached photographs of the seedlings allegedly planted by the Plaintiff.

**Plaintiff's Submissions**

Counsel for the Plaintiff submitted that the Defendant had allowed the Plaintiff and his family to till, plant and harvest their produce without any interference or objection and that the Defendant never took any action to report any trespass or acts of intrusion by an unauthorized person. That showed that the Plaintiff allowed peaceful occupation or utilization of the land by the Plaintiff and his family. Counsel cited ***Celina Muthoni Kithinji (Suing on her own behalf and on behalf of 5 others) v Safia Binti Swale and 8 others [2018] eKLR*** for the proposition that adverse possession is where a person had actual, exclusive, open and notorious possession of land and the person having title to it omits or neglects to take action against such a person in assertion of his title for 12 years.

**Defendant's Submissions**

Counsel for the Defendant submitted that a person seeking interest in land by way of adverse possession must prove that the Defendant is the owner of the land; that he/she entered without permission of the Defendant; that he/she has been in occupation against the interests of the Defendant; and the possession or occupation has been open, overt and exclusive. Counsel submitted that based on the evidence on record, the Plaintiff had not satisfied the ingredients necessary for a claim of adverse possession.

**Issues for Determination**

1. Whether the Plaintiff has acquired title to the suit land by way of adverse possession

The Court of Appeal in ***Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others*** [2018] eKLR enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See **Jandu vs. Kirplal & Another (1975) EA 225**. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in **Wambugu vs. Njuguna [1983] KLR 173.**”

The Plaintiff herein has not sufficiently demonstrated through evidence that he had been in non-permissive, open, notorious and adverse use or occupation of the suit parcel for an uninterrupted period of 12 years. He states in the supporting affidavit that he entered the land in 2001 whilst the defendant counters the same by stating that the plaintiff entered in 2017. The plaintiff did not file a supplementary affidavit to counter the allegations in the replying affidavit on the above allegations and the allegations that the plaintiff planted seedlings in 2017. The plaintiff has not demonstrated that he was in control of the suit land before 2017. Moreover, the letter by the district land registrar dated 24<sup>th</sup> April 2017 addressed to the defendant through the assistant chief indicated that the title deed of the suitland did not correspond to the parcel of land in dispute hence there was need for correction. The letter by the chief dated 4<sup>th</sup> Day of May 2017 To Paul Oganga Ogada indicates that the plaintiff entered the land in 2017. Taking the two letters in consideration, and the fact that the plaintiff’s uncles never swore any affidavit, it is my considered view that the plaintiff has not proved his case as required by law. The upshot of the above is that the suit is dismissed with costs.

**DATED, DELIVERED AND SIGNED THIS 27<sup>th</sup> DAY OF APRIL, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**