



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISII

ELC CASE NO. 222 OF 2017

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF LR. NO. BASSI/BOGETAORIO II/62, A PORTION MEASURING 0.22 Ha

JACKSON ANDREW NYABUTO.....PLAINTIFF/ APPLICANT

VERSUS

DAVID OGEGA OMARE.....DEFENDANT/RESPONDENT

JUDGMENT

INTRODUCTION

1. The Plaintiff brought the instant Originating Summons under Order 37 Rules 7 & 14 Civil Procedure Rules and Section 38 of Limitation of Actions Act, seeking a determination of the following issues;

- a. A declaration that the Defendant/Respondent's right to recover a portion of the land known as LR. No. Bassi/Bogetaorio II/62 measuring 0.22 Ha is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff/ Applicant herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years;
- b. There be an order that the Plaintiff/Applicant be registered as the proprietor of a portion of LR. No. Bassi/Bogetaorio II/62 measuring 0.22 Ha in place of the Defendant/Respondent who currently holds the title of the suit land;
- c. There be an order that the Plaintiff/Applicant be registered as the proprietor of a portion of the land parcel No. LR. No. Bassi/Bogetaorio II/62 measuring 0.22 Ha in place of the Defendant/Respondent who currently holds the title to the suit land;
- d. The portion measuring 0.22 Ha out of land LR. No. Bassi/Bogetaorio II/62 measuring 0.9 Ha be subdivided and the title in respect thereof be issued in favour of the Plaintiff/Applicant
- e. There be an order restraining the Defendant/Respondent either by himself, agents, servants and/or employees from interfering with the Plaintiff/Applicant's peaceful possession and occupation of the said portion of land measuring 0.22 Ha comprising of all the parcel of land known as LR. No. Bassi/Bogetaorio II/62 measuring 0.9 Ha in any manner whatsoever and/or howsoever;
- f. The Deputy Registrar and/or the Executive Officer of the Honourable High Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of land measuring 0.22 Ha comprising the parcel of land known as LR. No. Bassi/Bogetaorio II/62 measuring 0.9 Ha in favour of the Plaintiff/Applicant, in the event of default by the Defendant/Respondent to execute the necessary transfer instruments;
- g. Costs of this originating summons be borne by the Defendant /Respondent.

h. Such further and/ or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

BRIEF BACKGROUND

2. In the affidavit in support of the Summons, the Plaintiff averred that he had purchased 0.22 Ha of land parcel LR. No. Bassi/Bogetaorio II/62 (herein “the plot”) from the Defendant’s father Omare Morangi (deceased) by a written agreement on 1st July 1998. He claimed that despite the chief’s intervention, the Defendant and his brothers had refused to transfer the plot into his name. The Plaintiff deposed that he had been in occupation of the plot for a period exceeding 18 years and the Defendant, who had been registered as the owner of LR. No. Bassi/Bogetaorio II/62 in 2016 was aware of this. The Plaintiff asserted that he had acquired adverse rights over the plot and argued that the same ought to be transferred and registered into his name.

3. In his reply to the Originating Summons the Defendant admitted that he was the owner of LR. No. Bassi/Bogetaorio II/62. He stated that the Plaintiff’s claim that his father had sold to him land was deceptive, since his late father was illiterate and mentally incompetent to engage in any binding contract. The Defendant also claimed that the land was ancestral land and could not be sold without his written consent. He denied participating in any attempt to resolve the matter with elders and was adamant that the Plaintiff had not attained the requirements for adverse possession. The Defendant also claimed that he was in occupation of the property and his parents had been interred in the land according to custom. He therefore urged the court to dismiss the Plaintiff’s claim.

4. Directions were taken to have the matter disposed through viva voce evidence. When the matter came up for hearing, the Plaintiff reiterated the averments in his supporting affidavit and added that he had taken possession and had been living on the plot with his family since 1998 when he bought it. The Defendant did not testify despite being served with a hearing notice.

ANALYSIS AND DETERMINATION

5. Having considered the parties’ averments, the evidence and the Plaintiff’s written submissions, I found that the sole issue commending itself for determination herein is whether the Plaintiff has acquired title to the plot through adverse possession.

6. The concept of adverse possession was defined by the Court of Appeal in the case of **Mtana Lewa v Kahindi Ngala Mwangandi Civil Appeal No. 56 of 2014 [2015]eKLR** thus;

Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

7. It is the Plaintiff’s case that he has been in continuous, notorious and uninterrupted occupation of the plot for a period of more than 12 years since he purchased it from the Defendant’s father on 1st July 1998. To support his claim the Plaintiff produced the sale agreement and a series of acknowledgements to show that he purchased the land at a sum of Kshs. 30,000/= and made the final instalment of the purchase price on 21st October 2001. He argues that time began to run from the day he paid his final instalment.

8. In **Public Trustee v Wanduru Ndegwa CIVIL APPEAL NO. 73 OF 1982 [1984] eKLR** Madan JA held;

“The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive (as the learned judge found it to be so in this case) 28 Halsbury 4th Edition paragraph 769. Under section 9 of the Act the right of action accrues on the date of dispossession or discontinuance”.

9. The above authority is clear that time begins to run from the day the owner is dispossessed of his land as opposed to the day the full purchase price is paid as argued by the Plaintiff. Thus the Plaintiff proved that he had been in occupation of the land for the requisite period of time since by the time he filed this suit on 23rd November 2017, 19 years had lapsed from the time he took possession of the plot in 1998.

10. There is no evidence to show that the Plaintiff’s occupation of the plot was disrupted. He rightly argues that the transmission of the land into the name of the Defendant did not interfere with his adverse possession. On this, I find useful guidance in the case of **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others Civil Appeal No. 35 of 2002 [2004] eKLR** where the Court of Appeal held;

“A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – (see Githu v Ndeete [1984] KLR 776)”.

11. Although he entered appearance and filed a response to the Plaintiff’s Summons, the Defendant did not testify when the matter came up for hearing. He did not produce any evidence to support his claim that his father had no capacity to sell the plot to the Plaintiff. Moreover, **Section 7 of the Limitation of Actions Act** prohibits actions for recovery of land twelve years from the date when the right of action accrued. In this case, twelve years have lapsed from when the plaintiff purchased the land. Any action based on the purchase would therefore be time barred.

12. Since the Plaintiff’s claim that he has had open, continuous and hostile occupation of the plot for the requisite period has not been challenged, I find that his claim for adverse possession has merit.

13. For the foregoing reasons, I enter judgment for the Plaintiff and issue the following final order;

- a. The Plaintiff/Applicant is hereby declared to have acquired by way of adverse possession a portion measuring 0.22 Ha of LR. No. Bassi/Bogetaorio II/62;
- b. It is hereby ordered that LR. No. Bassi/Bogetaorio II/62 be sub-divided into two portions and the portion measuring 0.22 Ha be registered in the name of the Plaintiff/Applicant;
- c. The Respondent/Defendant be and is hereby ordered to execute all documents and take steps necessary to effect transfer of the portion measuring 0.22Ha of LR. No. Bassi/Bogetaorio II/62 to the Plaintiff/Applicant;
- d. In default of c) above the said documents be executed by the Deputy Registrar of this Honourable Court;
- e. The Defendant/Respondent either by himself, his agents, servants and/or employees is permanently restrained from interfering with the Plaintiff/Applicant's peaceful possession and occupation of the said portion of land measuring 0.22 Ha comprising of all the parcel of land known as LR. No. Bassi/Bogetaorio II/62;
- f. The Defendant/Respondent shall bear the costs of this suit.

Dated, signed and delivered at Kisii via Zoom this 28th day of May, 2020.

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J.M. ONYANGO

JUDGE