



**REPUBLIC OF KENYA**

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

**HCC NO.49 OF 2007**

**JEREMIAH WALTER OWUOR**

**MARTIN OWOUR OGOT**

**NELSON ZADOK OTIENO (Suing as the administrators of the Estate of**

**MANASSE OGOT (Deceased) ..... PLAINTIFFS**

**VS**

**LUCAS ONG'INJO GOGO.....DEFENDANT**

**JUDGEMENT**

1. This judgment concerns an originating Summons (O.S) which was amended and filed on 12/4/2011. The application was brought by the plaintiff – **NELSON ZADOCK OTIENO** – against the defendant **LUCAS ONG'IJO GOGO** -and concerns land parcel No. **EAST ALEGO/MUR-NGIYA/1694 (Suit land hereafter)**.
2. The plaintiff, who sues as administrator of the estate of the deceased **MANASSE OGOT**, says he is entitled to the suit through the doctrine of adverse possession.
3. The plaintiff wants the court to determine and order as follows:

- I. **That the plaintiff and the deceased be decreed as owners of 0.11 Ha of the suit land which they are entitled to by virtue of adverse possession and the defendant be ordered to transfer title to the suit land to the plaintiff and the estate of the deceased.**
- II. **That the plaintiff do execute all the transfer forms failing which the deputy registrar, High court to do so.**

**(III) That this court do make other orders it may deem necessary .**

**(IV) Costs be provided for.**

4 . The supporting affidavit accompanying the application states, interalia, that plaintiff and the deceased – **MANASSE OGOT** – started using the suit Land way back in 1973, and in 1975 they erected a building which comprises a bar, hotel and residential rooms. They having been leasing the property and receiving rent over the years.

5. It appears that the property was situated on original parcel No.**EAST ALEGO/MUR-NGIYA/317** which the defendant subdivided into several parcels in year 2003. The property then became situate on the suit land.
6. The defendant did not register the plaintiff and the deceased as owners of the suit land, he instead

- threatened to evict them. All this notwithstanding that the plaintiff and the deceased had occupied, utilised and developed the suit land for a long time.
7. The longevity of the occupation, plaintiff said, coupled with its continuous nature entitled the plaintiff to adverse possession. And that is what he is claiming.
  8. It appears clear that the defendant didn't respond to the amended originating Summons. He had however responded to the earlier originating Summons filed on 24/4/2007. The response was vide a replying affidavit filed on 28/5/2007. That response must therefore be deemed as a response to the amended Originating Summons.
  9. According to the defendant the plaintiff and the deceased were permitted occupation and allowed to construct a building in 1995. The permission was to run for 25 years. The plaintiff and the deceased were not to pay rent but were to leave the building after 25 years.
  10. The 25 years expired in year 2000 and the defendant intimated to the plaintiff that their time was up. The plaintiff refused to leave. A dispute arose which was referred to the area chief. Yet another dispute – **CM CC No. 8745/04** – was filed at law courts, Nairobi, by the plaintiff. The case sought to declare the plaintiff as absolute proprietor of parcel No.4, **Ngija** which is the same as the suit land. The case is said to have been dismissed.
  11. In the suit in land, the plaintiff is said to have deposed in an affidavit availed here as “**LOG 3**” that they were on the suit land through permissive use and occupation.
  12. According to defendant the period allowed the plaintiff was 25 years and that period expired in year 2002. This suit was filed on 24/7/2007 and 12 years therefore had not expired. And adverse possession and possession with permission can not co-exist, the defendant said. The plaintiff further said that from year 2000, there have been several cases, one being the **Nairobi one (Supra)** while the other is **Kisumu HC MISC.270/07**.
  13. No hearing took place in this matter; Submissions were filed instead. The plaintiff's submissions were filed on 29/10/2013. According to the plaintiff, there has been open, continuous and uninterrupted occupation and possession of the suit land since 1974. And all that has been without permission. This constitutes adverse possession and the decided case of **KASUVE VS MWAANI INVESTMENTS LIMITED** and others:(2004) IEA was cited to reinforce this point. This court was urged to grant the orders sought.
  14. The defendant's submissions were filed on 28/10/2013. According to defendant, the plaintiffs entered the land with permission from the plaintiff's father.

The period of use and occupation was 25 years. The period expired in year 2000. From that time, there has not been peaceful occupation. Several cases have arisen. The plaintiff cited the case of **KWEYU VS OMUTO: Civil Appeal No. 8 of 1990, Kiisumu**, to show that adverse possession and possession with permission cannot co-exist.

15. The plaintiff was also faulted for not annexing a draft copy of title of the suit land to the affidavit supporting his Originating Summons. This omission is said to run afoul of order 37 rule 7(2) of Civil Procedure Rules and the holding in **WASUI VS MUSIMBA (2002) KLR 397 and CHACHA VS MANINI (2002) KCR 2002(2)**.
16. I have considered the material availed. Two things are crucial in the determination of the matters. They are:

**(a) Did the plaintiff have permission to enter and use the suit land?**

**(b) Is it necessary to annex a copy of title to the originating Summons?**

17. According to the plaintiff, there was no permission to enter and use the suit land. According to submissions of plaintiff there is no evidence of agreement to that effect and no consideration is shown to have been given. According to the defendant however, the entry and occupation of the suit land by the plaintiff was by permission. The defendant is said to have referred to such permission in the case he had filed in Nairobi. I have looked at the records. There is indeed such averment at paragraph 2 of an affidavit (**marked LOG 3**) sworn by the plaintiff in that case. Indeed, further evidence of that is to be found at paragraph 3 of the plaint in that same case.

18. When the plaintiff therefore says there was no permission, he is being less than honest. It seems clear to me that when the plaintiff decided to file a claim of adverse possession, he had the benefit of hindsight. He knew that proof of permission would be detrimental to his cause, hence the denial.
19. The other consideration is about annexing the title to the affidavit in support of the Originating Summons. This is a mandatory requirement contained in order 37 rule 7(2) of Civil Procedure Rules, 2010. The plaintiff has not annexed any extract or copy of title. Instead what I see is a copy of green card. The copy however concerns parcel **No.317**. It shows clearly that the defendant and one **P.O. Ngiya** were entitled to it in half shares. It shows further that the land was further subdivided into several smaller portions which included the suit land. It does not show in whose name or names the parcels were registered.
20. In a claim for adverse possession, the plaintiff has to show that he claims the land he uses as of right: **NEC VI, NEC CLAIM, NEC PRECARIO**. (no force, Secrecy, no evasion). The possession of the land must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; see **WANYOIKE GATHURE VS BENVERLY (1965) EA 514**.
21. Permission and adverse possession can not co-exist, see **KWEYU VS OMOTO C.A. No.8 of 1990 Kisumu**. So where the defendant shows that the plaintiff is on the land through permissive use, that defeats the claim of adverse possession.
22. An extract of title needs to be annexed to the supporting affidavit accompanying the application for adverse possession. This is a mandatory requirement and there is no escaping from it. And the decided cases of **WASUI VS MUSIMBA (2002) KLR PAGE 397-405 and CHACHAS VS MANINI (2002) KLR 2 PAGE 83-88** which the defendant cited, endorse and reinforce the legal position.
23. Records show that the plaintiff has tried through various court processes to be declared the owner of the suit land. He has not been successful.

This suit itself is yet another of the plaintiff's effort in that direction. As can be gleaned from our analysis so far, he is also bound to fail. It was shown well that he was on the suit land with permission. And he failed to annex an extract of title to the suit land in his application. All this is fatal to his case. And from year 2000 up to date, the plaintiff can not talk of continuous, unchallenged and uninterrupted possession. He has had cases with the defendant.

24. The upshot is that the plaintiff's claim is not proved on a balance of probabilities. The claim is therefore hereby dismissed with costs.

**A.K. KANIARU**

**ENVIRONMENT & LAND – JUDGE**

**7/5/2015**

**7/5/2015**

A.K. Kaniaru J.

John Ogendo court clerk

No party present

Amondi for Applicant

Odeny for Ndeda M/S for Respondent.

Interpretation English/Kiswahili

Court: Judgment read and delivered in open court. Right of appeal 30 days.

**A.K. KANIARU**

**ENVIRONMENT & LAND – JUDGE**

**7/5/2015**