



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO. 203 OF 2017

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF A CLAIM BY ADVERSE POSSESSION OF KISUMU/KANYAKWAR "A"/75 MEASURING 0.11 HA

BETWEEN

GRACE MONICA AKETCH ONYANGO.....PLAINTIFF

VERSUS

ARTHUR WILLIAM OGWAYO.....1ST DEFENDANT

JACTON BLASIO LUKE AKUMU.....2ND DEFENDANT

J U D G M E N T

GRACE MONICA AKETCH ONYANGO (the plaintiff herein) filed this Originating Summons on 15th June 2017 seeking against **ARTHUR WILLIAM OGWAYO** and **JACTON BLASIO LUKE AKUMU** (the defendants herein) the following orders with respect to land parcel **NO KISUMU/KANYAKWAR "A"/75** (the suit land): -

- 1. The plaintiff be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1984 of all that parcel of land comprised in title LR NO KISUMU/KANYAKWAR "A"/75 within Kisumu County.**
- 2. The plaintiff be registered as the sole proprietor of the whole parcel of land namely L.R NO KISUMU/KANYAKWAR "A"/75 in place of the named defendants in whose favour the land is currently registered.**
- 3. The defendants by themselves, tenants, servants and/or agents of any other person claiming through them in respect of L.R NO KISUMU/KANYAKWAR "A"/75 deliver title document and any other last original indentures to the suit parcel to the plaintiff.**

The Originating Summons was premised on the grounds set out therein and also supported by the plaintiff's affidavit dated 14th June 2017. The plaintiff also filed the statement of her witness **JEANE HELLEN ONYANGO** and the following documents: -

- 1. Photograph of the homestead.**
- 2. Certificate of Search in respect to the suit land.**
- 3. Green Card in respect to the suit land.**

Being un - able to trace and serve the defendants with the Originating Summons, the plaintiff moved the Court vide her Notice of Motion dated 3rd September 2018 seeking orders to serve them by substituted service. On 17th September 2018, **KIBUNJA J** granted the application and allowed the plaintiff to serve the defendants through one of the newspapers. The record shows that the defendants were subsequently served through an advertisement in the **STANDARD NEWSPAPER** of 2nd September 2019. To date, the defendants have not entered appearance nor filed any defence. When the matter was placed before **OMBWAYO J** on 9th March 2020, the Judge directed that it

be heard on 7th October 2020. The case was therefore placed before me for hearing on 1st September 2020 during the service week at the Environment and Land Court Kisumu.

The basis of the plaintiff's claim is that the suit land was previously owned by one **OKUMBE** before she purchased it in 1984. She then fenced it and in 1987, she constructed permanent houses thereon. She has remained in un-interrupted occupation of the suit land since then but when she conducted a search at the Land Registry Kisumu, she found that the suit land is currently registered in the names of the defendants. It is her case that the defendants' title to the suit land has been extinguished by her continuous, open and un-interrupted occupation thereof hence this Originating Summons.

However, when the suit came up for hearing on 1st September 2020, the plaintiff did not attend. The Court was informed both by her counsel **MR KOYO OMONDI** and her daughter **JEANE HELLEN ONYANGO (PW 1)** that the plaintiff could not attend Court for trial as she was un-well and bed ridden. The Court was also informed that the plaintiff had granted her daughter authority to act on her behalf.

JEANE HELLEN ONYANGO (PW 1) told the Court that she is the plaintiff's daughter and is familiar with the facts in this case. She stated that she was a witness when the plaintiff purchased the suit land in 1984 from one **OKUMBE**, fenced it and constructed permanent houses thereon in 1987 from where she has continued to collect rent without any interruption. It was only in 2017 that they discovered that the defendants are the registered proprietors of the suit land. She added however that the plaintiff has peacefully lived on the suit land. In addition to her oral testimony, the witness adopted as her evidence the un-dated statement filed together with the Originating Summons.

As I have already stated above, the defendants did not file any reply to the Originating Summons though served by substituted service. The plaintiff's averments are therefore not rebutted. That notwithstanding, this Court is bound to consider the evidence on record and satisfy itself that the plaintiff has met the threshold to warrant the orders that she is entitled to the suit land by way of adverse possession.

Before I do so, however, I must consider the value of the Authority to Act granted to **JEANE HELLEN ONYANGO (PW 1)** by the plaintiff herein and dated 31st August 2020. The same was filed on 1st September 2020 shortly before the trial commenced. It reads: -

“AUTHORITY TO ACT

DATE: 31ST AUGUST 2020

TO WHOM IT MAY CONCERN

I, the undersigned hereby authorise JEANE HELLEN ONYANGO to appear, plead and act on my behalf in ELC SUIT NO 203 OF 2013 proceedings before this Honourable Court

Signed

GRACE MONICA AKETCH ONYANGO.”

The said Authority to Act bears the plaintiff's thumb print.

While **Order 9 of the Civil Procedure Rules** allows a recognized agent or an advocate to act on behalf of a party, there are requirements that need to be fulfilled before such agent can act. **Order 9 Rule 1 of the Civil Procedure Rules** provides as follows: -

“Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate appointed to act on his behalf

provided that –

(a) any such appearance shall, if the Court so directs, be made by the party in person.”

Order 9 Rule 2(a) of the Civil Procedure Rules then goes on to describe the categories of such agents. It states as follows: -

(a) “subject to approval by the Court in any particular suit, persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) –

(c) – ” Emphasis added.

It is clear from the above that before one can act as an agent of a party in proceedings, he must hold a Power of Attorney and be approved by the Court. In the circumstances of this case, **JEANE HELLEN ONYANGO** does not hold any power any Power of Attorney donated to her by the plaintiff. At least none was exhibited before me. The issue of her approval to act and testify on behalf of the plaintiff does not

therefore arise for my consideration. It is instructive to note, however, that prior to authorizing **JEANE HELLEN ONYANGO (PW 1)** to act on her behalf on 1st September 2020, the plaintiff had at the institution of this suit thumb – printed both her supporting affidavit and witness statement on 14th June 2017 when she filed the Originating Summons on 15th June 2017 which was drawn and filed by her advocate. The authority to act was filed three (3) years later when she became ill and bed – ridden. The sole purpose was to enable **JEANE HELLEN ONYANGO (PW 1)** to testify on her behalf and, as is now clear, that was not permitted in law.

Having said so, is the fact that the plaintiff did not personally appear to testify in support of her claim and also that **JEANE HELLEN ONYANGO (PW 1)** holds no Power of Attorney to do so on her behalf fatal to the plaintiff’s case? The legal position is that a plaintiff need not appear personally to testify in support of his/her case if another witness can testify and prove the plaintiff’s claim. **Order 18 Rule 2(1) of the Civil Procedure Rules** provides as follows: -

“On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.”

In considering the then **Order 17 Rule 2(1)** of the then **Civil Procedure Rules** which is now **Order 18 Rule 2(1)**, the Court of Appeal in the case of **JULIANNE ULRIKE STAM .V. TIWI BEACH HOTEL LTD C.A CIVIL APPEAL NO 57 OF 1996 [1998 eKLR]** said: -

***“There is no reference in this rule to the plaintiff himself giving evidence first or at all. But the plaintiff is bound to produce evidence in support of the issues which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff’s counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel*”**

Guided by the above, I must now consider whether the evidence of **JEANE HELLEN ONYANGO (PW 1)** is sufficient to prove the plaintiff’s case.

It is clear from the evidence of **JEANE HELLEN ONYANGO (PW 1)** that she is familiar with the facts of this case. She testified as to how she was present when the plaintiff purchased the suit land in 1984 from the late **OKUMBE**, when it was fenced and permanent houses constructed thereon in 1987 and that the plaintiff has continued to be in open and uninterrupted occupation thereof. She added that she is the one who has been collecting rent on behalf of the plaintiff. **Section 38(1) of the Limitation of Action Act** provides 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 the proprietor of the land.”

In **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 K.L.R 184**, the Court of Appeal stated as follows: -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

In **WAMBUGU .V. NJUGUNA 1983 KLR 174**, the Court stated that a party claiming land by adverse possession has to show that he has been in occupation and possession of the land in dispute for a period in excess of 12 years having dispossessed the owner or by the owner having discontinued his possession thereof. The un – controverted evidence of **JEANE HELLEN ONYANGO (PW 1)** is that since the plaintiff developed the suit land in 1987, neither the defendants nor any other person has interfered with her occupation and possession thereof. And although the agreement between the plaintiff and the late **OKUMBE** was not availed, the claim to the suit land is anchored on adverse possession a concept that was described in **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL NO 56 OF 2014 [2015 eKLR]** as follows: -

“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, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential pre – requisite 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.”

The Green Card shows that the suit land was first registered in the joint names of the defendants on 26th August 1986 before they obtained the title deed thereto on 8th October 1992. Time for purposes of adverse possession therefore started running in 1986 when the suit land was first registered. This suit was filed on 15th June 2017 which means that the plaintiff has been in peaceful, open exclusive and un – interrupted occupation and possession thereof for thirty one (31) years. As the defendants did not file any response to the Originating Summons having been served through an advertisement in the **STANDARD NEWSPAPER**, and believing the un – controverted testimony of **JEANE HELLEN ONYANGO (PW 1)** as I hereby do, I am satisfied that the plaintiff has proved her case as required in law.

The up – shot of the above is that there shall be Judgment for the plaintiff against the defendants in the following terms: -

- 1. The plaintiff is declared to have become the legal owner by adverse possession of all that parcel of land comprised in title NO L.R KISUMU/KANYAKWAR/“A”/75 within KISUMU COUNTY the rights of the defendants having been extinguished by operation of the law.**
- 2. The Land Registrar Kisumu shall register the plaintiff as the proprietor of the land comprised in title NO L.R KISUMU/KANYAKWAR/“A”/75 in place of the defendants and the register shall be amended accordingly.**
- 3. The defendants shall execute all the relevant documents to facilitate the registration of the land parcel NO KISUMU/KANYAKWAR/“A”/75 in the name of the plaintiff within 30 days from the date of this Judgment.**
- 4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to execute all such documents on behalf of the defendants.**
- 5. There shall be no orders as to costs.**

Boaz N. Olao.

J U D G E

30th September 2020.

Judgment dated and signed at **BUNGOMA** this 30th day of September 2020. To be delivered by electronic mail in keeping with the guidelines following the **COVID – 19** pandemic and as was advised to counsel at the end of the trial on 1st September 2020.

Boaz N. Olao.

J U D G E

30th September 2020.