



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 24 OF 2019 (O.S)

IN THE MATTER OF AN APPLICATION FOR DECLARATION OF EXTINCTION OF THE INTEREST AND RIGHTS OF REGISTERED PROPRIETOR AND OWNER OLUOCH OBONDO (DECEASED) IN THAT PARCEL OF LAND KNOWN AS SOUTH SAKWA/BAR-KOWINO/1493 AND REGISTERED OF THE SAME IN THE NAME OF PLAINTIFF

BETWEEN

**JOSEPH MUGA AKACH(suing as legal representative of the estate of
RAMANUS AKACH MUGA – DECEASED).....PLAINTIFF**

VERSUS

**ALPHONCE OLOO OKELLO (suing as the legal representative of the estate
of OLUOCH OBONDO – DECEASED).....DEFENDANT**

J U D G M E N T

JOSEPH MUGA AKACH (the plaintiff herein) suing as the legal representative of the Estate of his late father **RAMANUS AKACH MUGA (MUGA)** filed this Originating Summons on 14th September 2017 against **ALPHONCE OLOO OKELLO** (the defendant herein) sued as the legal representative of the Estate of his late father **OLUOCH OBONDO (OBONDO)** seeking a determination of the following questions in relation to the land parcel **NO SOUTH SAKWA/BAR – KOWINO/1493** (the suit property):-

1. Is the deceased OBONDO the registered owner and/or proprietor of the suit property?

a. Does the Estate of OBONDO vest on MUGA?

2. Has the plaintiff been in actual, factual and active possession and in physical occupation and possession of the suit property to-date?

3. Has the said occupation and possession been peaceful, uninterrupted and has the same been known to or by OBONDO, the plaintiff, their legal representative or any other person with an interest in the suit property?

4. What is the cumulative and/or total period or duration of such occupation to – date?

5. Was the entry or ingress into the suit property with the permission of OBONDO and the plaintiff, their legal representatives or any person with an interest in the suit property?

6. Has the plaintiff fulfilled all and singular the requirements for a declaration for the extension of the registered proprietor's interests in the suit property and the registration of the same in his favour by virtue of the doctrine of adverse possession?

7. A declaration be made that the ownership and proprietary interest of the registered owner the late OBONDO be and is hereby extinguished.

8. A declaration be made that the suit property be and is hereby ordered to be registered in the name of the plaintiff.

9. The District Land Registrar BONDO SUB – COUNTY is hereby ordered to effect the change of ownership and proprietorship accordingly.

10. The Deputy Registrar to execute transfer and consent forms in the event the defendant declines to do so.

11. The defendant to meet costs of this suit.

The Originating Summons was premised on the grounds set out therein and supported by the plaintiff's affidavit and statement both dated 27th June 2017. The plaintiff also filed the following documents in support of his claim.

- 1. Copy of the Grant of Letters of Administration issued to him in respect to the Estate of MUGA**
- 2. Copy of the Grant of Letters of Administration issued to the defendant in respect of the Estate of OBONDO.**
- 3. Copy of Certificate of Search for the suit property.**
- 4. Copy of the Green Card for the suit property.**
- 5. Agreement dated 9th January 1982.**

See annexures **JMAI – JMA 4** respectively.

The basis of the plaintiff's claim, as can be gleaned from the supporting affidavit, is that whereas **OBONDO** is the registered proprietor of the suit property, he had allowed **MUGA** to take possession and occupation thereof in 1982 following an agreement. That the family of **MUGA** has remained in peaceful and uninterrupted occupation and possession of the suit property with the knowledge and to the exclusion of the defendant tilling and cultivating the same year in year out. That the plaintiff has met all the requirements for a declaration that the interests of **OBONDO** in the suit property have been extinguished and that the same should be registered in the names of the plaintiff. In any case, the defendant's family have an alternative parcel of land being land parcel **NO SOUTH SAKWA/BAR – KOWINO/1613** and therefore it is in the interest of justice that the orders sought be granted.

Though served with the Originating Summons, the defendant only entered appearance through the firm of **KEN OMOLLO ADVOCATES** but filed no replying affidavit. Similarly, although the defendant's counsel was served with a hearing notice for 3rd September 2020 when the suit was placed before me during the service week at the Environment and Land Court Kisumu, neither the defendant nor his counsel appeared. The plaintiff's claim is therefore not opposed.

The plaintiff testified and adopted as his evidence his supporting affidavit, statement and list of documents. I have considered the plaintiff's un – controverted evidence in support of his claim.

The plaintiff's claim to the suit property is based on adverse possession and although the defendant did not file any replying affidavit in rebuttal, I must consider if he has met the threshold to warrant the orders sought in his Originating Summons.

Section 38(1) of the Limitation of Actions 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.”

The Originating Summons is anchored on, among other provisions, **Section 38 of the Limitation of Actions Act**. It is clear from the copies of the Certificate of Search and Green Card which are part of the plaintiff's documents that the suit property has since 18th November 1985 been registered in the names of **OBONDO** now deceased and whose Estate is represented by the defendant. A claim for adverse possession can however be made against the Estate of a deceased person – **KARUNTIMI RAIJI .V. M'MKINYA M'ITUNGA 2013 eKLR**.

A party claiming land by adverse possession must demonstrate that he has been in occupation and possession of the suit property for a period in excess of 12 years having dispossessed the owner or by the owner having discontinued his possession thereof – **WAMBUGU .V. NJUGUNA 1983 KLR 174**. He must also show that he has used the land which he claims as of right **nec vi nec clam nec precario** (no force, no secrecy no persuasion) – **KIMANI RUCHINE .V. SWIFT RUTHERFORDS & CO LTD 1980 KLR 10**.

A reading of paragraph 11 of the plaintiff's supporting affidavit appears to suggest that his family occupies the suit land by virtue of the consent of the registered proprietor. This is what the plaintiff has deponed therein: -

“That I know of my own knowledge that my family entered or gained ingress into the said parcel of land with the consent, permission and or let by the Respondent and that we have remained in actual, physical and outright occupation and possession of the same to the exclusion of the Respondents or any persons with an interest in the suit property.”

That would seem to suggest that the plaintiff's occupation and possession of the suit property was with the consent of **OBONDO** and his family including the defendant. A party in occupation and possession of land with the consent and permission of the owner cannot claim it by way of adverse possession – **JANDU .V. KIRPAL 1975 E.A 225**.

However, in paragraph 4 of the same affidavit, the plaintiff has pleaded as follows:-

“That I am aware that the deceased allowed my father namely RAMANUS AKACH MUGA also deceased to take possession and active occupation of the suit property in December 1982 vide a written agreement. Translated and annexed hereto marked ‘JMA 2’.”

The agreement which is among the documents produced herein reads as follows:-

“Date 9 January 1982

OLUOCH OBONDO: I have given OLUOCH 4 (four) heads of cattle 2 (two) bulls 3 heifers total of 4 (four) cattle in exchange of parcel of land.

I have purchased from OLUOCH OBONDO land.

That is all.

I am RAMANUS AKACH MUGA

The land parcel NO 1493.

Witness

- 1. ALEXIS OKUMU RODI**
- 2. ONGONDO OKUMU**
- 3. PETHALA OKUMU OBONDO**
- 4. OKOMO AOLO OGANDA”**

AKACH and his family which include the plaintiff therefore took possession of the suit land in 1982 pursuant to the agreement above. That agreement was drawn by lay persons but I have no doubt in my mind that it amounts to an agreement for sale of the suit property in exchange for cattle rather than cash. In **PUBLIC TRUSTEE .V. WANDURU 1984 KLR 314** it was held that a purchaser in possession of land having paid the purchase price is a person in whose favour the period of limitation can run. Computing the period from 1982 to 2017 when this suit was filed, **AKACH** and his family have been in occupation and possession of the suit property for thirty-five (35) years well in excess of the Statutory period of twelve (12) years that would entitle the plaintiff to orders in adverse possession. In **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal stated that: -

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

Having considered the plaintiff’s un – controverted evidence and also the relevant law and Judicial precedents, I am satisfied that the plaintiff has established that he is entitled to the orders sought in his Originating Summons.

Ultimately therefore, there shall be Judgment for the plaintiff against the defendant in the following terms: -

- 1. The interests of OLUOCH OBONDO in the land parcel NO SOUTH SAKWA/BAR – KOWINO/1493 have been extinguished by operation of law.**
- 2. The plaintiff has acquired and is entitled to be registered as the proprietor of the land parcel NO SOUTH SAKWA/BAR – KOWINO/1493 by way of adverse possession.**
- 3. The defendant shall execute all the relevant documents to facilitate the registration of the land parcel NO SOUTH SAKWA/BAR – KOWINO/1493 in the names 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 defendant.**
- 5. The Land Registrar shall delete the name OLUOCH BONDO from the register for the land parcel NO SOUTH SAKWAR/BAR – KOWINO/1493 and in it’s place, insert the name JOSEPH MUGA AKACH.**
- 6. 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 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.