



**REPUBLIC OF KENYA**

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

**ELC NO. 11 OF 2017 (OS)**

**DAVID ODHIAMBO OOKO.....PLAINTIFF**

**VERSUS**

**HELIDA AKOTH ODUOR.....1<sup>ST</sup> DEFENDANT**

**JARED OTIENO OGOLA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By an originating summons dated 21<sup>st</sup> April 2017 the applicant herein sued the Respondents claiming that he had acquired title to 1.00 hectares comprised in LR. NO. EAST ALEGO/PAP-ORIANG'/1317 by way of adverse possession and sought for the following orders:

1. That the Plaintiff has acquired title to 1.00 hectares comprised in LR. NO. EAST ALEGO/PAP-ORIANG'/1317 by adverse possession.
2. An order directing rectification of the register by deleting the name of the 2<sup>nd</sup> Defendant and substituting the name of the Plaintiff as the proprietor of the parcel of land described as EAST ALEGO/PAP-ORIANG'/1317 measuring approximately 1.00 hectares and the Plaintiff be issued with the title deed in respect of the said parcel of land.
3. An order vesting title of all that parcel of land described as EAST ALEGO/PAP-ORIANG'/1317 measuring approximately 1.00 hectares in the name of the Plaintiff as the absolute proprietor and all necessary and requisite forms be signed by the Deputy Registrar of the High Court as the situation may require.
4. That costs of this cause be granted to the Plaintiff.

The Plaintiff laid the following grounds for the application:

- (a) That the Plaintiff has been in constant, exclusive and peaceful occupation, use and possession of the suit parcel since 1994, and to date there having been no interruption of the occupation for the period of over 12 years, he has acquired the suit parcel by adverse possession by operation of the law.
- (b) That the Defendants were registered as proprietors of the land through collusion, trickery, misrepresentation, fraud and/or deceit that the original title was lost and issues another whence transfer was effected, without succession, in favour of the Defendants.
- (c) That the Defendants held and hold the title in trust in favour of the Plaintiff by operation of the law.
- (d) That the Plaintiff has resided on the suit parcel since 1994 and has tilled, planted and generally marked the land openly, adversely and without interruption to date.
- (e) That the application is fit and proper for the grant of the orders sought to guard the ends of justice.

**Plaintiff's case**

PW1 testified and stated that he was the legal administrator of the estate of one Cosmas Ooko Asir, the Plaintiff's father who, prior to his death, entered into a land sale agreement with one Patrick Odie Onguta (deceased) on the suit parcel measuring 1.00 hectares, absolutely owned by Patrick Odie Onguta. That at the time of their demise, the deceased vendor has allowed the Plaintiff's father to take possession of the land, start farming on it and build a house. That the deceased vendor issued the Plaintiff's father with the Certificate of Title to effect the transfer without signing the transfer forms due to ignorance. Copies of both the sale agreement and Certificate of Title were annexed to the

affidavit.

PW1 further testified that his father passed the said title and death certificate of the vendor to him to effect the transfer in ignorance of the requisite process. That at the time of his demise, the vendor was survived by his brother Odima Onguta's children namely James Onguta and Cecilia Awuor. That James Onguta was partially mentally instable and could therefore not undertake legal transactions. That the two relatives left without notice, where after the Plaintiff made diligent efforts to make them secure letters of administration to their uncle's estate in vain. That after his father's demise on 10<sup>th</sup> March 1995, the Plaintiff had been in uninterrupted possession control and use of the suit parcel to date.

PW1 stated that sometime in 2013, the 1<sup>st</sup> Defendant was issued with an introductory letter from the office of the area chief stating that she as the next of kin and heir to the estate of the late Odie Onguta to the exclusion of everybody else whatsoever. That the Plaintiff proceeded to the Siaya Lands Registry and placed a caution on the suit parcel. That he was informed that the 1<sup>st</sup> Defendant had reported and gazetted the loss of the title deed on 15<sup>th</sup> March 2003 and the title transferred to the 1<sup>st</sup> Defendant.

It was PW1's further evidence that despite the caution, the 1<sup>st</sup> Defendant entered into a land sale agreement on the whole suit land with the 2<sup>nd</sup> Defendant and transferred the suit land to the 2<sup>nd</sup> Defendant. PW1 contended that the sale and transfer of the land was not only illegal but void *ab initio* for failure of the Defendants to obtain letters of administration; not being relatives or beneficiaries of the estate of Odie Onguta.

PW1 also produced copies of the original title and the sale agreement, as well as copies of the grant of letters of administration and confirmation of grant with respect to the 1<sup>st</sup> Defendant.

On cross-examination by the 2<sup>nd</sup> Defendant, PW1 testified that he knew the 2<sup>nd</sup> Defendant in 2013 and that they met at the chief's office on 27<sup>th</sup> April 2014 where PW1 was told by the chief and elders to stop construction on the plot as it had been sold. That he produced the first agreement and denied asking for a Kshs. 5,000/= refund. That he was arrested and locked in a police cell and that the agreement produced before Justice Kibunja did not have any additions. PW1 admitted withdrawing that particular case in respect of the suit land and that the court ordered him to pay the 2<sup>nd</sup> Defendant.

PW2 Joel Otieno Osir testified and stated that he was present when the Plaintiff's father paid Patrick Onguta for the land. On cross-examination PW2 stated that he was 17 years old when he witnessed the Plaintiff's father paying the money for the land in 1993. PW2 agreed that in the agreement produced in court, the witnesses were Odama and Domtilla. That he was a witness 4 times in an agreement. PW2 admitted that there was a time he was stopped from ploughing the suit land.

### **Defendants' Case**

The 1<sup>st</sup> defendant did not testify so her case was closed. DW1 the 2<sup>nd</sup> defendant testified and described the process through which he acquired the suit land from the 1<sup>st</sup> Defendant for Kshs. 250,000. DW1 produced a sale agreement and a copy of the title which he was issued with in 2013.

It was DW1's evidence that in March 2013, he got word that the 1<sup>st</sup> Defendant was looking for a buyer to purchase the suit land. That he acquired the suit land from the 1<sup>st</sup> Defendant after she did a Succession Cause which allowed her to get the land vide transmission and subsequently transferred to the DW1 making him the absolute proprietor of the suit land.

DW1 stated that the Plaintiff has never resided on the land at any given time and that the Plaintiff's father and mother died and were buried at their home and not the parcel in question. That the Plaintiff's assertion that the 1<sup>st</sup> Defendant was not a relative of Patrick Odie Onguta was controverted by the annexed letter of introduction by the Area Assistant chief.

DW1 testified that the copy of grant of letters of administration and the alleged sale agreements annexed by the Plaintiff are forgeries, fake and containing hand written insertions, with detailed descriptions of the alleged forgeries, insertions and inconsistencies in the documents.

It was DW1's evidence that there was a difference between the sale agreement annexed by Plaintiff herein and the one filed in Case No. 120 of 2014 which the Plaintiff withdrew.

DW1 stated that the Plaintiff had filed Case No. 120 of 2014 which was withdrawn, after which the Plaintiff filed the present suit in 2017. DW2 produced a letter from the Land Registrar indicating that he was the absolute proprietor.

On cross-examination, DW2 stated that he did due diligence and confirmed at the lands office, and that there were no structures on the suit land when he bought it. DW1 also stated that this suit was dismissed on 4<sup>th</sup> September 2018 for want of prosecution but subsequently reinstated in the Court's ruling of 11<sup>th</sup> June 2019.

### **Analysis and Determination**

The issues for determination in a case for adverse possession are well settled. The Court of Appeal in **Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others** [2018] eKLR elaborated on the required elements to prove

adverse possession thus:

“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**.”

In **Mbira v Gachuhi [2002] 1 EA 137**, the court held that the claimant must lead evidence to show that the owner has been dispossessed or that the owner had discontinued possession:

*“There must be evidence and facts found showing that the true owner’s titled has been expressly repudiated by the adverse possessor. There must be facts of possession asserted against a claim of ownership of all others, including the registered proprietor.... So, one must show the mode of repudiation; the knowledge by the true owner, of the assertion of the adverse claim; the date and mode in which the adverse claim was brought to the knowledge of the true owner...*

*...a person who raises that doctrine for a statutory acquisition of title to land must satisfy the Court in the normal standard of proof in civil cases:*

*(a) that there has been absence of possession by the true owner through abandonment (discontinuance);*

*(b) that the adverse possessor has been in actual possession of the same piece of land;*

*(c) that the adverse possessor has no colour of right to be there, other than his entry and occupation;*

*(d) that he has openly and without permission or agreement of the true owner, done acts which are inconsistent with the enjoyment by the true owner of the land for purposes for which he intended to use it;*

*(e) that there was sufficient animus to dispossess and an animus Possidendi;*

*(f) that all this has lasted for the statutory period, in his case, twelve years, since the adverse possession began;*

*(g) that the nature of the property was such that in the light of the foregoing acts, there resulted adverse possession;*

*(h) that throughout the twelve years which tolled, there was no interruption of the adverse possession.”*

The Court of Appeal in **M’Mbaoni M’Ithara v James Mbaka [2019] eKLR** further elaborated on claims of adverse possession predicated upon a sale agreement as follows:

*“The very character or ingredients of adverse possession must be proved by facts. Therefore we agree that if the appellant entered the suit land as of right because of a sale agreement, it was necessary to adduce evidence about the said agreement and in particular when the agreement collapsed.”*

In the present case, the onus was on the Plaintiff to prove that the sale agreement between his father and Patrick Odie Onguta had collapsed following their deaths and inaction in processing the land transaction, and that the Plaintiff was subsequently in adverse use and/or occupation of the suit parcel for an uninterrupted period of 12 years or more.

While the Plaintiff tendered considerable evidence to demonstrate the existence of a sale agreement between his father and Patrick Odie Onguta, including calling PW2 to testify as a witness to the transaction, the Plaintiff failed to tender any evidence to prove his actual adverse occupation of the suit parcel since 1994 as he claimed.

The Plaintiff failed to prove that the true and/or registered owners of the suit parcel had relinquished possession or abandoned the suit parcel; or that they had actual knowledge of his occupation and possession of the parcel. The earliest evidence of interaction between the Plaintiffs and the Defendants was the summons before the District Land Registrar on 24<sup>th</sup> September 2014.

Adverse possession is a doctrine that legally dispossesses the legal owner of a suit land by operation of the law. That is why the principles or the ingredients for proof of adverse possession are very stringent so as not to dispossess a rightful owner of the suit land. It was not enough for the Plaintiff to make mere averments in his pleadings that he had been in uninterrupted possession without tendering evidence to that effect.

I have considered the pleadings, the evidence by the parties and find that the plaintiff has not proved his case and it is therefore dismissed with costs.

**DATED and DELIVERED at KISUMU this 4<sup>TH</sup> DAY OF SEPTEMBER, 2020.**

***M. A. ODENY***

***JUDGE***

**JUDGMENT READ**, and **SIGNED** in open court in the presence of;

The 1<sup>st</sup> & 2<sup>nd</sup> Defendants and in the absence of the Plaintiff.

**M. A. ODENY**

**JUDGE**