REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE 134 OF 2007

LUKE OMULO OMOLO …….PLAINTIFF

VERSUS

SAMUEL JUMA KEYA …….....……..DEFENDANT

JUDGMENT

The plaintiff's originating summons dated 12th September 2007 and filed on 2nd October 2007 prays that he be declared the proprietor by way of adverse possession of to land parcel number Border Section 3412. The same has been opposed by the defendant vide his replying affidavit dated 7th November 2007.

According to the plaintiff his father one **Vincent Omolo Andega** deceased purchased the suit proprietor from one **Keya Owaga,** deceased. The said Keya Owaga is the father to the defendant.

He told the court that his father passed away before having the suit land registered into his name. He further said that he has been in occupation of the suit land for more than twenty (20) years.

The plaintiff produced series of correspondence from the Public Trustee who apparently was managing the said property after the demise of his father.

The plaintiff further produced criminal proceedings vide **Nyando CRC Number 1145 of 1996** where the defendant had been charged with the offence of trespassing on the suit property and was sentenced to a three (3) months imprisonment.

He further testified that upon conducting a search he discovered that the suit property had been registered in the names of Keya Owaga, the defendant's father.

The defendant denied the plaintiff allegation. He conceded however that there was an oral sale transaction between his father and the plaintiff father.

The plaintiff's father was to purchase two (2) acres from the suit property for a sum of Ksh

s. 30,000/=. The plaintiff father only paid Kshs. 9,800 but died before completing the transaction.

After his death the plaintiff's family could not complete the balance hence necessitating them to refund the sums of Kshs. 9,800/=. Those who demanded the refund included **Mama Anyango** the plaintiff's mother, **George Omollo** the plaintiff's brother and the Plaintiff.

According to the defendant therefore the plaintiff had been refunded the money.

After hearing the parties the issue to be determined is whether the plaintiff has been in a continuous and uninterrupted occupation of the suit property. The land is described as **Kisumu /Border/3412**. The same was registered on 7th June 2006 and the proprietor was Keya Owaga. On 15th October 2008 **Samuel Juma Keya** and **Naftali Akeyo Keya** were registered as joint proprietors.

For this claim of adverse possession to qualify one has to have stayed in the suit property for a period of over twelve (12) years uninterrupted and with full acquiescence by the registered proprietor.

Going by the evidence of the plaintiff it seems that he has not had a peaceful, continuous and uninterrupted occupation of the suit property. The letter dated 5th June 1991 from the Public Trustee to the defendant (exhibit number P1) States in part:-

"……I have a land agreement confirming that you sold to the deceased a piece of land number 341 Kochogo. I am made to understand that you have <u>prevented</u> the deceased heirs from ploughing the Land.

Please refrain from such activities as it is an offence". (*Underling mine*)

On 31st May 1996 the Public Trustee wrote to the District Commissioner quoting Exhibit 1 above over the said issue (Exhibit P2)

The deceased is the adjudicated owner of the same. In the nutshell such action is provocative and may lead to breach of peace. The piece of land id vests on this office any body trying to encroach on the same may be charged with offence of intermeddling within the estate country to the provisions of law of Succession Act Cap 160. It's in the light of the foregoing that we are requesting your office to wan such intermeddling to keep away from.

Further on the 5th September 1996 the same Public Trustee wrote to the District Officer, Nyando District a letter in respect to the said parcel of land – Exhibit P8 that:-

"……The adjudication register in respect of land parcel Number 3412 is in the name of the deceased. We are made to understand that some relatives of the vendor are threatening to invade the above parcel of land although they are aware that the deceased is the adjudicated owner of the same. In the nutshell such action is provocative and may lead to breach of peace. The piece of land is vests on this office anybody trying to encroach on the same may be charged with offence of intermeddling with the estate contrary to the provisions of law of Succession Act Cap 160. It is in the light of the foregoing that we are requesting your office to warn such intermeddling to keep away from the deceased land or else appropriate legal action will be taken against them

We are further informed that one Samuel Juma Keya without lawful excuse trespassed upon the land and built a house thereon Kindly proceed and have such a house demolished".

The criminal proceedings at Nyando where the defendant was imprisoned for three (3) months for the trespass on to the said parcel of land say as much.

It is my finding that the plaintiff and his family attempt to occupy the suit land has always been interrupted. The letters from the Public Trustee and the Provincial Administration shows that the plaintiff's has not had a peaceful stay on the suit property.

Equally although the agreements were not produced it would appear that the purchase consideration was returned by the defendant. That evidence became apparent in the Criminal case Nyando Court.

The other issue that militates against the plaintiff case is the date of registration of the suit parcel of

land. The defendant's father became registered on 7th June 2006. It means that previously the land was still unadjudicated and by the operation of the law the land was still vested under the Government of Kenya.

It is trite law that adverse possession does not run against land held by the state or such government agencies.

In fact exhibit P4, the letter from the District Land Adjudication and Settlement Officer Kisumu District dated 29th August 1996 clearly shows the heading to be "**Number 3412 – Border Adjudication Section".**

If therefore any adverse was to run then it ought to begin from 7th June 2006 to date or any other convenient date after 7th June 2006.

In the premises I do find that there was no ouster of the defendant or his late father from the suit land.

I find that the use of the land if any by the plaintiff was not continuous, exclusive, hostile, open and notorious to warrant me grant the prayers in the originating summons. The same is otherwise dismissed with costs to the Defendant.

Dated, signed and delivered at Kisumu this 13th of July 2012

H. K. CHEMITEI

JUDGE

In the presence of:
Sijele for Amondi Advocate for Plaintiff
Sam Onyango for Onsongo Advocate for Defendant
HKC/aao