



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 29 of 2009

NO. 598

IN THE MATTER OF: LIMITATION OF ACTIONS ACT, CHAPTER 22

AND

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38
OF LIMITATIONS OF ACTIONS ACT**

BETWEEN

**JAMES AJWANG ODIYO PLAINTIFF
VERSUS**

THOMAS GAT OMONDI

(suing as the legal Administrator of OMONDI OUKO,

DECEASED VICTOR ONGARO NYAWIRI DEFENDANTS

JUDGMENT

1. The plaintiff filed an Originating Summons under **section 38** of the **Limitation of Actions Chapter 22 Laws of Kenya** and **Order XXXVI Rules 3D** of the **Old Civil Procedure Rules**. The Originating Summons is dated 12th February 2007 and the same was filed in court on the 17th February 2009 together with a supporting affidavit sworn by James Ajwang Odiyo the plaintiff seeking:-

1. *A declaration that the defendants rights to recover the whole of LR NO. CENTRAL KASIPUL/KAMUMA/443 is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya, and their title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 36 years.*

2. *That there be an order that the plaintiff be registered as the proprietor of the whole of LR NO. CENTRAL KASIPUL/KAMUMA/443, in place of the defendants, more particularly the 2nd defendant, who currently holds the tile of the suit land.*

3. *That there be an order restraining the defendants by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said parcel of land, that is, LR NO. CENTRAL KASIPUL/KAMUMA.443, in any manner whatsoever and/or howsoever.*
4. *Costs of this Originating Summons be borne by the defendants.*
5. *Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.*

2. The originating summons was supported by an affidavit sworn by the plaintiff averring that he entered into a land sale agreement with one Omondi Ouko (now deceased) on 15th May 1972 whereby the said Omondi Ouko sold to him the entire of his plot known as Central Kasipul/Kamuma.443 (hereinafter known as the suit property) that he took possession of the suit property, cultivated on the same upto October 2008 when the 2nd defendant herein started laying claim to the suit property. He further averred that on 26th January 2009, he proceeded to the District Land Registry, Rachuonyo District, whereupon he was issued with the relevant documents relating to the transfer of the suit property and registration of the same in the name of the 2nd defendant, that he discovered that the 1st defendant had taken out Letters of Administration in respect of the estate of Omondi Ouko and that he had sold the suit property to the 2nd defendant thus culminating into the registration of the same in the name of the 2nd defendant on 19th October 2008. He further averred that at the time of sale and transfer of the suit land to the 2nd defendant, he had been in occupation and possession of the same for over 36 years having taken possession of the suit land in 1972, that in so far as he has occupied or possessed the suit land for over 36 years, the defendants rights over same have been extinguished by effluxion of time and that the 2nd defendant did not acquire any valid title to the suit property and that the 2nd defendant's name ought to be deleted from the register of the suit land. In conclusion he seeks adverse possession over the suit property and rectification of the register thereof.

3. The defendants on their part filed a memorandum of appearance on 6th March 2009 and a replying affidavit dated 19th March 2009 sworn by the 2nd defendant with authority from the 1st defendant averring that the plaintiff has at no time in his life been in continuous and uninterrupted occupation and possession of the suit property, that he is the registered proprietor of the suit property and has a lawful title to the same; that at no time did the plaintiff enter into a sale agreement or valid sale agreement capable of enforcement by law with one Omondi Ouko. He further averred that if the alleged sale transaction ever took place, it was a controlled transaction under the provisions of the **Registered Land Act (the RLA), Cap 300 Laws of Kenya** (now repealed) and further that such sale attracted the requirements of the Land Control Board within the statutory 6 months, that the previous Legal Administrator (the 1st defendant) had authority and/or mandate to sell/or transfer the suit land to the 2nd defendant and that the plaintiff did not object to the issuance of the certificate of confirmation of the grant issued to the 1st defendant. He further averred that **section 50 of the Registered Land Act Cap 300** does not provide any right and/or interest to the plaintiff in respect of the said suit property. The deponent of the Replying Affidavit also denied that the plaintiff has ever at any time in his life cultivated the suit property, that the 1st defendant had lawfully taken out letters of administration in respect of the estate of Omondi Ouko, that the plaintiff has no remedy at all against the defendants; that the transfer of title in the suit property from the 1st defendant to the 2nd defendant was valid and lawful hence the 2nd defendant acquired a valid title to the suit property and that the plaintiff's prayer for a declaration/or an order of adverse possession and for rectification of the register as against the Defendants are misplaced.

4. On 6th April 2009 the plaintiff filed a chamber summons under **Order XXXVI rules 8 A, 8B and 9 of CPR** seeking directions and on 8th February 2010, Muchelule, J. directed that the originating summons dated 17th February 2009 be heard by adducing oral evidence in court.

5. When the case came up for hearing on 6th March 2012, Mr. Oguttu representing the plaintiff submitted that though the defendants were served with hearing notices through their advocates, they

failed to appear in court. Court ordered the matter to proceed.

6. The plaintiff (PW1) stated that he was a farmer, and knew the late Omondi Ouko. He further stated that he bought the suit property from Omondi Ouko before Omondi Ouko died. The agreement was reduced into writing and Omondi Ouko signed the same. He was shown the records where he referred to an affidavit dated 15th May 1972 sworn by Omondi Ouko stating he had sold the land for Kshs.400,000/=. He produced the affidavit as evidence and marked it **P. Exhibit 1**.

7. The plaintiff stated further that after buying the suit property he planted trees, built a house and stayed in the land with his family. The deceased Omondi Ouko took him to the Land Control Board, he however never transferred the suit property nor did he interfere with his use of it. He further stated that he knew the 1st defendant (though doubtful) but added that he was not related to the deceased; that the 1st defendant had never been to the suit property and that he did not know when the 1st defendant took out Letters of Administration. He referred to the Letters of Administration issued to the 1st defendant on behalf of the estate of the deceased and produced the grant in evidence – **P. exhibit 2**.

8. He also referred to the certificate of confirmation of grant granted to the 1st defendant in respect of the suit property, the transfer to the 2nd defendant and an official search certificate and produced all these documents as **P. Exhibits 3 and 4** respectively.

9. The plaintiff also obtained a green card for the land showing transfer of the land from 1st defendant to 2nd defendant on 15th October 2008. He produced green card as **P. Exhibit 5**.

10. He further testified that he went to the Lands Office from where he obtained the transfer of land for suit property and produced it as **P. exhibit 6**. He stated that though the 2nd defendant is registered as owner of suit property, it is the plaintiff who occupies the suit property and that by 2008 when the 2nd defendant was registered there were already developments on the suit land. He prayed that the court do grant him title for this land and to nullify the title of 2nd defendant.

11. At the close of plaintiff's testimony, Mr. Oguttu counsel for the plaintiff orally submitted firstly that the plaintiff having bought the suit property from the deceased Omondi Ouko, taken possession of it in 1972, without any interruption by the deceased Omondi Ouko upto 1994 when Omondi Ouko died, the plaintiff had acquired adverse rights in respect to the suit property. Secondly, that by the time the 1st defendant had the suit land registered in his name as on 15th October 2008, the rights and interests of the estate of the deceased vendor as well as the rights of the 1st defendant were already extinguished. He relied on **Peter Thuo Kairu –vs- Kuria Gacheru [1988] 2 KAR 447at holding Nos. 1 & 2.**

12. Secondly, Mr. Oguttu submitted that mere changing in ownership of land that is in the possession of a person entitled to same by virtue of adverse possession does not affect the rights and interests already accrued in favour of adverse possession. Furthermore, he submitted that the acquisition of the suit land by 2nd defendant was subject to the overriding rights of adverse possession. He relied on **Githu –vs- Ndeete [1984] KLR 776 to 781 holdings 1 and 2 at p. 776.** In the case, the respondents had filed a suit at the High Court seeking a declaration that they were the absolute owners of the suit land by virtue of an agreement or by adverse possession. The respondents were granted the declaration on grounds that they had been in continuous possession and in exclusive control of their respective portions. On appeal Madan, Law and Porter JJA held that:-

1) *The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.*

2) *Where the person in possession has already began and is in the course of acquiring rights under section 7 of the Limitation of Actions Act (Cap 22) and by virtue of section 30 (f) of the Registered Land Act (Cap 300) those rights are overriding interests to which the new registered purchaser's title will be subject.*

13. Thirdly, counsel submitted that if the defendants were intent on terminating acquisition of adverse possession rights they ought to have asserted their rights either by taking possession of suit property, or by filing suit for recovery of the suit land. Counsel submitted that mere change of ownership is immaterial. He relied on **Njuguna Ndatho –vs- Masai Itumo & 2 others.**

14. In the instant case, it appears clear to me that the plaintiff's possession of the suit land since 1972 was open, uninterrupted and adverse to the title of the 1st defendant herein. From that time until 15th October 2008, when the 1st defendant purported to transfer the suit land into his own name, the 1st defendant took no action or no active step to evict the plaintiff from the suit land. Mere change of ownership of the suit land which was already in the possession of the plaintiff was immaterial and did not change the fact that the plaintiff was in adverse possession. It is clear that by 15th October 2008, the 12 year period for claiming the suit land had run three cycles and by that time, the defendant's title to the suit land had already been extinguished. The 1st defendant should have acted earlier.

15. The law relating to adverse possession in Kenya was set out by the Lords of Appeal in the case of **Njuguna Ndasho** (above). Their Lordships cited the case of **William Gatuhi Muratho –vs- Gakuru Gathumbi – Civil Appeal No.49 of 1996 – Court of Appeal** – unreported where the Court of Appeal followed its decision in the case of **Joseph Gahumi Kivitu –vs- Lawrence Munyambu Kabura (Civil Appeal NO.20 of 1993** – unreported) which reviewed previous judgments of the court on the question of when time would stop running, for purposes of **section 38** of the **Limitation of Actions Act** under which a person may claim to have become entitled to land by adverse possession. I will as their Lordships did in the **Ndasho case**, set out a portion from the judgment of Kwach JA in the **Kivitu case** (above):-

“The passage from Cheshire’s Modern Law of Real property to which Potter JA made reference in Githu –vs- Ndeete is important and deserves to be read in full. It is at page 894 section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the Learned author says –

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor.

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu –vs- Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni –vs- Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this court going both ways I am free to decide which way to go. An on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed.”

16. Against the above statements, the question that arises for determination is whether or not the plaintiff acquired the suit property by adverse possession as provided by **section 38** of the **Limitation of Actions**

Act. The section provides that:-

“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 proprietor of the land.”

17. In Wambugu –vs- Njuguna [1983] KLR 172 the Court of Appeal stated:-

“First, in order to acquire by the statute of limitations title of land which has a known owner that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the suit land for the purpose for which he intended to use it.”

18. In Mulcathy –vs- Curramore Ply Ltd. [1972] 2 Ms WLR 464 at 475 D, it was held as per Brown CJ that possession which causes time to run must be open not secret; peaceful, not by force; and adverse not by consent of the true owner.

19. Applying the above principles to the instant case, it is to be noted that the possession of the suit property the plaintiff between 1972-1994 at the time of Omondi Ouko’s death was not by adverse possession because it was by Omondi Ouko’s consent. However once Ouko Omondi died, from January 29th 1994 to 27th October 2008, when the purported transfer of land was done by the 1st defendant to the 2nd defendant, it was the plaintiff’s unchallenged testimony that no dispossession and discontinuance of possession took place.

20. Based on the above evidence I find that the possession of the suit property by the plaintiff between 29th January 1994 to 27th October 2008 was adverse because there was no attempt by the 1st defendant to evict him and as counsel for the plaintiff correctly pointed out in that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.

21. Regarding the issue of what amounts to interruption of possession and occupation I am guided by the decision in Civil Appeal No.24 of 1974 where Madan, Law & Potter JJA held:-

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

22. In the instant case, the 1st defendant never made any attempt to assert his ownership rights between 1994 and October 2008 by evicting the plaintiff from the suit property therefore the plaintiff has proved the fact that there was no interruption of possession of the suit land.

23. In my considered view therefore, the plaintiff has proved that he had had open, peaceful, adverse occupation and possession of the suit property to the interest of the 1st defendant for a period of over 12 years starting from 29th January 1994 to October 2008 when the 1st defendant purported transferred the suit land to his own name. The plaintiff has therefore proved that he is entitled to the suit property by way of adverse possession.

24. Accordingly, I enter judgment for the plaintiff as against the defendants as follows:

1. *It is hereby declared that the defendants’ rights to recover the whole of LR. NO. CENTRAL KASIPUL/KAMUMA/443 is barred under the Limitation of Actions Act, Chapter 22 Laws of Kenya, and*

their title thereto extinguished on the grounds that the plaintiff has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 36 years.

2. *It is further ordered that the plaintiff be registered as the proprietor of the whole of LR NO. CENTRAL KASIPUL/ KAMUMA/443, in place of the defendants more particularly the 2nd defendant, who currently holds the title of the suit land.*

3. *The defendants be and are hereby restrained by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said parcel of land, that is, LR CENTRAL KASIPUL/KAMUMA/443 in any manner howsoever.*

4. *Costs of this O.S shall be borne by the defendants.*

Dated and delivered at Kisii this 2nd day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya (absent) for Plaintiff

M/s K'owinoh (absent) for Defendants

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.