



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 10 OF 2019 (OS)

LAWY OUMA ODERA.....PLAINTIFF

VERSUS

EDWARD ODHIAMBO AMISI.....DEFENDANT

JUDGMENT

The applicant **LAWY OUMA ODERA** filed an originating summons dated 22nd February 2019 and claimed proprietary interest by way of adverse possession of a portion of land parcel No. **KISUMU/SEME/KATIENO/3378**(which was formerly part of land parcel No. **KISUMU/SEME/KATIENO/1604**) measuring or estimated to measure 195 steps x 55 steps x 52 steps or thereabouts and/or determination of the following questions.

1. Whether the applicant/plaintiff herein is entitled to a portion of land parcel No. **KISUMU/SEME/KATIENO/3378** measuring or estimated to measure 195 steps x 55 steps x 52 steps or thereabouts by reason of his adverse possession of the same for a period exceeding 12 years.
2. Whether the Respondent/defendant's proprietary interest in the said land parcel No. **KISUMU/SEME/KATIENO/3378** has been extinguished by virtue of the applicant's adverse possession and whether the respondent is now holding the title for the said portion of land in trust for the applicant.
3. Whether the respondent/defendant's title to and proprietary interest in the said portion of the said land parcel No. **KISUMU/SEME/KATIENO/3378**.
4. Whether the said land parcel No. **KISUMU/SEME/KATIENO/3378** should now be subdivided so that the portion occupied by the applicant/plaintiff is transferred and registered in favour of the applicant/plaintiff in place of the respondent.
5. Whether the respondent should be ordered to pay the costs of this summons to the applicant.

The respondent was served with the summons and instructed counsel to file a memorandum of appearance who did so but never filed a replying affidavit to the summons. Counsel filed a preliminary objection which was heard and determined with an outcome of dismissal. Counsel participated in the hearing of the case, cross-examined the applicant but did not call any evidence.

APPLICANT'S CASE

The applicant gave evidence and relied on his supporting affidavit filed in support of the summons. It was his evidence that his late father purchased a portion of the suit land measuring or estimated to measure 195 steps x 55 steps x 52 steps or thereabouts in 1999 and took possession.

The applicant stated that he took possession in 2001 whereby he has built his house, fenced the whole portion with a live fence of euphorbia plus barbed wire and cedar posts and has been cultivating subsistence crops. He further stated that he has two houses, a cowshed and a pit latrine. The applicant also stated that in 2006 he invited his brother Fredrick Ochieng to come and stay with him whereby he also constructed his homestead.

The applicant testified that he has been in occupation for a period of more than 15 years. That the respondent sold a further portion measuring 1 acre to the applicant and sub divided the suit land **KISUMU/SEME/KATIENO/1604** with resultant Nos. **KISUMU/SEME/KATIENO/3378** and **KISUMU/SEME/KATIENO/3379** which are still registered in the respondent's name.

The applicant produced a copies of the agreements and abstracts of green cards for the parcels of land as exhibits before the court. The applicant therefore urged the court to find that he has acquired the suit land by way of adverse possession having occupied the suit land for

uninterrupted period for over 15 years. That his occupation has been peaceful and without force.

ANALYSIS AND DETERMINATION

The respondent filed a memorandum of appearance but never filed any response to the summons. Counsel for the respondent filed a preliminary objection which was dismissed and the matter proceeded to full hearing. Even though counsel for the respondent cross examined the applicant, he opted not to call the respondent to tender evidence. The applicant's evidence is therefore uncontroverted.

The fact that evidence is uncontroverted does not mean that the applicant's burden of proof of his case is reduced. The applicant is still under an obligation to prove his case that he has acquired the suit land by way of adverse possession. If he fails, this test then the case can still be dismissed.

The Court of Appeal discussed the ingredients in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR** where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

It is also a well settled principle that a party claiming Adverse Possession must to prove that this possession was “*nec vi, nec clam, nec precario,*” that is, peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner.

The applicant stated that his father had bought the suit land in 1999 and took possession and that he later took possession in 2001. He also stated that he later bought another portion of land from the respondent who sub divided the land but the title is still registered in the respondent's name.

In the case of **Public Trustee vs. Wanduru, Madan J A** stated as follows; -

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

The applicant has been in possession since 2001 and subsequently entered into a further agreement for a portion of one acre with the respondent of which the respondent caused the subdivision but the titles are still in his name. This subdivision of the title did not stop time from running in respect of adverse possession.

In the case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“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 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”.

The applicant has proved that he is in possession of the suit land for a period of more than 12 years and that his occupation has been quiet, peaceful, uninterrupted, continuous and without secrecy and force.

I have considered the summons, the evidence and the applicable law and find that the applicant has proved his case for adverse possession. The applicant is also entitled to costs of the summons.

DATED and DELIVERED at ELDORET this 5TH DAY OF NOVEMBER, 2020

M. A. ODENY

JUDGE