



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NUMBER 17 OF 2017(OS)

IN THE MATTER OF SECTION 38 OF THE LIMITAION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

JOHN MWALO,

KEVIN OMONDI MWALO,

BECCY ATIENO MWALO

FRED LEO MWALO.....PLAINTIFFS

AND

FRANCIS ADIKA OWUOR,

NASHON OPIYO ONGALA,

WALTER ONGALA ONGALA.....DEFENDANTS

JUDGMENT

John Mwalo, Nashon Omondi Mwalo, Beccy A Mwalo, Fred Leo Mwalo hereinafter referred to as the plaintiffs have come to court claiming to be entitled to be registered as proprietors of the all pieces of land known as Kisumu/Wathorego/2020 and Kisumu/wathorego/2018 measuring 0.08Ha and 0.12Ha respectively and pray for a declaration that the title held by Francis Adika Owuor over Kisumu/wathorego/2020 measuring 0.08Ha has been extinguished by adverse possession and that the title held by Nashon Opiyo Ongala and Walter Ongala Ongala over Kisumu/Wathorego/2018 measuring 0.12Ha has been extinguished by adverse possession and therefor seek for an order that the land Registrar, Kisumu, be directed to cancel and / or revoke the existing titles and records of the suit properties in the names of the defendants and to issue new titles in the names of the Plaintiffs.

The plaintiffs pray for an order of injunction to restrain the defendant by themselves, agents, servants or whomever from alienating, disposing or in any manner interfering with the Plaintiffs' possession of all parcels of lands known as Kisumu/Wathorego/2020 and Kisumu/Wathorego/2018 measuring 0.08Ha and 0.12Ha respectively. Lastly the Cost of the suit be borne by the defendants.

The originating summons is based on grounds that pursuant to an Agreement for sale made in the year 1990, the 1st plaintiff purchased the suit properties in the sum of KSh. 15,000 for Kisumu/Wathorego/2018 and KShs. 14,500 for Kisumu/Wathorego/2020. The defendant did not sign transfer instruments neither was a consent transfer issued by the Land Control Board. Having believed that they had the right to have the suit properties and upon payment of the purchase price the plaintiff moved in the suit properties. On or about the year 1991, the 1st plaintiff moved into the suit properties with the wife, Monique Tabu Mwalo (now deceased) together with the 2nd, 3rd and 4th plaintiff as the children. The 1st plaintiff so soon after taking possession of the suit properties constructed a two-bedroom semi-permanent residential house wherein he moved and lived with the family.

The plaintiffs cleared mowed, planted, harvested fruits of the lands, logged and cut timber, fenced, ran livestock and constructed buildings among them being a cow shade and outdoor toilet.

The 1st plaintiff, together with the family support proceeded to put up a perimeter fence of cider polls, barbed wire and planted natural plants popularly as "kayaba". The 1st plaintiff also proceeded to put up a permanent gate

During the possession of the land, the plaintiffs planted numerous Eucalyptus trees among other trees, some of which are more than 15 years

old on the suit properties.

The plaintiffs dug gabions and raised the ground on the suit properties to avoid seasonal flooding in the locality

Immediately after taking possession of the suit properties, the defendants discontinued their possession to date.

In the year 2003 the plaintiffs laid to rest his wife Monique Tabu Mwalo, on the suit properties without any objection from the Defendants. In any event, the Defendants attended the funeral. The deceased was the mother to 2nd, 3rd and 4th plaintiff.

Since 1991 the Plaintiffs have publicly and as of right been in possession of the suit properties and exercised all acts of the owners without any objection from the defendants

In the supporting affidavit, John Mwalo states that he purchased the suit properties in the sum of KSHs. 15,000 for Kisumu/Wathorego/2018 and KSHs. 41,500 for Kisumu/Wathorego/2020 and paid the entire price. The Defendants herein did not sign transfer instruments neither was consent to transfer issued by the Land Control Board but his family moved in the suit properties and constructed a house. He planted, harvested fruit of the lands, logged and cut timber, fenced, ran livestock and constructed buildings, among them being a cow shade and outdoor toilet and constructed a permanent gate.

That during the possession of the land, the family planted numerous Eucalyptus trees among others, some of which are more than 15 years old on the suit properties. That in an effort to upgrade the suit properties they dug gabions and raised the ground on the suit properties to avoid seasonal flooding in the locality and with absolute sole aim of permanent residing in the suit properties.

That immediately after taking possession of the suit properties, the Defendants discontinued their possession to date.

He depones that in the year 2003 they laid to rest Monique Tabu Mwalo on the suit properties without any objection from the Defendants. In any event, the Defendants attended the funeral and participated actively in the logistics. The deceased was a mother to 2nd, 3rd and 4th Plaintiffs and the wife of the 1st plaintiff **and that** since 1991 they have publicly and as of right been in possession of the suit properties and exercised all acts of the owners without any objection from the defendants.

His sons, 2nd and 4th Plaintiffs have proceeded to construct their house on the suit properties traditionally known as "Simba".

According to the plaintiffs, the official search carried out at the Kisumu Land Registry indicate that defendants are the registered proprietors of the properties. That they have also applied and connected electricity and water on the suit properties and that as from the date of the filing of this case the plaintiffs are occupying the suit properties and continue to enjoy their fruits.

I have considered the pleadings and the evidence on record and submissions by the plaintiffs' counsel and do find that the plaintiff's evidence is not contested and has demonstrated that he has been in exclusive, continuous, hostile, no permissive possession of the suit property and therefore entitled to be declared in adverse possession of the suit property.

The doctrine of adverse possession in Kenya is enshrined in **Section 7** of the Limitation of Actions Act, which is in these terms: -

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

"(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land."

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land."

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land."

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that:-

"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

The plaintiffs have proved that they are in adverse possession of the suit property and therefore I do grant orders that the title held by Francis Adika Owuor over Kisumu/wathorego/2020 measuring 0.08Ha has been extinguished by adverse possession and that the title held by Nason Opiyo Ongala and Walter Ongala Ongala over Kisumu/Wathorego/2018 measuring 0.12Ha has been extinguished by adverse possession.

The land Registrar, Kisumu, is hereby directed to cancel and / or revoke the existing titles and records of the suit properties in the names of the defendants and to issue new titles in the names of the Plaintiffs.

Further I do grant an order of injunction to restrain the defendant by themselves, agents, servants or whomever from alienating, disposing or in any manner interfering with the Plaintiffs' possession of all parcels of lands known as Kisumu/Wathorego/2020 and Kisumu/Wathorego/2018 measuring 0.08Ha and 0.12Ha respectively. Lastly the Cost of the suit shall be borne by the defendants.

Dated at Kisumu this 10th day of DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE