



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KISUMU
ELC NO. 256 OF 2014 (O.S)
IN THE MATTER OF THE LAND REGISTRATION ACT, 2012
AND
IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT (CAP 22) LAWS OF KENYA
BETWEEN
CHARLES PATTERSON OWINO (Suing on his own behalf
and as the personal representative of the estate of the
late **FRANCIS OBILO ABONGO**.....**PLAINTIFF**
VERSUS
SOFIA AUMA OWOUR.....**DEFENDANT**

JUDGMENT

By an Originating Summons dated 3rd September 2014, the plaintiff herein who claims to be entitled to be registered as the proprietor of Land parcel No. KISUMU/MANYATTA “B’/916 by way of adverse possession urged the court to determine the following questions:

- 1) Whether the plaintiff has been in actual, open, hostile, continuous and uninterrupted possession of a parcel of land known as KISUMU/MANYATTA “B’/916 registered in the name of the defendant prior to and after 14th September 1990 to date for a period of 24 years.
- 2) Whether the Plaintiff has in the process of such possession/occupation constructed dwelling structures where he has lived as of right to the total exclusion of the defendant.
- 3) Whether in the circumstances the defendant’s title to the suit land was extinguished after 12 years of such possession/ occupation and that the defendant now remains registered only as a trustee for the plaintiff.
- 4) Whether the plaintiff should now be registered as the proprietor of the suit parcel of land known as KISUMU/MANYATTA “B’/916 having acquired the suit parcel of land

The defendant was served with the summons but did not file any response to the summons. The matter therefore proceeded in the absence of the defendant. The defendant was also served with a hearing notice but did not appear.

Plaintiff’s Case

The plaintiff gave evidence and stated that he is the son of the late Francis Obilo Abong’o who died on 1/10/00 of which he produced a copy of limited grant as an exhibit before the court. The plaintiff further stated that the deceased purchased the suit property Kisumu/Manyatta ‘B’/624 from one Joseph Owiti Ogola a.k.a Panyako. However, on the ground the vendor pinpointed parcel Kisumu/Manyata ‘B’/615 as the property being sold and so being satisfied with the same the deceased moved in and settled therein.

The plaintiff produced a sale agreement dated 1/12/81. It was his evidence that later parcel Kisumu/Manyatta 'B'/615 was sub divided into two plots Kisumu/Manyatta 'B'/916 and Kisumu/Manyatta 'B'/917 of which on the map the location of the deceased's settlement/homestead was identified as Kisumu/Manyatta 'B'/916.

It was the plaintiff's testimony that the deceased left behind the Plaintiff and family members to succeed him who have continued to reside on the suit land. He stated that the members of the family have been in actual physical and exclusive possession of this parcel Kisumu/Manyatta 'B'/916 continuously for an aggregate of 28 years.

The plaintiff therefore urged the court to declare that he has acquired the suit parcel of land vide adverse possession. He therefore closed his case.

Counsel filed submissions and submitted that the issues for determination in this case are :

- a) Whether the Plaintiff purchased the suit property Kisumu/Manyatta 'B'/624.
- b) Whether the Plaintiff has been in constant possession and use of the suit parcel Kisumu/Manyatta 'B'/ 916 of land without force, without secrecy, without permission and without interruption for a period more than 12 years.

Analysis and determination

This matter proceeded in the absence of the defendant who had been served with summons and a hearing notice but failed to file any response or attend court. The plaintiff therefore gave evidence and produced documents which were uncontroverted. The fact that a matter proceeds without the other party does not mean that a party has a field day. It is incumbent upon that party to prove his or her case to the required standards.

The issues for determination is as to whether the deceased entered into a sale agreement as claimed and whether he has acquired the suit land by way of adverse possession.

From the evidence on record it is clear that the Plaintiff's late father had entered into a sale agreement for the purchase of the suit property Kisumu/Manyatta 'B'/624 from one Joseph Owiti Ogola a.k.a Panyako of which he produced a sale agreement.

Further on the issue as to whether the Plaintiff has been in constant possession and use of the suit parcel Kisumu/Manyatta 'B'/916 of land without force, without secrecy, without permission and without interruption for a period more than 12 years, it was the plaintiff's evidence that they have been residing on the suit land for a period of more than 28 years. This evidence has not been controverted. The plaintiff produced photographs to show the homesteads where they reside.

The sub division of the parcel Kisumu/Manyatta 'B'/615 into two plots Kisumu/Manyatta 'B'/916 and Kisumu/Manyatta 'B'/917 does not affect the occupation of the plaintiff as the location of the deceased's settlement/homestead was identified as Kisumu/Manyatta 'B'/916 on the map and the chief's letter that was produced in court.

The law on adverse possession is now settled with many decided cases on the ingredients to be satisfied in the doctrine of adverse possession. It was held in the case of **Public Trustee –vs- Wanduru (1984) KLR** that a purchaser's title is subject to an adverse possessor overriding interest. Further, that in the case of **Peter Thuo Kairu –vs- Kuria Gacheru (1988) 2 KLR** and in **Samuel Miki Waweru –vs- Jane Njeri Richu Nairobi C.A 122 of 2001** it was held that the law relating to prescription affect not only present holders of title but their predecessors. Further it was an *orbiter* in the case of **Richard Satia & Partners and Another –vs- Samson Sichangi C.A Nakuru Civil Appeal No. 164 of 1995** where the learned judges of Appeal stated that a contract for sale can be used as evidence of possession of a suit property.

Having considered the plaintiff's uncontroverted evidence, the documents produced and submission of Counsel, I find that the plaintiff has met the threshold of being declared an adverse possessor as he has proved his case to the required standard. I therefore make the following orders:

- a) A declaration that the plaintiff has acquired land parcel Kisumu/Manyatta 'B'/916 by way of adverse possession.**
- b) An order to the Land Registrar Kisumu to register the plaintiff as the owner of land parcel Kisumu/Manyatta 'B'/916.**
- c) The defendant to pay costs of the suit to the plaintiff.**

DATED and DELIVERED at KISUMU this 25TH DAY of JANUARY, 2019.

M.A ODENY

JUDGE

Delivered in the presence of:-