

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. E004 OF 2022 (OS)**

**IN THE MATTER OF LAND PARCEL KISUMU/KOGONY/5402**

AND

**IN THE MATTER OF SECTION 38 OF LIMITATION OF ACTIONS ACT CAP.**

**22 LAWS OF KENYA**

AND

**IN THE MATTER OF ORDER 37 RULES 7 (1) OF THE CIVIL PROCEDURE**

RULES

BETWEEN

CHRISOPHER OTIENO OSIR ..... APPLICANT

VERSUS

CONSATA AUMA OKORE ..... RESPONDENT

**J U D G E M E N T**

Introduction

Christopher Otieno Osir, the Applicant herein, vide the Originating Summons dated 14<sup>th</sup> February, 2022, placed before the court the following questions for determination against the Respondent;

- 1) Is Consata Auma Okore the registered proprietor of that entire of land parcel known as KISUMU/KOGONY/5402?

- 2) Has the Applicant been in actual, factual, active and physical possession and occupation of all that KISUMU/KOGONY/5402?
- 3) Has the said occupation and possession been peaceful, uninterrupted and has the same been known to by the Respondent and previous registered owners?
- 4) What is the cumulative duration of such occupation to date?
- 5) Was the entry or ingress of the Applicant without permission, let and or the instance of the Respondent and or previous registered owners?
- 6) Has the Applicant fulfilled all and singular the requirements for the declaration for the extinction of the registered proprietor's interest in the said parcel of land and the registration of the same in his favour by virtue of adverse possession?
- 7) Should a declaration be made that the ownership and proprietary rights of the registered owner Consata Auma Okore be and is hereby extinguished as she holds the suit land in trust for the Applicant?
- 8) Should an order be issued to the Registrar, Kisumu Land Registry for registration of the Applicant as the proprietor of all that KISUMU/KOGONY/5402?

The Applicant sought for orders of;

- a) A declaration that the Respondent has acquired the right to recover all that KISUMU/KOGONY/5402 by virtue of adverse possession.
- b) An order directing the Land Registrar, Kisumu Land Registry to enter the name of the Applicant in the parcel register subject to adverse possession as the sole and absolute proprietors and forthwith issue a title deed to the Applicant.
- c) Costs of the Originating Summons be determined.

The Originating Summons was supported by the averments in the Supporting Affidavit sworn on 14<sup>th</sup> February, 2022 by the Applicant.

Affidavit of service sworn by Amos Eliud Osango shows that the Respondent was served with hearing notice on 6<sup>th</sup> January, 2025.

The Respondent neither filed response to the Originating Summons nor attended court for the hearing.

The matter therefore proceeded to hearing ex parte.

### The evidence

The Applicant testified as PW1. He adopted the contents of his Supporting Affidavit sworn on 14<sup>th</sup> February, 2022 as his evidence in chief. He had stated in the Supporting Affidavit that land parcel

known as KISUMU/KOGONY/5402 is currently registered in the name of Consata Auma Okore. That he first bought land parcel number KISUMU/KOGONY/3659 from the respondent but that the respondent later on without notice to him sold it to a third party constraining him (applicant) to exercise entry onto parcel number KISUMU/KOGONY/5402 without the respondent's permission as self-compensation for KISUMU/KOGONY/3659.

That he has been living on and tilling the land from the year 2002. That he entered onto the land and remained thereon without the consent, permission and or let by the registered owners and/or proprietors of the same and that he has been in actual, physical and outright occupation and possession of the same to the exclusion of the registered owners and/or proprietors of the same. That the occupation and possession has been peaceful, uninterrupted and for a period of more than 18.

That the occupation has been open overt, noticeable and hostile to the right or the interest of the registered proprietors; current and past by virtue of the fact that he (Applicant) has established permanent structures which he has been occupying along with his family and cultivated and rented out parts of the structure to tenants

year in year out. That the occupation and possession relate to KISUMU/KOGONY/5402.

The Applicant produced certificate of official search for the suit land, land sale agreement dated 11<sup>th</sup> December, 1997 and copies of photographs as exhibits.

### Submissions

It was submitted on behalf of the Applicant vide the written submissions dated 15<sup>th</sup> March, 2025 and filed by the firm of C. Obiero & Company Advocates that the claim of adverse possession is grounded in sections 7, 13 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya. That the entry onto the land by the Applicant was without the consent of the owner following an unauthorized sale to a third party. That for over 12 years, the Applicant's occupation of the land has been open as required under section 7 of the Limitation of Actions Act. That he has resided on the property, constructed homes and leased areas to tenants solidifying his de facto exercise of rights. That this is supported by the photographs produced by the Applicant.

Counsel submitted further that the possession has been exclusive, continuous and uninterrupted since 2002. Counsel relied on the case of James Maina Kinya -vs- Gerald Kwendaka (2018)eKLR and

submitted that the Applicant had demonstrated all the criteria for adverse possession and prayed that the claim be allowed.

### Issues for determination

The sole issue for determination herein is whether the Applicant has had adverse possession of the suit land.

### Analysis and determination

Though the suit proceeded ex parte, the applicant is still duty bound by law to prove his claim on a balance of probabilities. In the case of Charter House Bank Limited (Under Statutory management -vs- Frank N. Kamau [2016] e KLR the Court of Appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant. ....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves

the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

The applicant must produce evidence to prove the ingredients of adverse possession. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion and without the consent or permission of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. As submitted on behalf of the applicant, the doctrine is anchored on sections 7, 13, 17 and 38 of the Limitation of Actions Act.

In the case of *Mtana Lewa -vs- Kahindi Ngala Mwagandi [2015] e KLR* the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

The Applicant claims to have entered onto the suit land forcefully in the year 2002 as a way of self-compensation for a piece of land that he bought from the Respondent which the Respondent sold to a third party.

A reading of the certificate of official search in respect of the suit land produced as exhibit P.1 shows that the suit land was registered in the name of one Consata Auma Okore on 7<sup>th</sup> July, 2010 as the first registered owner thereof.

It shows further that the suit land which measure 0.10 Hectares was a resultant parcel from sub-division of land parcel No. KISUMU/KOGONY/3659.

From this information, it is clear that the suit land did not exist in the year 2002 for entry by the Applicant in the manner he claims to have entered thereonto or at all.

Secondly, the applicant's case is hinged on a sale agreement between himself and the respondent as the genesis of his occupation of the suit land. He claims that vide the agreement which he produced as exhibit, he bought land parcel number KISUMU/KOGONY/3659 from the respondent and that when the respondent failed to deliver the sold land to him, he forcefully entered and occupied the suit land as a way of self- compensation.

There is no evidence placed before court that the Applicant had bought land parcel number KISUMU/KOGONY/3659 or any other land from the Respondent. The land sale agreement dated 11<sup>th</sup> December, 1997 produced as exhibit P.2 by the Applicant was between one Leocadia Wasonga Otieno as the purchaser and Consolata Auma Okore. The Applicant herein was not a party in the agreement. Further, there is no evidence that land parcel No. KISUMU/KOGONY/3659 belonged to the Respondent.

The totality of this evidence is that the Applicant has not demonstrated that he entered onto the suit land without the permission of the Respondent or at all.

Although the Applicant claims to have had continuous and uninterrupted, open and actual occupation and possession of the suit land for a period in excess of 12 years, the court finds no evidence to this effect. Firstly, the suit land came into existence on 7<sup>th</sup> July, 2010 as shown in the certificate of official search. The suit was filed on 14<sup>th</sup> February, 2022. A period of 12 years had not elapsed from the date the suit land came into being to the date of filing suit.

The alleged entry in the year 2002 was not possible as the suit land was not in existence.

To demonstrate occupation, the Applicant exhibited photographs produced as exhibit P.3. The photographs have nothing on them to prove that they are true images of what is on the suit land. There is no surveyor's report accompanying the photographs and showing that the developments, if any, in the photographs are developments on the suit land.

The applicant claimed that he leases parts of the land to tenants year in year out and that he cultivates parts of the land. There is no to show this. No tenancy agreements were produced. The photographs produced do not show evidence of cultivation.

The outcome of a declaration that a party has had adverse possession of a parcel of land is that the registered owner loses the right to own the land which right is secured by the Constitution. His/her title becomes extinguished under section 17 of the Limitation of Actions Act and the right of ownership is transferred to the adverse possessor. For this reason, adverse possession must be proved to the required degree.

In the present case the totality of the evidence has not demonstrated that the applicant has had adverse possession of the suit land.

The question on the Originating Summons are therefore determined as follows: -

- 1) Question 1 is determined in the affirmative. Consata Auma Okore is the registered proprietor of the parcel of land known as KISUMU/KOGONY/5402 which was registered in her name on 7<sup>th</sup> July, 2010 as per the certificate of official search produced as exhibit 1.
- 2) Question 2 and 3 are answered in the negative as there is no evidence placed before the court that the Applicant has been in actual, factual, active or physical, peaceful or uninterrupted occupation or possession of the suit land for the requisite period.
- 3) Question 4 concerns the cumulative period of occupation. Having found that the suit land came into being on 7/7/2010, assuming that the applicant came into occupation on the same day of registration the cumulative period of up to the date of filing suit was 11 years and 8 months.
- 4) The court having found that there is no evidence of possession or occupation questions 5 and 6 are answered in the negative.
- 5) Regarding question 7, given the findings hereinabove, there is no basis for holding that the proprietary interests of the registered owner have become extinguished. Under section

17 of the Limitation of Actions Act, the proprietary rights of the registered become extinguished at the expiration of the limitation period after the cause of action has accrued. This has not happened in the present case. Hence there is no basis upon which the court can order the Land Registrar to register the Applicant as proprietor of the suit land as per question 8 of the Originating Summons.

### Conclusion

The conclusion is that the Applicant has not proved his claim on a balance of probabilities. The burden of proof under sections 107 to 109 of the Evidence Act was with the applicant to prove his claim. He did not discharge the burden. The suit commenced by way of the Originating Summons dated 14<sup>th</sup> February, 2022 is therefore hereby dismissed. No orders as to costs as the suit was not defended.

Orders accordingly.

**Judgement dated and signed at Kisumu and delivered this 9<sup>th</sup> day of October, 2025 virtually through Microsoft Teams Online Application.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen - Court Assistant.

Abuya h/b for Obiero for the Applicant.

No appearance for the Respondent.