



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 35 OF 2016

ROBERT OTIENO AGOK.....PLAINTIFF

VERSUS

PASKAL OOR.....DEFENDANT

J U D G M E N T

ROBERT OTIENO AGOK (the plaintiff herein) filed this Originating Summons on 15th February 2016 against the defendant (**PASKAL OOR**) seeking orders that he has acquired through adverse possession all that parcel of land known as **SIAYA/KARADOLO/296**. The plaintiff therefore sought a determination of the following:-

- 1. That he has acquired title to 1.5 Hectares comprised in land parcel NO SIAYA/KARADOLO/296 by adverse possession.**
- 2. An order directing the Register to rectify the register by deleting the names PASKAL OOR and substituting the names ROBERT OTIENO AGOK as the proprietor of the land parcel NO. SIAYA/KARADOLO/296 measuring approximately 1.5 Hectares and that the plaintiff be issued with the title deed in respect to that land.**
- 3. An order vesting the title to all that parcel of land described as NO. SIAYA/KARADOLO/296 measuring approximately 1.5 Hectares in the names ROBERT OTIENO AGOK as the absolute proprietor and all the necessary forms to be signed by the Deputy Registrar of this Court.**

4. Costs of the suit.

The Originating Summons is supported by the plaintiff's affidavit dated 15th February 2016, his witness statement as well as those of his witnesses all of which are un-dated but filed on 3rd June, 2016, a Certificate of Search in respect to the land parcel **NO. SIAYA/KARADOLO/296** showing that it has been registered in the names of the defendant since 7th August 1976 as well as photograph of homesteads and graves.

The basis of the plaintiff's claim is that although the land parcel **NO. SIAYA/KARADOLO/296** (hereinafter the suit land) is currently registered in the names of the defendant that, registration was done in error because the plaintiff ought to have been registered as the owner thereof at the time of the adjudication process in 1972. Nonetheless, the plaintiff and his family have since 1958 had the exclusive use, possession and enjoyment of the suit land where he has even buried some of his family members whose names he has provided in paragraph nine (9) of his supporting affidavit. That his occupation, use and possession of the suit land has never been interrupted and is in excess of twelve (12) years and infact the defendant who is a man of the church has presided over numerous church functions in the plaintiff's homestead.

The plaintiff similarly filed statements by his witnesses **FLORENCE AKONGO OBUGU (PW 3)** and **FRANCIS ONYANGO OBWEMBE (PW 2)**.

In her statement **FLORENCE AKONGO OBUGU (PW 3)** states that she is the sister-in-law to the plaintiff and from the time she was married into the plaintiff's home in 1980, her late husband **ALEX OBUGU** was living on the suit land. She added that she goes to the same Evangelist Church with the defendant who is a pastor in the said church and indeed the defendant is the one who conducted the prayers for their new home on the suit land. That the late **ALEX OBUGU** was buried on the suit land in 2007 and again it was the defendant who presided over the burial service.

On his part, **FRANCIS ONYANGO OBWEMBE (PW 2)** has in his statement stated that one **MR. OWELE** the father to the defendant was infact invited to the suit land in 1959 where he was given a portion to put up a home. The said **MR. OWELE** late filed a case against one **OBWOMBE OKETCH** and emerged victorious but on appeal, the land was given to **OBWOMBE OKETCH**. He adds in his statement that the plaintiff and his family have lived on the suit land without interruption since the adjudication process in 1972 and that the defendant

secretly and fraudulently registered the suit land in his names.

In resisting the plaintiff's claim, the defendant filed a replying affidavit dated 4th March 2016 to which he attached the title deed to the suit land issued in his names on 3rd February 2016, a Certificate of Search in respect to land parcel **NO. SIAYA/KARADOLO/292** showing that the said parcel has since 1st August 2013 been registered in the names of the plaintiff and one **ALEXANDER OBUNGU**, a letter signed by one **STANLAUS O. NDIRA** the Assistant Chief Karadolo addressed to whom it may concern to the effect that on 28th January 2016 he summoned both the plaintiff and the defendant to his office and it was agreed that the suit land is the property of the defendant and not the plaintiff.

In his replying affidavit, the defendant has deponed, inter alia, that he is the registered proprietor of the suit land and that the defendant has been his neighbour for a long time. That he allowed the plaintiff to settle his family on a portion of the suit land on the understanding that he would move out after a while. Later however, he learnt that the plaintiff has a separate parcel of land registered in his names and so he sought the assistance of the Chief to ask the plaintiff to relocate but in vain. That the Chief summoned them on 10th December 2015 for a meeting after which the plaintiff was asked to vacate. That the plaintiff therefore has no legal interest in the suit land and has misrepresented to this Court that the suit land was mistakenly registered in the defendant's names. That this suit is incompetent and an abuse of the Court process.

This suit was placed before me for hearing on 4th December 2018 during the service week at the Environment and Land Court Kisumu.

The plaintiff adopted as his evidence his replying affidavit, statement and list of documents filed herein. He added that he is now aged 83 years and was born on the suit land which is registered in the defendant's names but he has lived thereon peacefully. He confirmed in cross – examination that there was land case No. 86 of 1960 between **OWELE AGENG and RAMJUS OBWOMBE** but it involved land parcel **NO. SIAYA/KARADOL /730** and not the suit land. He added that all members of his family are buried on the suit land. His two witnesses **FRANCIS ONYANGO OBWEMBE (PW 2)** and **FLORENCE AKONGO OBUNGU (PW 3)** reiterated the contents of their respective statements which I have referred to above and added that the plaintiff and his family have been living on the suit land to-date.

The defendant similarly adopted as his evidence his replying affidavit and list of documents and called as his witness **AGENGA JOHN SHADRACK (DW 2)**. The defendant reiterated that the suit land belongs to him. His witness told the Court that there is a road passing through the suit land and that the plaintiff lives on the upper part while the defendant utilizes the lower part.

At the end of the trial, it was agreed that **MR OMONDI** Counsel for the plaintiff would file his submissions within 21 days from 4th December 2018 while **MR BAGADA** Counsel for the defendant would respond within 21 days from the date of service and the parties would be given a date for judgment by **KIBUNJA J** after which the file would be dispatched to me for purposes of drafting a judgment. It would appear that Counsel for the plaintiff did not comply with those directions because by the time the file was dispatched to **BUNGOMA ENVIRONMENT AND LAND COURT** by the Deputy Registrar **KISUMU ENVIRONMENT AND LAND COURT** vide his letter dated 30th January 2019 under reference **JUD/KSM/ELC**, only the submissions by the defendant's counsel had been filed. I have therefore not had the benefit of the submissions by plaintiff's counsel while drafting this Judgment.

I have considered the evidence by both parties and the submissions by Counsel for the defendant.

The plaintiff's claim to the suit land is based on adverse possession. In paragraph 8 of his supporting affidavit he depones as follows:-

“That I know of my own knowledge that I reside on the said parcel of land where I have established as home since 1958) annexed herewith and produced as ROA 2 is a bundle of photographs showing the old and new houses on the homestead”.

So the plaintiff's claim is premised on the fact that he and his family have lived on and utilized the suit land since 1958. He adds that his possession and occupation of the suit land has been exclusive and without interruption for a period well in excess of 12 years without interruption and some members of his family are buried thereon. It is common ground that the suit land has since 7th August 1976 been registered in the names of the defendant as per the Certificate of Search dated 13th January 2016 and annexed to the plaintiff's supporting affidavit although the title deed was only issued to the defendant on 3rd February 2016. **Section 38(1) of the Limitation of Actions Act** allows a party who is in adverse possession of another person's land to approach the Court to declare him the owner of the said land. It reads:-

“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”.

It is now well established that the combined effect of the provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession of the land in dispute – **BENJAMIN KAMAU V GLADYS NJERI C.A CIVIL APPEAL NO. 2136 OF 1996**. It is also now clear from both **Section 28(h) of the Land Registration Act and Section 7 of the Land Act** that the new land laws recognize the doctrine of adverse possession which was recently defined in **MTANA LEWA V. KAHINDI NGALA MWAGANDI 2015 eKLR** as follows:-

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

embodied in Section 7 of the Limitation of Actions Act”

Earlier on in the case of **TITUS KASUVE V. MWAANI INVESTMENT LTD C.A CIVIL APPEAL NO. 35 OF 2002 (2004 I K.L.R 184)** the Court of Appeal stated that a person claiming land registered in the names of another through adverse possession must prove:-

“ That he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition”.

The claimant must also prove that he had been in possession and occupation of the land in dispute nec vic, nec clam nec precario (i.e no force, no secrecy no persuasion) – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO. LTD 1976 – 80 I KLR 1500 (1980 KLR 10)**.

There can be no adverse possession of another person’s land if the entry is with the consent of the registered proprietor – **JANDU V KIRPAL 1975 E.A 225 and also WAMBUGU .V. NJUGUNA 1983 KLR 172**.

Applying the above legal principles and precedents to the circumstances of this case, it is clear to me that the plaintiff’s occupation and possession of the suit land is not really in dispute. Although the plaintiff has stated that he had his family have lived on the suit land since 1958, the Certificate of Search produced by the plaintiff shows that the suit land was only registered in the names of the defendant on 7th August 1976. Therefore, time for adverse possession only started to run from 1976 when the defendant became the registered proprietor of the suit land and not in 1958. That would mean that the defendant’s interest in the suit land was extinguished on 8th August 1988 because under **Section 7 of the Limitation of Actions Act:-**

“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”.

Counsel for the defendant has submitted that the plaintiff’s stay on the suit land has not been peaceful because the parties were summoned by the area Assistant Chief who directed that the suit land belongs to the defendant. The defendant’s ownership of the suit land is not in dispute. The Certificate of Search produced by the plaintiff and the title deed produced by the defendant speak for themselves. But what the plaintiff is claiming is that having been in occupation of the suit land for a period in excess of 12 years un-interrupted, peacefully and with the knowledge of the defendant who did not assert his rights thereto, he (plaintiff) has acquired it by adverse possession. It is of course true that the parties were summoned by their area Chief over this dispute. However that was on 28th January 2016 as per the letter dated 27th February 2016 signed by the said Assistant Chief and which is part of the defendant’s documentary exhibits. By that date however the plaintiff had been living on the suit land adversely for some 40 years when time is computed from 1976 when it was first registered in the names of the defendant. And although the defendant’s counsel has submitted *“that the parties have been in continuous fighting over the Respondent’s land since memorial (sic)”*, there was no such evidence other than the Assistant Chief’s intervention which came too late in the day. Counsel for the defendant has also submitted that the defendant has been trying to remove the plaintiff from the suit land. The law is that time ceases to run under the Limitation of Actions Act when the owner of the land in dispute asserts his right by taking legal action or by making an effective entry or when his right is admitted by the adverse possessor – **GITHU V. NDEETE 1984 KLR 776**. Neither of those happened in this case because the proceedings in the **UKWALA DIVISIONAL COURT LAND CAS NO. 86 OF 1960** were filed on 5th October 1960 long before the suit land came into existence. And indeed the defendant told the Court that it involved the land parcel **NO SIAYA/KARADOL/730** and not the suit land.

Counsel for the defendant has also made the following submission with regard to the plaintiff’s occupation and possession of the suit land:-

“There was no evidence proved beyond any reasonable doubt by the Applicant herein that he has developed, constructed, stayed peacefully without any interruptions on the Respondent’s land Parcel Number SIAYA/KARADOLO 296 which taints the Applicant’s application for adverse possession and therefore all his claims cannot be substantiated”.

That submission is however not supported by the evidence in this case. In support of his claim to the suit land by adverse possession, the plaintiff annexed photographs of his homestead which he says was established in 1958. The photographs also show graves of his relatives. Surely there can be no better evidence to prove occupation of land than what the plaintiff has availed. The establishment of a home on the land in dispute by the adverse possessor is probably the best evidence in such cases. And this was not even disputed by the defendant. Infact he confirmed it under cross examination when he said:-

“It is true that the plaintiff’s homestead is on the land parcel NO SIAYA/KARADOLO/296. The homestead has been there since the 1920’s. It is true that the plaintiff has lived there peacefully and even when they have a function, I pray in that home. It is true that I went to the surveyor who confirmed that the plaintiff occupies parcel NO. SIAYA/KARADOLO/296. It is true that I have never utilized the land in dispute. I only started complaining in 2015. I have never had any dispute with the plaintiff before 2015”.

That evidence from the defendant clearly supports the plaintiff’s claim to the suit land through adverse possession and obviously negates his own Counsel’s submissions about the veracity of the plaintiff’s evidence.

The defendant has also made heavy weather of the fact that the plaintiff is himself the registered proprietor of land parcel **NO SIAYA KARADOLO/292** and has availed the Search Certificate thereto. That is not disputed. However, the fact that a party is himself the registered proprietor of a parcel of land other than the one he is claiming is not a reason to deny him orders in adverse possession of another parcel of land if there is sufficient evidence to warrant those orders being granted in his favour. There is no limit as to the amount of land that a deserving party can claim through adverse possession so long as he meets the threshold established above and which the plaintiff has, in my view, met.

Having evaluated the evidence by both parties, I am satisfied that the plaintiff has proved his case against the defendant and is entitled to the orders sought in his Originating Summons.

Judgment is therefore entered for the plaintiff against the defendant in the following terms:-

- 1. An order is issued that the plaintiff has acquired by adverse possession the land parcel NO SIAYA/KARADOLO/296 measuring 1.5 Hectares.**
- 2. An order directing the Land Register to rectify the register by deleting the names PASKAL OOR as the proprietor of the land parcel NO SIAYA /KARADOLO/296 and substituting the names ROBERT OTIENO AGOK as the proprietor thereof and he be issued with the title.**
- 3. An order vesting the title of the land parcel NO SIAYA/KARADOLO/296 in the names ROBERT OTIENO AGOK as proprietor. The Deputy Registrar shall sign all the necessary forms as may be required on behalf of the defendant should he decline to do so.**
- 4. There shall be no order as to costs.**

B. N. Olao.

JUDGE

21st March, 2019.

Judgment dated and delivered in open Court this 21st day of March 2019 at Kisumu.

Ms Kagoya for Mr. M. M. Omondi for plaintiff – present

Mr. J Oduor for defendant – absent

Right of Appeal explained.

B. N. Olao.

JUDGE

21st March, 2019.