



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 2 OF 2015 (O.S)

EMMANUEL ODUOR OPONDO.....1ST APPLICANT

MOSES OPONDO ODUOR.....2ND APPLICANT

GEORGE ONYANGO OBUYA.....3RD APPLICANT

VERSUS

DENNIS MIGADA OKOTH.....1ST RESPONDENT

JOSEPH AKENO AWUOR (sued as trustees of Kenya Church Christ)....2ND RESPONDENT

LARRY MARK STEPHEN.....3RD RESPONDENT

JUDGEMENT

1. This suit was commenced by Emmanuel Oduor Opondo, Moses Opondo Oduor and George Onyango Obuya, the Applicants against Denis Miganda Okoth, Joseph Akengo Owuor and Larry Mark Stephen, sued as trustees of Kenya Church Christ, the Respondents through the Originating summons dated and filed on the 7th January 2015 seeking for the following;

1. **“An order that the applicants and their families have been in adverse possession of a portion of parcel Nos. Kisumu/Kasule/1897 specifically 0.083 Ha thereof for a period of over 12 years.**
2. **An order that upon expiry of 12 years since the applicants and their family have been in occupation and possession of a portion of parcel Nos. KISUMU/KASULE/1897 specifically 0.083 Ha thereof the respondents’ rights over the said portion have been extinguished.**
3. **An order that the respondents hold a portion of parcel Nos. KISUMU/KASULE/1897 specifically 0.083 Ha thereof in trust for the applicants.**
4. **An order that a portion of parcel Nos. KISUMU/KASULE/1897 occupied by the applicants specifically 0.083 Ha thereof is transferred to the applicants and the applicants be registered as the owners of the said parcels of land.**
5. **An order that the respondents do execute all the transfer documents in favour of the applicants and in event of default, the Deputy Registrar of this honorable court herein be empowered to execute the same to give effect to the aforesaid order.**
6. **An order that the respondents do meet cost of this suit.**
7. **Such other or further relief order of this honorable court may deem fit and just to grant in the circumstances.”**

The application is supported by the verifying and supporting affidavits sworn by Moses Opondo Oduor, with the approval of the two other Applicants, on the 7th January 2015 in which he among others depones as follows;

- a) **That on the 11th December 1983, his late mother and himself bought a parcel of land, now designated as Kisumu/Kasule/1281 measuring 0.083 hectares, from Samuel Ndalo Wambane and paid full purchase price. That they took immediate occupation of the said land, erected semi-permanent houses and have been farming thereon.**

- b) That Kasule Kenya Church of Christ is their immediate neighbour and each live peacefully within their fenced land.**
- c) That the 2nd Applicant and his father, the 1st Applicant sold a portion measuring 0.04 hectares to the 3rd Applicant out of the land to get money to process their title. That the 3rd Applicant took possession of the portion sold to him.**
- d) That upon visiting the Lands office to transact on their land, they discovered that their land did not exist as it had been included to Kisumu/Kasule/1897 that belongs to the Respondents.**
- e) That their efforts to resolve the matter with the Respondents' Pastor, Assistant Chief and the Land Registrar did not bear fruits and hence this suit.**

2. The Originating Summons is opposed by the Respondents through the replying affidavit sworn by Joseph Akengo Awuor, the 2nd Respondent, on the 3rd March 2015 in which he among others depones as follows;

- a) That the application is based on falsehood and aimed at committing fraud as in 1983, the 2nd Applicant was a toddler who had no legal capacity to transact any legal contract and could therefore not take possession of the land as alleged.**
- b) That the Applicants have not been living on the suit land.**
- c) That the Applicants have not enjoined the Land Registrar in the suit even after discovering that their land was included in that of the Respondent.**
- d) That the application should be struck out.**

3. The matter came up for hearing of the notice of motion by the Applicants dated 30th April 2015, on the 5th October 2017 when by consent, the motion was marked abandoned to pave way for the hearing of the originating summons. That further, the Counsel for the parties agreed to file and exchange written submission on the originating summons. That during the subsequent mention on the 12th March 2018 the Counsel for the Applicants reported that they had filed and served their submissions dated 9th November 2017. The Counsel for the Respondents sought for more time to file theirs, and another mention of 25th September 2018 was fixed. That no parties attended court on that day and a further mention of 14th February 2019 was fixed with directions for the deputy Registrar to notify Counsel. That when the matter was mentioned on the 14th February 2019, the Counsel for the Respondents was absent and had not filed submissions. The court proceeded to fix the matter for Judgment today.

4. The following are the issues for the Court's determinations;

- a) Whether the Applicants have been in adverse possession of the portion of Kisumu/Kasule/1897 measuring 0.083 hectares for more than 12 years.**
- b) Whether the said land is registered in the name of the Respondents.**
- c) What orders to issue.**
- d) Who pays the costs of the Originating Summons.**

5. The Court has after considering the originating summons, the affidavit evidence by the 2nd Applicant and the 2nd Respondent, the written submissions by the Counsel for the Applicants come to the following determinations;

- a) That from the available documentary and affidavit evidence availed by the Applicants, their claim to a portion measuring 0.083 hectares of Kisumu/Kasule/1897 is the interest the 2nd Applicant and his mother acquired over parcel described as Plot 1281, Manyatta "B" Land Adjudication Section through the sale agreement dated 11th December, from one Samuel Ndalo. That it is the Applicants' case that the said plot was later found to have been included into parcel Kisumu/Kasule/1897, the suit property that is registered with the Respondents' Church. That however, the Applicants have not availed any copy of Land Proprietorship documents in the form of either copies of title deed, lease, certificate of lease, certificate of official search, green card or adjudication register of plots 1281 and Kisumu/Kasule/1897 to enable the court confirm who is the current registered owner, the proprietorship and acreage.
- b) That **Order 37 of Civil Procedure Rules** provides for Originating Summons seeking for adverse possession orders and **Rule 7 (2)** requires the summons to be supported by an affidavit to which a certified extract of the title in question shall be attached. That the Applicants have not complied with that mandatory provision as no extract of the title for Kisumu/Kasule/1897, whether certified or not, has been annexed to the affidavit supporting the Originating Summons.
- c) That the Applicants have through the other documents attached to the supporting affidavits, like the sale agreement with Samuel Ndalo, photographs, letters dated 10th March 2014 and 6th March 2014 to Land registrar, regional Surveyor letter dated 5th May 2014 and Assistant Chief's letter of 12th July 2012, among others, shown that their land is on the same parcel with that of the church. That however does not satisfy the legal requirement under **Order 37 Rule 7 (2) of the Civil Procedure Rules** and the failure to attach the certified copy of the title document of the suit land issued by the Land Registrar to the supporting affidavit makes the Originating Summons incompetent and defective.

d) That the sale agreement between 1st and 2nd Applicant on one part, and 3rd Applicant on the other part, dated the 24th August 2011 indicates that the land being sold was a portion of Kisumu/Kasule/1987, the suit property, and not plot 1281. That the land is described at paragraph 2 of the agreement as **“registered in the names of Denis Miganda Okoth, Joseph Akengo Owuor and Larry Mark Stephen the registered trustees of Kasule Christ Church.”** That shows that as of the date of the agreement, the Applicants knew in whose name that land was registered, but went ahead to enter into a sale agreement of a portion thereof and to acknowledge receipt of the purchase price, without participation of the registered proprietors.

e) That the 1st and 2nd Applicants had entered onto the land they bought from Samuel Ndalo in 1983 as owners and not as adverse possessors. That the Applicants have not disclosed on what date they discovered that the land they occupied, and had possession of, from 1983 was registered with the Respondents. That would enable the court consider whether a period of twelve (12) years had lapsed from that date, when their possession probably became adverse to the title of the registered proprietor, to the date of filing the Originating Summons.

6. That for the reasons set out above, the Applicants’ Originating Summons dated and filed on the 7th January 2015 is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JUNE 2019

In the presence of:

Applicants 3rd present

Respondents Absent

Counsel M/s Willy for Applicants

M/s Ayieta for Respondents

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE