



**REPUBLIC OF KENYA**

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

**ELC MISC. CASE NO. 62 OF 2013 (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**

**LEONIDA AMIMO AGAI.....PLAINTIFF**

**VERSUS**

**PIUS OTIENO AGAI.....DEFENDANT**

**JUDGEMENT**

1. Cosmas Juma Agai, who was later substituted after passing on by Leonida Amimo Agai, the Plaintiff, filed this suit against Pius Otieno Agai, the Defendant, through the Originating Summons dated the 27<sup>th</sup> February 2013 and amended on 28<sup>th</sup> October 2016 seeking for the following determinations;

1. **“Whether the Applicant purchased the land parcel KISUMU/FORT TERNAN/207 sometimes in the year 1966 vide a partnership agreement, culminating from an equal financial contribution of Kshs. 400/= each between him and Pius Otieno Agai his blood brother.**
2. **Whether the Applicant Cosmas Juma Agai has an overriding interest under Section 28 of the Land Registration Act 2012 to parcel, KISUMU/FORT TERNAN/207.**
3. **Whether the Applicant is an adverse possessor of a portion of land parcel number KISUMU/FORT TERNAN/207.**
4. **Whether the honourable court ought to vest the suit property/land to the applicant.**
5. **If 1, 2, 3 and 4 are in the affirmative whether the Nyando District Land Registrar should be directed to register the rights and interests of the Applicant upon KISUMU/FORT TERNANA/207**
6. **Whether the honourable court ought to vest the suit land to the Applicant.**
7. **Whether the Applicant is entitled to the cost of this application.”**

The Originating summons is based on three (3) grounds that the suit land belongs to him as he bought it in 1966; that he has been in adverse possession for over 19 years, and would suffer great prejudice if the orders sought are not granted. The summons is supported by the affidavit sworn by the Plaintiff on 27<sup>th</sup> February 2013 and summarized as follows;

- a) **That the Defendant who is his brother approached him in 1966 to jointly purchase some land. That they each contributed Kshs. 400/= and bought land parcel Kisumu/Fort Ternan/207.**
- b) **That when he retired in 1974, he settled on the said land and has heavily developed it without any interference until 1998, when the defendant threatened to evict him.**
- c) **That the Plaintiff filed Muhoroni D.M.C Misc. Appl. No. 5 of 1994. That the dispute was also heard by the Chief’s, elders,**

the District Officer and Nyando District Lands Tribunal in case No. 4 of 2004 all giving a verdict that they share the suit land equally.

d) That the Defendant appealed against the tribunal decision in Kisumu Land Appeal case No. 42 of 2007 and a further appeal in Kisumu H.C.C.A No. 80 of 2009. That the later appeal was allowed on the basis that the tribunal was without jurisdiction.

e) That he occupies about three (3) hectares while the Defendant occupies about twelve (12) hectares. That the Defendant had brought surveyors to the land and there is fear he may transfer the land to a third party.

2. The Originating Summons is opposed by the Defendant through the replying affidavit sworn on the “4<sup>th</sup> April 2012” and filed on the 4<sup>th</sup> April 2013 summarized as follows;

a) That he never approached the Plaintiff to jointly purchase the suit land and that the Plaintiff never contributed to its purchase.

b) That he allowed the Plaintiff to build a house on the suit for a time. That the Plaintiff later declined to vacate and filed Muhoroni P.M. Misc. App. No. 5 of 1994 claiming a portion of the land. That the matter was heard by the Land Disputes Provincial Appeals Tribunal and the High Court determined the appeal thereof in January 2012 in his favour.

c) That he had bought the land from the Settlement Fund Trustees with his own money and it was transferred to him on the 19<sup>th</sup> February 1991.

d) That the Plaintiff has not been in continuous and uninterrupted occupation of the suit land as alleged and the application should be dismissed with costs.

3. The Counsel for the parties entered a consent on the 27<sup>th</sup> June 2013 converting the Originating Summons into a plaint and the replying affidavit into a defence. The original Plaintiff testified as PW2 and called Maurice Akuku Abudha, who testified as PW1. The original Plaintiff died before he could be cross-examined. That PW2 was substituted by Leonida Amimo Juma alias Agai who testified as PW3. One Joseph Ouma Juma, a son to PW3, testified as PW4. The Defendant testified as DW1.

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

a) Whether the Plaintiff has proved that he contributed equally for the purchase of the suit land.

b) Whether the Plaintiff has been in adverse possession of the suit land or a portion thereof.

c) Who pays the costs of the suit.

5. The Court has carefully considered the pleadings and affidavit evidence by both sides, the oral and documentary evidence tendered, submissions by the Plaintiff’s Counsel and come to the following findings;

a) That whereas the Plaintiff’s claim that he contributed equally for the purchase of the suit land in 1966, the Defendant’s contention is that he bought the land wholly on his own. That the legal burden therefore fell upon the Plaintiff to tender proof of his contribution and partnership towards the purchase. That towards that end he availed a relative who testified as PW1 whose evidence was that he heard about the Plaintiff’s contributions of Kshs. 400/=, but was not present when it was given. That the testimony of PW4, Leonida Amimo Agai, did not help in any way on the matter as her evidence was that *“The Settlement Fund Trustee payment was paid from the proceeds realized from the sale of sugarcane that had been left on the land by the Mzungu (White man) from whom the land was bought.... We did not write a document when my husband contributed Kshs 400/= for the purchase of the land...”* That in the absence of any documentary evidence that the Plaintiff was an equal purchaser of the suit land, and in view of the fact that his name did not appear as a joint proprietor when the Defendant was registered and issued with the title deed on 19<sup>th</sup> February 1991, then the claim that his entitled to half share out of being an equal purchaser fails.

b) That notwithstanding the finding in (a) above, the evidence tendered by PW1, PW2, PW3 and PW4 confirms that the Plaintiff and his family have lived on portion of the suit land for many years. That it was the testimony of PW4, who is a son to the Plaintiff, that he was born on that land in 1978. That PW2 testimony was that he established a home there with the Defendant’s assistance in 1974, which fact has been confirmed by PW1 and PW3. That even though the Defendant had in his testimony in court denied that the Plaintiff was settled on the land, he later conceded during cross-examination that the Plaintiff settled there in 1974; that he has buried two of his deceased children there; and that he was also buried on the said land after passing on. That this confirmation by the Defendant leaves no doubt that the Plaintiff and his family settled on the suit land in 1974, and despite the Defendant’s attempt to evict them in 1991, they are still on that land.

c) That even though the Plaintiff’s entry onto the land in 1974 may have been with the consent and permission of the Defendant, the land was then in the name of the Settlement Trustee Fund, until 1991 when it was registered in the name of the Defendant. The claim of adverse possession could not crystalize or hold for the period the land was in the name of the Settlement Trustee Fund.

d) That from the 19<sup>th</sup> February 1991, when the Defendant became the registered proprietor, to the 18<sup>th</sup> March 2013 when this suit was filed in court, a period of about twenty two (22) years, one (1) month had lapsed. The evidence

tendered by PW2 and PW3 leads to the court concluding that they have remained on the land without the Defendant's consent or permission from 1991, which is the date their occupation and possession of the portion of the suit land became adverse to the title of the Defendant. They have continued being in occupation uninterrupted and peacefully for over twelve (12) years. That they have over time buried two of their children on it. That PW2 was also buried on the said parcel. That the Defendant confirmed attending the burials of the two children and that of PW2 which in itself is an acknowledgement that they were indeed in occupation and possession. That the title of the defendant over that portion of the suit land under the possession and occupation of the Plaintiff has therefore since been extinguished by the operations of the law and should be registered in the name of the Plaintiff.

e) That in view of the fact that the Plaintiff and defendant are closely related and so as to foster cordial family relationship, each party will bear her/his own costs.

6. That flowing from the foregoing, the court finds that the Plaintiff has established her claim for the portion of the suit land under her possession and occupation under adverse possession on a balance of probabilities. The court therefore enters Judgment for the Plaintiff as against the Defendant as follows;

**a) That the Plaintiff has been in adverse possession of the portion of Land parcel Kisumu/Fort Ternan/207 under her possession for over twelve (12) years since 1991, and that the Defendant's title over that portion has been extinguished.**

**b) That the Defendant do cause a survey to be carried out for the portion of the said land occupied by the Plaintiff and transfer it to her within ninety (90) days, and in default the Deputy Registrar of the court be and is hereby empowered to execute all necessary documents to give effect to this order.**

**c) That each party do bear her/his own costs.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2019**

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Mr. Ojuro for Odeny for Plaintiff

Mr. Ogunda for Kowino for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**