



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT KISUMU**

**ELC NO. 116 OF 2016**

**JACOB ODERO OMENYO.....1<sup>ST</sup> PLAINTIFF**

**ISAAC MORO OMENYO.....2<sup>ND</sup> PLAINTIFF**

**EDWIN OKOTH OJUNGA.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**NEWTON LEE ODHIAMBO.....DEFENDANT**

**JUDGEMENT**

1. Jacob Odero Omenyo, Isaac Moro Omenyo and Edwin Okoth Ojunga, the plaintiffs, commenced these proceedings through the originating summons dated the 9<sup>th</sup> May, 2016, against Newton Lee Odhiambo, the defendant, seeking to be declared the owners of Kisumu/Konya/2528, the suit land, by dint of adverse possession; Defendant be ordered to transfer the suit land to them and in default the Deputy Registrar to be empowered to do so; and costs. The plaintiffs' claim is based on grounds that they have been in uninterrupted occupation of the land for over 26 years; that their occupation was not with the consent of the registered proprietors and has been open and notorious and the defendant's title over the suit land has been extinguished. The summons is supported by the affidavit sworn by the 1<sup>st</sup> Plaintiff on the 9<sup>th</sup> May, 2016 to which he annexed among others a copy of the green card for the suit land showing that the defendant became the registered proprietor of the suit land on the 30<sup>th</sup> August, 2013.

2. The defendant did not enter appearance, file reply to the summons or participate in the proceedings.

3. The case for the plaintiffs was as told by Jacob Odero Omenyo, the 1<sup>st</sup> Plaintiff, who testified as PW 1 on the 17<sup>th</sup> January, 2019, on behalf of himself and the other plaintiffs. The plaintiffs' case is that the suit land that belonged to their late grandfather was inherited by their father who passed on in 1993. That they have lived on the land for over 20 years. That when they obtained the green card for the suit land on the 2<sup>nd</sup> April, 2014 they found it was registered in the name of the defendant whom they did not know. They then filed this suit. That their parents were buried on another land and not the suit land. During cross-examination, PW 1 agreed his late father's name does not appear as a proprietor of the suit land on the green card. That he was involved in the Land adjudication exercise in the area in 1982 and was registered with another land. That there was no objection proceedings filed in respect of the suit land being registered with Francis Michael Simiyu. That the Plaintiffs do farming on the suit land but do not reside on it.

4. The learned counsel for the plaintiffs filed their written submissions dated the 22<sup>nd</sup> February, 2019.

5. The issues for the court's determinations are as follows:-

a. Whether the plaintiffs have been in uninterrupted peaceful and open occupation of the suit land, and if so, when their occupation became adverse to the title of the registered proprietor(s).

b. Whether the plaintiffs had been in adverse possession of the suit land for twelve (12) years by the date this suit was filed.

c. Who pays the costs.

6. The court has carefully considered the grounds on the originating summons, the affidavit, documentary and oral evidence by PW 1, the learned counsel's written submissions and come to the following determination;

a. That the plaintiffs had through the summons and supporting affidavit in support traced their occupation to the suit land to the 1950s when their late father reportedly established his home on a portion of it. That when their late father passed on in 1993, they interred his remains on the suit land and by then the 2<sup>nd</sup> plaintiff had established his home on the said parcel in 1990. That the 1<sup>st</sup> plaintiff then established his home on the suit land in 2000 and that the 3<sup>rd</sup> plaintiff remains in occupation of a portion thereof. That when the 1<sup>st</sup> plaintiff testified as PW 1 on behalf of himself and the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, his testimony did not support the summons and his earlier depositions in the supporting affidavit. That he told the court that his late father was buried (interred) on a different parcel from the suit land, and that none of the plaintiffs were residing on the suit land, which materially differs with their pleadings. That the evidence given by PW 1 does not therefore support their claim as laid out in the originating summons and supporting affidavit.

b. That the originating summons and supporting affidavit clearly shows that the plaintiffs and their kin occupied the suit land as their own land. That it was their ancestral land and what this tell the court is that their occupation could not have been adverse as they believed the land was theirs. That one cannot in law be in adverse possession of his or her own land. That the only time the plaintiffs occupation of the suit land because adverse to the title of the registered proprietor was when they discovered the title to the land was not theirs but the defendant's. That according to paragraph 10 of the supporting affidavit and the oral testimony of PW 1 was after perusing the suit land's green card. The green card attached to the supporting affidavit was certified as a true copy of the original on the 2<sup>nd</sup> April, 2014 which the court takes to be the date the plaintiffs discovered the land was actually registered in the name of the defendant. That from that date to the 24<sup>th</sup> May, 2016 when the originating summons was filed, only about two (2) years one (1) month had lapsed from the date the occupation of the suit land by the plaintiffs became adverse to the title of the defendant. That accordingly, the plaintiffs claim based on adverse possession, though undefended, fails as they have failed to discharge the legal duty bestowed upon them by **Section 107** of the Evidence Act **Chapter 80** of Laws of Kenya.

c. That though the plaintiffs had applied for and obtained leave to serve the defendant through advertisement, the copy of the 7<sup>th</sup> April, 2017 Standard Newspaper advert attached to the 1<sup>st</sup> Plaintiff affidavit sworn on 7<sup>th</sup> April, 2017 does not amount to proper service. That is because it was made and deponed by bthe 1<sup>st</sup> plaintiff who is not an authorized process server, and secondly the advert only amounts to notifying the defendant to come to court on the 20<sup>th</sup> June, 2017, but does not inform him where to collect or obtain the suit papers from as required.

d. That as the defendant did not participate in the proceedings and the plaintiffs have failed to prove their claim, and as under **Section 27** of Civil Procedure Act **Chapter 21** of Laws of Kenya, costs follow the events the plaintiffs will bear their own costs.

7. That in view of the foregoing the court finds that the plaintiffs have failed to prove their case against the defendant to the standard required of balance of probabilities. The plaintiffs claim is therefore dismissed with the plaintiffs bearing their own costs.

Orders accordingly.

**S. M. KIBUNJA**

**ENVIRONMENT & LAND - JUDGE**

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**In presence of;**

Plaintiffs Absent

Defendant Absent

Counsel Mr. Oguso for Odeny for Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**