



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 18 OF 2014

BERNARD APOLLO MESSOH.....PLAINTIFF

VERSUS

GEORGE ODUOR OMONDI ONGUOLO.....DEFENDANT

JUDGMENT

The Plaintiff brought this suit by way of originating summons dated 3rd February 2014 seeking determination of the following questions:

- 1. Whether by virtue of having been in open, peaceful and uninterrupted occupation of part of land parcel no. SIAYA/AMBIRA/691 measuring 3.5 acres for a period in excess of 40 years, the Plaintiff is entitled to have the same registered in his name.**
- 2. Whether the Defendant ought to be ordered to transfer the said land in the name of the Plaintiff and failing which the Deputy Registrar of this court do sign such transfer documents in favour of the Plaintiff.**
- 3. Whether the Defendant ought to be ordered to pay costs of this suit.**

The Plaintiff claims that his grandfather settled on the suit parcel even before the land adjudication process began. That in 1969, his father (Peter Olingo) put up his homestead on part of the suit parcel and that was where the Plaintiff and his family members have lived to date. That during the land adjudication process in the 1960s, the portion of the suit parcel occupied by the Plaintiff was designated as no. 1644 while the portion occupied by the Defendant and his family was designated as no. 691.

The Plaintiff claims that the Defendant's father (Samson Omondi Onguolo) had been away from home during the land adjudication process and upon his return in 1976, he caused the parcels no. 691 and 1644 to be amalgamated and designated as a single parcel no. 691. That the Defendant's father then had himself registered as the absolute proprietor of the land without the knowledge of the Plaintiff's family. That the Plaintiff and his family have been in open, peaceful and continuous occupation of the suit property for more than 44 years and during this period neither the Defendant, his family nor any other person has laid any claim to the land occupied by the Plaintiff and his family. That the suit land belongs to the Plaintiff but at any rate should be declared as having been acquired by the principle of adverse possession.

In his replying affidavit, the Defendant stated that the Plaintiff was allowed permissive use of the suit land and therefore the claim of adverse possession fails on the ground that the Plaintiff's occupation was not hostile. That the Plaintiff had no exclusive use of the suit land and at all material times, the Defendant used the land in a manner consistent with a property owner. That the Plaintiff had failed to produce letters of administration to show that he is the personal representative of his deceased father's estate. That this matter was the subject of judicial proceedings in Civil Case No. 20 of 2012 on which the Plaintiff unilaterally withdrew his case.

The suit proceeded by way of written submissions.

Defendant's Submissions

Counsel for the Defendant submitted that the Plaintiff should have brought the suit within the 12-year window for actions for the recovery of land as prescribed by Section 7 of the Limitation of Actions Act. That the Defendant's father had been in possession of the suit land for 47 years before the suit was filed, therefore the suit was time barred (*not pleaded*).

Counsel submitted that the Plaintiff could not base his claim on the principle of adverse possession because the Plaintiff was allowed a permissive use of the suit land. Counsel relied on the case of *Gabriel Mbui v Mukindia Maranya [1993] eKLR* in which the court held that among the elements required to prove adverse possession was that the "occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied" and that "If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession."

Counsel submitted that the fact that the Defendant's father had allowed the Plaintiff's family to live and bury their kin on the suit land did not give the Plaintiff the right to adverse possession. Counsel submitted that the Plaintiff had not satisfied the elements required to prove adverse possession as enumerated in Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR.

Plaintiff was to file and serve submissions within 21 days from 25th September 2019 and the Defendant to file and serve submissions within 21 days of service. None of the parties have filed submissions as of 14th November 2019.

Issues for Determination

1. What is required to prove adverse possession

Claims under adverse possession are set out in several provisions of the Limitation of Actions Act. Section 7 places a bar on actions to recover land after 12 years from the date on which the right accrued. Section 13 provides adverse possession as the exception to this limitation:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Finally, **Section 38 of the Act** provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.”

The Court of Appeal in Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR elaborated on the required elements to prove adverse possession thus:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See Jandu vs. Kirplal & Another (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in Wambugu vs. Njuguna [1983] KLR 173.”

Analysis:

The fact that the Plaintiff in this case has lived on the land for more than the statutory period of 12 years is not in dispute by either party. The land parcel was registered in the name of the Defendant's father in 1976, therefore the time accrued when the Plaintiff brought this suit in 2014 is 38 years. The main issue for determination is therefore whether the Plaintiff dispossessed the owner of the land, or whether the owner discontinued his possession.

2. Whether the Plaintiff has proved dispossession of the owner

In Mbira v Gachuhi [2002] 1 EA 137, the court held that the claimant must lead evidence to show that the owner has been dispossessed or that the owner had discontinued possession:

“There must be evidence and facts found showing that the true owner's titled has been expressly repudiated by the adverse possessor. There must be facts of possession asserted against a claim of ownership of all others, including the registered proprietor.... So, one must show the mode of repudiation; the knowledge by the true owner, of the assertion of the adverse claim; the date and mode in which the adverse claim was brought to the knowledge of the true owner...

...a person who raises that doctrine for a statutory acquisition of title to land must satisfy the Court in the normal standard of proof in civil cases:

(a) that there has been absence of possession by the true owner through abandonment (discontinuance);

(b) that the adverse possessor has been in actual possession of the same piece of land;

- (c) that the adverse possessor has no colour of right to be there, other than his entry and occupation;
- (d) that he has openly and without permission or agreement of the true owner, done acts which are inconsistent with the enjoyment by the true owner of the land for purposes for which he intended to use it;
- (e) that there was sufficient *animus* to dispossess and an *animus Possidendi*;
- (f) that all this has lasted for the statutory period, in his case, twelve years, since the adverse possession began;
- (g) that the nature of the property was such that in the light of the foregoing acts, there resulted adverse possession;
- (h) that throughout the twelve years which tolled, there was no interruption of the adverse possession.”

In *Wambugu v Njuguna* [1983] 1 EA 137 the Court of Appeal while holding that the proper way of assessing proof of adverse possession will be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period, described dispossession thus:

“The next question, therefore, is what constitutes dispossession of the proprietor. Bramwell LJ in *Leigh v Jack* said at 273, that to defeat a title by dispossessing the former owner ‘acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.’”

Analysis

The Defendant did not deny the claims that the Plaintiff’s family has been living in the land; that the Plaintiff’s father set up his home on the land; and that the Plaintiff subsequently also built his home on the land. In his supporting affidavit, the Plaintiff attached death certificates and a burial permit to show that his family had buried relatives on the land. This claim was not denied by the Defendant. The act of burial of the Plaintiff’s relatives on the land with the knowledge of the Defendant can be seen to be inconsistent with the Defendant’s enjoyment of the land.

The Defendant, on the other hand, mounted a lethargic defence. The Defendant failed to prove that the occupation of the suit parcel by the Plaintiff was permissive as claimed. There was no evidence led by the Defendant showing any express permission given by the Defendant or his father to the Plaintiff’s father or the Plaintiff to occupy the land. The Defendant led no evidence to show acts by the parties to establish that a permissive occupation had been allowed.

I do find that the Plaintiff has sufficiently demonstrated to the required standard of proof that the Defendant was dispossessed of the portion of the land parcel occupied by the Plaintiff. The plaintiff has been in possession for more than 12 years after the defendant obtained title and therefore do declare that by virtue of having been in open, peaceful and uninterrupted occupation of part of land parcel no. SIAYA/AMBIRA/691 measuring 3.5 acres for a period in excess of 12 years, the Plaintiff is entitled to have the same registered in his name.

The Defendant is ordered to transfer the said land in the name of the Plaintiff and failing which the Deputy Registrar of this court do sign such transfer documents in favour of the Plaintiff. The Defendant to pay costs of this suit.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2019.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

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