



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 484 OF 2014

STEPHEN WERE OBWOGO.....APPLICANT

VERSUS

HAGGAI NGAMIA NYAROTSO.....RESPONDENT

AND

SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA

AND

SECTION 28 (h) OF THE LAND REGISTRATION ACT, No 3 OF 2012

AND

ORDER 37, RULE 7 (1) & (2) OF THE CIVIL PROCEDURE RULES, 2010

AND

LR No SOUTH WANGA/MUSANDA/479

JUDGEMENT

This is the Application of Stephen Were Obwogo who claims that he is entitled to the entire parcel of land measuring approximately 2.8 Ha, namely, L.R No South Wanga/Musanda/479 registered in the name of the said Haggai Ngamia Nyarotso by virtue of having been in continuous and uninterrupted possession, occupation and open use of the said entire parcel of land for a period in excess of 12 years and in a peaceful manner and for determination of the following issues;

1. Whether the respondent is the registered proprietor of L.R. No. South Wanga/Musanda/479;
2. Whether the Applicant has been a permanent resident upon the said parcel of land;
3. Whether the residence of the Applicant upon the parcel of land in excess of 12 years and in an open, peaceful and uninterrupted manner;
4. Whether the residence of the Applicant upon the parcel of land has been adverse to the proprietary interests of the Respondent and other proprietors before him;
5. When did time necessary to constitute adverse possession in favour of the Applicant begin to run;
6. Whether having been in possession and use of the parcel of land in a peaceful and open manner for a period in excess of 12 years, whether the Applicant has acquired ownership of the same through prescription;
7. Whether the proprietorship of the Respondent with respect to the parcel of land is subject to the prescriptive rights of the Applicant;

PW1 the plaintiff testified that, L.R No South Wanga/Musanda/479 measuring approximately 2.8 acres was first registered in the name of the late Odera Nafukha. That presently the said parcel of land is registered in the name of the Respondent as is shown by the certificate of

official search marked as PEx1. That he does reside on the said parcel of land and has done so for a period in excess of 12 years. That his residence thereon has been open, peaceful, uninterrupted and continuous with regard to the use of the entire parcel of land. That given the fact that his occupation of the parcel of land has been open and peaceful he has now acquired absolute ownership thereof through the principle of prescription and any registered proprietor does so subject to the prescriptive rights due to him.

The applicant in submissions relied in the case of Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 where Kneller J, held that:

"The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)".

So the plaintiff must show that the defendant had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration".

They submit that, as the Defendant exercised his right not to defend the suit herein the assertions by the Plaintiff that he has had the use of Plot 479 for a period in excess of 12 years was not rebutted. Further, as the Defendant is presently the registered owner of Plot 479 and given the fact that the Plaintiff is in occupation and use thereof, the Defendant must have had the actual or constructive knowledge of such occupation. They also relied in the case of Ann Itumbi Kiseli v James Muriuki Muriithi [2013] eKLR Malindi Environment and Land Court Case No 163 of 2012. They submit that, the Period prescribed by the Limitation of Actions Act, Cap. 22 for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years. Therefore, having demonstrated before this Honourable Court that he has been in open, peaceful, continuous and uninterrupted possession, occupation and use of Plot 479 for periods beyond 12 years the Plaintiff is entitled to the prayers sought herein.

This court has considered the applicants' case and submissions herein. The respondent was served but failed to attend court or file any defence. In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Sergon J in the case of Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu v Njuguna (1983) KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.

3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

In applying these principles to the present case, it has been established that the applicant/plaintiff has established his homestead on the said parcel of land. The applicant submitted that L.R No South Wanga/Musanda/479 (Plot 479) measuring approximately 2.8 Ha is registered in the name of Haggai Ngamia Nyarotso the Defendant herein. The Plaintiff produced a Certificate of Search in respect of Plot 479 as P/Exh 1 and it shows that the Defendant became the registered proprietor thereof on the 31st day of March 2008. It is the allegation by the Plaintiff that prior to the registration of the Defendant, Plot 479 was in the name of the late Odera Nafukha. The Plaintiff prays that this Honourable Court decrees that Plot 479 be registered in his name by way of Adverse Possession since he has been in open, peaceful, uninterrupted and continuous occupation thereof for more than 12 years. The plaintiff's evidence was not challenged. I find that the applicant has proved his case on a balance of probabilities. The Applicant's possession and occupation of a portion LR No South Wanga/Musanda/479 has been adverse to the proprietary interests of the Respondent. And I grant the following orders;

1. A declaration that the defendant's/respondent's sole proprietary interests in the said land have been extinguished by virtue of the plaintiff's/applicant's adverse possession of the same.
2. That the defendant/ Respondent to execute all subdivision and transfer documents of a portion of land parcel No. South Wanga/Musanda/479 occupied by the applicant and in event of default the Deputy Registrar of this court be empowered to execute the same to give effect to the foresaid orders.
3. That costs to be borne by the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE