



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 57 OF 2014 (O.S)

JOSEPH ODEK OWINO.....PLAINTIFF

VERSUS

SILFANUS OWINO AYOSI.....DEFENDANT

JUDGMENT

1. This suit was commenced by Joseph Odek Owino, the Plaintiff, against Silfanus Owino Ayosi, the Defendant, through the Originating Summons dated 7th March 2014. The Plaintiff seeks to be declared the owner of a portion of about ¼ acre of Kisumu/Bar/651 registered in the name of the Defendant, for having been in adverse possession of the portion from 19th July 1980, which is a period exceeding 12 years. The Plaintiff depones in the supporting affidavit that he bought a portion of the said land for Kshs. 11,200/= from the late Domtila Agai Orondo and her son, the late John Orondo on or about 13th July 1980. That he took possession of the portion and erected his homestead on it on the 19th July 1980. That the sale agreement was for a portion of Kisumu/Bar/650 but the portion he was shown and occupied was later found to be Kisumu/Bar/651. That Kisumu/Bar/651 belongs to the Defendant who was a step son to the Domtila Agai Orondo. That in 1982, the Defendant moved onto Kisumu/bar/650 which belonged to his step brother, John Orondo and settled there. That he has lived on land parcel Kisumu/Bar/651 with his two wives and children for 34 years without any interruption. That he has severally asked the Defendant to surrender the title deed to that portion of land to him without success and hence this suit.

2. The Defendant opposed the Plaintiff's claim through the replying affidavit sworn on 30th April 2015. He depones that the Plaintiff had bought a portion of Kisumu/bar/650 and not Kisumu/bar/651. That the Plaintiff had trespassed onto land parcel Kisumu/Bar/651 and constructed a homestead. That he has not erected a homestead on Kisumu/bar/651 as alleged by the Plaintiff. That he had lodged ownership dispute against the Plaintiff over Kisumu/Bar/651 with the local administration officials and therefore the Plaintiff has not been in peaceful occupation.

3. The suit came up for directions on the 18th May 2015 when Mr. Orengo and Okungu, learned counsel for the Plaintiff and Defendant respectively, entered a consent that ***"this matter is converted into an ordinary suit. The Originating Summons become the plaint; the replying affidavit the defence; and the parties to comply with the pre-trial requirements."*** The suit was on the 26th September 2017 fixed for hearing on the 19th March 2018 by consent of both counsel.

4. That during the hearing, the Plaintiff testified as PW1 and called Patrick Omwombo Owino who testified as PW2. The Plaintiff more or less reiterated the contents of his supporting affidavit and added that he has fenced the whole of Kisumu/Bar/651. The witness, PW2, testified that the Plaintiff is using a half of Kisumu/Bar/651 while the other half is used by the Defendant.

5. The Defendant's case was marked closed without testifying as he failed to come to court on the hearing date.

6. The following are the issues for the court's determination;

- a) **When the Plaintiff took possession of the suit land.**
- b) **Whether the Plaintiff's occupation of the suit land became adverse to the title of the registered proprietor.**
- c) **Whether the Plaintiff has been in adverse possession of the suit land for over 12 years.**
- d) **What portion of the suit land the Plaintiff has been in adverse possession for over 12 years.**

7. The court has carefully considered the pleadings filed by both parties, affidavit evidence, the oral and documentary evidence tendered by the Plaintiff, submissions and come to the following conclusion;

a) That when the Plaintiff took possession of land parcel Kisumu/Bar/651 in 1980, it was with consent of Domtila Agai Orondo and her son, John Orondo under a sale agreement dated 13th July 1980 over Kisumu/Bar/650.

b) That there is no evidence of the consent of the Land Control Board having been obtained within six months of the sale agreement as required under **Sections 6 and 8 of Land Control Act Chapter 302 of Laws of Kenya**. That the sale agreement therefore became void after six months from 13th July 1980, that is on or about 13th January 1981.

c) That the Plaintiff's continued occupation of Kisumu/Bar/651 became adverse to the title of the registered proprietor, the Defendant from 13th January 1981. That by the time this suit was filed, the Plaintiff had been in continuous and uninterrupted occupation of the suit land for over 33 years.

d) That though the Plaintiff in his oral evidence stated that he had fenced the whole Kisumu/Bar/651, the opening paragraph of his Originating Summons shows that he "*...claims proprietary interest by way of adverse possession in a portion of the land parcel No. Kisumu/Bar/651, measuring or estimated to measure ¼ acre or thereabout....*" That a party in a suit is bound by his/her own pleadings and the court cannot therefore grant the Plaintiff what he did not pray for in his pleadings. That further, PW2's testimony shows that the Plaintiff and the Defendant are both using portions of Kisumu/Bar/651.

e) That the court therefore finds that the Plaintiff acquired proprietorship of a quarter (1/4) of Kisumu/Bar/651 on or about 13th January 1993 when 12 years lapsed from 13th January 1981, when his occupation of that portion of land became adverse to the title of the Defendant.

f) That accordingly, the Defendant title to the quarter of an acre portion of Kisumu/Bar/651, occupied by the Plaintiff was extinguished in accordance with **Section 7 of Limitation of Actions Act Chapter 22 of Laws of Kenya** on or about 13th January 1993.

8. The foregoing shows that the Plaintiff has proved his case against the Defendant on a balance of probabilities. The court therefore enters judgment for the Plaintiff against the Defendant in the following terms:

a) That Plaintiff has acquired ownership to a quarter (1/4) acre of Land Parcel Kisumu/Bar/651 through adverse possession.

b) That the Defendant do transfer a quarter (1/4) acre of Kisumu/Bar/651 to the Plaintiff forthwith. That the portion be surveyed on the portion of the said land occupied by the Plaintiff.

c) That each party do bear his own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26th DAY OF September 2018

In the presence of:

Plaintiff Present

Defendant Absent

Counsel Mr. Orengo for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE