



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 603 OF 2016**

**(FORMERLY HCC NO. 118 OF 2011 (OS))**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) LAWS OF KENYA**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**JOSEPH R. R. AGANYO .....PLAINTIFF**

**VERSUS**

**AGNES ANYANGO AKUMU, sued as the**

**Legal administratrix of the Estate of**

**WILLIS JOHN AKUMU YOYA (Deceased).....DEFENDANT**

**J U D G M E N T**

1. The plaintiff by the amended originating motion dated 26<sup>th</sup> October 2015 filed in court on the same day seeks orders against the defendant thus:-

**1. That the plaintiff be declared entitled by adverse possession to a portion measuring 25feet by 100feet of that piece of land containing 1.4hectares or thereabouts registered in the land Titles Registry as West Kasipul/ Konyango Kokal/2365 situated within Oyugis Township known as Plot No. 43B which he has developed and collected rent ever since by constructive trust.**

**2. That the title issued to the defendant be cancelled and the said plaintiff be registered as the sole proprietor of the said portion measuring 25feet by 100feet of that piece of land containing 1.4hectares or thereabout registered in the Land Titles Registry as West Kasipul/Konyango Kokal/2365 situated within Oyugis Township.**

**3. That the costs of the suit be provided for.**

2. That the originating summons was supported by the supporting affidavit sworn by the plaintiff dated 26<sup>th</sup> October 2015. The plaintiff avers that the parcel of land presently registered as parcel number **West Kasipul/Konyango Kokal/2365** was prior to subdivision known as **LR West Kasipul/Konyango Kokal/18** and was registered in the name of Nicodemus Yoya (deceased) who was the father of the

defendant herein.

3. The plaintiff states that the defendant's father gifted him a portion of land measuring 25feet by 100feet on which he constructed a commercial shop in 1983/1984 which he has occupied ever since. The plaintiff states he has been renting the shop out to tenants and that he has been paying land rent for the plot to the council since 1987 to date. That the County Council issued him with a plot card and a plot rent card.

4. The plaintiff states that his uncle died in the year 1984, consequent to which the sons of the late Nicodemus Yoya took out letters of administration and had the assets of their late father distributed to themselves. The plaintiff's commercial plot following the subdivision and transfer by transmission is now comprised in land parcel **West Kasipul/Konyango Kokal/2365** and registered in the name of Willis John Akumu Yoya (now also deceased). The plaintiff avers that on or about 15<sup>th</sup> January 2011 the defendant invaded the land where the plaintiff has constructed his shop and commenced building thereon without any regard to the building the plaintiff has constructed and has used as a shop since 1984. The plaintiff further avers efforts to have the matter amicably settled have not yielded results precipitating the filing of the instant suit.

5. The originating summons was initially served on one, Willis John Akuyu Yoya (deceased) as the defendant/respondent. Subsequently, the plaintiff following the death of the defendant, applied vide a Notice of Motion dated 14<sup>th</sup> July 2015 to have one Agnes Onyango Akumu who had taken out letters of administration substituted in place of the deceased defendant. The court made the order for the substitution on 12<sup>th</sup> October 2015. The said Agnes Anyango Akumu appointed the firm of H. Obach & Partners Advocates to act for her as per the Notice of Appointment of Advocates dated 29<sup>th</sup> September 2015 filed in court on 12<sup>th</sup> October 2015.

6. The hearing of the originating summons was fixed for hearing on 22<sup>nd</sup> November 2016 when the defendant sought an adjournment on account of her advocate being indisposed. The court adjourned the hearing and refixed the (OS) for hearing on 2<sup>nd</sup> February 2017 and at the same time granted the defendant, who had not filed any response, liberty to file her response to the (OS) within 45 days from 22<sup>nd</sup> November 2016.

7. On the 2<sup>nd</sup> February 2017 the defendant and her advocate did not attend court and neither had the defendant filed any response to the originating summons. As the plaintiff and his advocate were present in court and the hearing had been fixed in court in the presence of both parties and there was no explanation for the defendant's absence, the court allowed the hearing to proceed ex parte on the part of the plaintiff.

8. The plaintiff testified as PW1 and reiterated the contents of the affidavit sworn in support of the originating summons (amended). The plaintiff relied on the bundle of documents annexed to the originating summons. The plaintiff testified that his deceased uncle who was the father of the defendant (Willis John Akumu) gave him a plot measuring 25feet by 100feet as a gift in 1976 on which he (plaintiff) constructed a commercial shop which he has occupied since 1983. The plaintiff produced the building plan for the shop prepared in 1986 and duly approved by the then County Council of South Nyanza. The plaintiff testified that he was issued with a plot card by the Council and has from 1986 to date paid land rent to the council as evidenced by the bundle of payment receipts annexed to the Originating Summons and the further copies produced as exhibits 2 and 3.

9. The defendant testified that his shop is comprised in the parcel of land known as **West Kasipul/Konyango Kokal/2365** which formed part of **West Kasipul/Konyango Kokal/18** before the latter was subdivided. Land parcel 2365 was registered in the defendant's name on 29<sup>th</sup> December 2006 as per the certificate of official search issued on 20<sup>th</sup> January 2011. The plaintiff asserts that he has occupied and possessed the portion of land since it was gifted to him in 1976 and avers his possession has been adverse to the ownership rights of the defendant and he is in the circumstances entitled to be declared as the rightful owner of the suit premises.

10. I have considered the evidence adduced by the plaintiff and I note the same has not been controverted by any other evidence. The initial defendant, Willis John Akumu (deceased) did not file any response and neither has Agnes Anyango Akumu who substituted the defendant filed any response to the plaintiff's claim. The plaintiff's claim therefore remains unchallenged. I find there is credible evidence that the plaintiff was gifted a portion of land out of his uncle's land parcel **West Kasipu/Konyango Kokal/18** whereat he constructed a shop delineated as **Plot No. 33'B'** Oyugis Township as per the plot card issued by the South Nyanza County Council. I accept the plaintiff's evidence that he has been in occupation and possession of the shop at least since 1987 when the council approved the building plan and started charging rent for the plot which as per the record the plaintiff as paid upto and including 2016. The plot rent card and payment receipts produced as evidence confirm payment has been made.

11. In the premises, I am persuaded and satisfied that the gift made to the plaintiff by his uncle took effect when the plaintiff was documented as the owner of the plot by the County Council. The plaintiff testified that he was renting the shop out to tenants and it is clear that he was for all purposes the landlord in respect of the plot. When the transfer was effected to the defendant in 2006, the transfer was subject to the plaintiff's overriding interests of possession and occupation as provided under Section 30 (g) of the **Registered Land Act**, Cap 300 Laws of Kenya (now repealed).

12. The plaintiff has predicated his claim on adverse possession of the portion of land. However, adverse possession will only occur where the entry and possession is without the permission of the owner and the adverse possessor continues to carry out activities on the land that are adverse to the interests and rights of the real owner openly and uninterrupted for a period of 12 years or more.

13. In the present case, by the plaintiff's own evidence the entry and occupation was with the permission of his deceased uncle except that the plaintiff avers that his uncle made a gift of a plot to him. I have made a finding and I accept that indeed the plaintiff was gifted a portion of land measuring 25feet by 100feet. The evidence is consistent with the plaintiff having been given a gift which took effect when the plaintiff was permitted to build a commercial shop and which he has operated from 1984 to date either personally or by way of renting. It would be an affront to justice if the court failed to effectuate the intention of the plaintiff's benefactor. The defendant no doubt, knew his father had donated and/or given the plot to the plaintiff and that the plaintiff had developed the plot. In the premises, I find and hold that the plaintiff is entitled to a portion of 25feet by 100feet out of land parcel **West Kasipul/Konyango Kokal/2365** to be hived off on the portion where he has constructed a shop.

14. I accordingly enter judgment in favour of the plaintiff as against the defendant in the following terms:-

**1. That the plaintiff is entitled to be registered as owner of a portion of 25feet by 100feet out of land parcel West Kasipul/Konyango Kokal/2365.**

**2. That land parcel West Kasipul/Konyango Kokal/2365 is ordered to be subdivided and the plaintiff to be given a portion of 25feet by 100feet where he has constructed a shop designated as plot No. 33'B' Oyugis Township.**

**3. The parties to bear their own costs of the suit.**

**Judgment dated, signed and delivered at Kisii this 21<sup>st</sup> day of April, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Mireri for the plaintiff

N/A for the defendant

Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**