



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.257 OF 2015
IN THE MATTER OF LAND PARCEL KISUMU/NYALUNYA/3045

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTION ACT CAP22 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 7 (1) OF THE CIVIL PROCEDURE RULES

BETWEEN

MICHAEL OTIENO

OWINO.....PLAINTIFF

VERSUS

ROSELYNE ATIENO

KITOTODEFENDANT

JUDGMENT

1. Michael Otieno Owino, the Plaintiff, filed the originating summons dated 13th July 2015, against Roselyne Atieno Kitoto, the Defendant, seeking for the following determinations;

- a) Whether the Defendant is the registered proprietor of land parcel **Kisumu/Nyalunya/3045**.
- b) Whether the Plaintiff has been in occupation and possession of the said land peacefully and uninterrupted for over 12 years, and if so, whether the Defendant’s title has been extinguished.
- c) Whether the Plaintiff should be registered as proprietor of the said land.

The application is based on the five grounds on the originating summons and supported by the affidavits of the Plaintiff sworn on the 13th July 2015 and 9th February 2017.

2. The Defendant was served as confirmed through the filed affidavit of service but did not enter appearance or file any replying papers.

3. The counsel for the Plaintiff filed undated written submissions on the 12th July 2016.

4. The issues for determination by the court are as follows;

- a) Whether the Plaintiff has been in exclusive, continuous and uninterrupted occupation and possession of the said land for more than 12 years.
- b) What orders to issue
- c) Who pays the costs.

5. The court has considered the pleadings, affidavit evidence by Plaintiff, submissions by counsel and come to the following findings;

a) That as correctly submitted by counsel, a person who enters into a land without the permission of the owner, and remains in continuous and uninterrupted occupation, to the exclusion of the owner for more than twelve years acquires the right of an adverse possessor. That it because after twelve years, the initial owner's right to recover the land lapses in accordance with **Section 7** of the Limitation of Actions Act **Chapter 22** of Laws of Kenya and adverse possessor acquires the right to move this court under **Section 37 and 38** of the said Act for an order to be registered as the proprietor of that land.

b) That as held in various superior court decisions, including **Kenpol Services Limited -V- Beacon Towers Limited** [2015] eKLR and **Wambogo -V- Njuguna** [1983] KLR 172, for a party to succeed on a claim for adverse possession, he/she must demonstrate, among others, that he/she has been in open possession of the land for more than twelve (12) years. The Plaintiff has stated in ground 3 of the originating summons that he has been in peaceful and uninterrupted possession for a period of more than 12 years. The Plaintiff has repeated that in his deposition at paragraph 5 of the supporting affidavit. That however, the Plaintiff has not disclosed the time that he first entered onto the suit land for the court to confirm whether indeed the period of twelve (12) years has lapsed from that time to the date of filing of this suit.

c) That the submissions by counsel that **“The defendant had been away from the suit parcel for almost 9 years, but in 2013, came to the suit parcel and saw the structures on the suit parcel, but has to date made no move to evict the Plaintiff ”** is not based on the pleadings or affidavit evidence filed herein. That it however suggest that the Plaintiff took possession of the said land during the period the Defendant was away for nine (9) years. The copy of the green card availed shows that the Defendant became the registered proprietor of the land on the 26th May 2014 and therefore could not have been the owner during the period the learned counsel for the Plaintiff submitted on in her submissions. That however, submission by counsel, just like a counsel's statement from the bar is not evidence in a case.

d) That even though the plaintiff has shown through the photographs annexed to the further affidavit that he has been in occupation of the said land, the court is unable to confirm that his occupation has been for more than 12 (twelve) years without evidence of the year of his entry being availed to the court.

e) That the copy of the green card for land parcel **Kisumu/Nyalunya/3045** annexed to the supporting affidavit shows that the Defendant became the registered proprietor under entry No.2 on the 26th May 2014. That was about one year five months before the originating summons dated 13th July 2015 was filed in court on the 5th October 2015.

6. That though this suit was undefended, the Plaintiff has for the foregoing reasons failed to establish his case on a balance of probabilities and the same is dismissed with no order as to costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 10TH DAY OF MAY 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/5/2017

10/5/2017

S.M. Kibunja Judge

Oyugi court assistant

Mr Baganda for Opondo for the Plaintiff

Court: Judgment delivered in open court in presence of Mr. Baganda for opondo for the Plaintiff.

S.M.KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/5/2017