



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CAUSE NO. 294 OF 2016 (O.S)

**IN THE MATTER OF SECTION 38 OF LIMITATIONS ACTIONS ACT CAP 22 LAWS OF
KENYA**

JOHN OWITI OCHUNG.....PLAINTIFF

-VERSUS-

SAJUN LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff commenced this suit by way of an originating summons dated 11th November 2015 and filed in Court on the same date. In the summons, he sought for orders that:

1. A declaration that the defendant's title to ALL THAT PIECE OF LAND known as L.R. NO. 2333/I/MN (SUBDIVISION) registered as CR. 28931 (situate at Kongowea Mombasa County) has been extinguished in favour of the plaintiff by virtue of adverse possession pursuant to Section 37 and 38 of the limitation of Actions Act Cap 22 laws of Kenya having occupied the said land for more than 12 years preceding the filing of this suit.

2. That the plaintiff is entitled to be registered forwith as the owner of ALL THAT PIECE OF LAND known as L.R NO. SUBDIVISION 2333/I/MN registered as CR. 28932 (situate at Kongowea Mombasa County) which land the plaintiff has held on adverse possession since 1995 to date or a period of more than 12 years immediately preceding the filing of this suit, the same being land which the plaintiff has occupied openly and continuously as of right and without any interruption from the defendant or its predecessors in title.

3. That the land registrar at Mombasa land office to delete the name of SAJUN LTD the defendant herein and register the name of JOHN OCHUNG OWITI the plaintiff herein in place thereof absolutely.

4. That the costs of this application be provided for.

2. The summons was premised on the grounds inter alia that the plaintiff has since 1995 been in peaceful, uninterrupted and open occupation of L.R No subdivision 2333/I/MN for a period exceeding 12 years. That having lived on the property, he acquired prescriptive rights and the defendant has never upset that status.

3. The submissions is further supported by the affidavit sworn by John Ochung Owiti, the applicant. In

the affidavit, Mr Owiti deposes that the defendant is the registered owner of the suit property. He deposes that he has continuously since 1995 stayed in the suit property openly, peacefully and uninterrupted therefore he has acquired it by way of adverse possession. He deposed further that he knows by his knowledge that the rights of the defendant have been extinguished under section 38 of the Limitation of Actions Act. He therefore urged the Court to grant the orders sought.

4. The defendant was served by way of substituted service but did not enter appearance. The applicant at the time of hearing chose to proceed by way of affidavit evidence. He therefore relied on his affidavit filed whose contents I have set out in paragraph 3 above.

5. The applicant annexed a copy of certificate of title to show that indeed the defendant is the registered owner of the suit property. Although the suit is undefended, I will determine whether the suit has any merits.

6. The law on adverse possession has been clearly set out in statute under section 13 of the Limitation of Actions and several judicial decisions. For instance in the case of **Wambugu vs Njuguna (1983) KLR 173** that for an order to acquire land by statute of limitation the known owner of the land must have lost his right to the land either by being dispossessed or having discontinued possession. Secondly the plaintiff must prove that he is in possession of the subject land. Possession is a question of fact which must be proved by way of evidence.

7. From the affidavit of the plaintiff on record, it is not possible to deduce how the plaintiff got onto the land whether by consent or otherwise of the defendant. It is also not clear what action he has done on the land which has dispossessed the owner and which constitutes his possession. All he deposed is that he has stayed on the land since 1995 which is a period of over 12 years preceding the taking out of this summons. The burden of proof was upon the plaintiff to discharge.

8. In the case of **Powel vs MC Faslane (1979) 38 p & CR 451 at page 451** quoted by the high Court in Malindi case of **Samuel Katana Nzunga & 102 Others vs Salim A. Bakshwein & Another (2013) eKLR**, it was held that "*Factual possession signifies an appropriate degree of physical control. The question what acts constitutes a sufficient degree of exclusive physical control must depend on the circumstances in particular the nature of the land and the manner in which the land of that nature is commonly used or enjoyed...* Everything must depend on the circumstances but broadly I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have expected to deal with it and no one else has done so.

9. In my opinion and I so find, the plaintiff failed to satisfy this Court on what constituted his factual possession. His suit fails as the same has not been proved. It is dismissed with no order as to costs.

Judgement dated and delivered at Mombasa this 4th day of October 2016.

A. OMOLLO

JUDGE