



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abuor v Njera (Environment & Land Case 45 of 2019)
[2023] KEELC 709 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 45 OF 2019
SO OKONG'O, J
FEBRUARY 9, 2023**

BETWEEN

CALEB ODEYO ABUOR PLAINTIFF

AND

PETER OSELU NJERA DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendant by way of an Originating Summons dated 7th November 2019 seeking the determination of the following questions;
 - a. Whether the Plaintiff is entitled to be registered as the absolute proprietor of all that parcel of land known as Title No. Kisumu/Buoye/3990 (hereinafter referred to as “the suit property”) by adverse possession having been in open, peaceful and uninterrupted occupation thereof for a period in excess of 15 years.
 - b. Whether the Defendant should be ordered to transfer the suit property to the Plaintiff in default of which the Deputy Registrar of this court be authorized to sign the transfer of the suit property in favour of the Plaintiff.
 - c. Whether the Defendant should be ordered to pay the costs of the suit.
2. The Originating Summons was supported by an affidavit sworn by the Plaintiff on 7th November 2019. The Plaintiff stated that the suit property is registered in the name of the Defendant. The Plaintiff stated that in 2004 while he was looking for a parcel of land on which to establish his residence, he came across the suit property which at the material time was vacant. The Plaintiff stated that he occupied the suit property and established his home thereon.
3. The Plaintiff annexed to his affidavit in support of the Originating Summons a copy of an extract of the register of the suit property showing that the suit property was registered in the name of the



- Defendant on 18th August 2010. The Plaintiff also produced photographs showing his homestead and other activities that he was carrying out on the suit property.
4. The Plaintiff averred that he had had open, continuous and peaceful occupation of the suit property for a period of 15 years as at the time he brought the Originating Summons. The Plaintiff stated that his occupation had not been challenged by the Defendant or any other person. The Plaintiff averred that his entry and occupation of the suit property was without the consent or permission of the Defendant.
 5. The Plaintiff averred that due to his long occupation and use of the suit property, he was entitled to have the same registered in his name as the owner thereof.
 6. The Defendant opposed the Originating Summons through a Notice of Preliminary Objection dated 25th April 2022. The Defendant contended that the Originating Summons was misconceived, defective and incompetent. The Defendant contended further that the court lacked jurisdiction to hear the Originating Summons. The Defendant contended that the Plaintiff lacked the capacity to institute the Originating Summons and that the same was an abuse of the process of the court.
 7. The court directed that the Originating Summons be heard by way of affidavit evidence and written submissions. The Plaintiff filed his submissions on 28th November 2022 while the Defendant did not file submissions.
 8. The Plaintiff submitted that the averments in his affidavit regarding his entry and occupation of the suit property were not controverted by the Defendant. The Plaintiff submitted that the fact that his occupation was open, continuous and uninterrupted was also not controverted. The Plaintiff submitted that as at the time of filing this suit, he had occupied the suit property for 14 years. The Plaintiff submitted that he had demonstrated that he was entitled to be registered as the owner of the suit property having acquired the same by adverse possession. The Plaintiff submitted that the Defendant should pay the costs of the Originating Summons.
 9. I have considered the Originating Summons together with the supporting affidavit. I have also considered the submissions by the Plaintiff's advocates and the authorities cited in support thereof. Since the Defendant did not file submissions in support of his Notice of Preliminary Objection to the Originating Summons, I am unable to make sense of the said objection.
 10. In *Salim v Boyd and Another* [1971] E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In *Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another* (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”
 11. As I have stated earlier in this judgment, the Defendant did not file a replying affidavit in response to the Originating Summons. The Defendant filed a Notice of Preliminary Objection that he did not pursue. The Originating Summons was therefore undefended. The affidavit evidence that was tendered by the Plaintiff as to the circumstances under which he entered the suit property and when he made the entry was not controverted. The averment that the Plaintiff took possession of the suit property in 2004 and has remained in possession since then was also not disputed. It was also not disputed that the Plaintiff entered the suit property without the consent of the Defendant and that his occupation of the property was open, continuous and uninterrupted. It was also not disputed that the Defendant



was the registered owner of the suit property and that as at the time of filing this suit the Plaintiff had occupied the suit property for over 12 years.

12. Due to the foregoing, I am satisfied that the Plaintiff has proved his adverse possession claim against the Defendant. I therefore enter judgment for the Plaintiff against the Defendant as follows;
- a. I declare that the Plaintiff, Caleb Odeyo Abuor is entitled to be registered as the owner of all that parcel of land known as Title No. Kisumu/Buoye/3990 measuring approximately 0.38 hectares (“the suit property”) in place of the Defendant.
 - b. The Defendant shall transfer the suit property to the Plaintiff within 45 days from the date of service upon him personally and through his advocate on record of a copy of this judgment and a decree extracted therefrom in default of which the Deputy Registrar of this court is authorized to execute all documents necessary to effect the transfer of the suit property to the Plaintiff.
 - c. The Plaintiff shall pay all fees and other statutory charges required for the transfer of the suit property from the Defendant to the Plaintiff.
 - d. Since the suit was not defended, each party shall bear its own costs.

DELIVERED AND SIGNED AT KISUMU ON THIS 9TH DAY OF FEBRUARY 2023

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Onyango for the Plaintiff

N/A for the Defendant

Ms. J.Omondi-Court Assistant

