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Date Delivered:	31 Mar 2022
Case Class:	Civil
Court:	Environment and Land Court at Kisumu
Case Action:	Judgment
Judge:	Antony Ombwayo
Citation:	Doris Atieno Onjala & another v Silfanus Osika Obongo & another [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kisumu
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 531 OF 2015**

**CNSOLIDATED WITH ELC 530 OF 2015**

**(FORMELY CIVIL HCCC NO. 41 OF 2012**

**DORIS ATIENO ONJALA.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH GOINGA ONJALA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SILFANUS OSIKA OBONGO.....1<sup>ST</sup> DEFENDANT**

**GEORGE ONYANGO OWAGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

This consolidated suit was commenced by Rev. Simeon Onjala Odak against John Ogejo Obongo on the 2<sup>nd</sup> March 2012 by way of an Originating Summon. John Ogejo Obongo filed a replying affidavit on 14/3/2012. On 29/8/2013, an amended Originating summon was filed wherein Doris Atieno Onjala and Joseph Oginga Onjala substituted Rev. Simeon Onjala Odak who had passed on.

The 2<sup>nd</sup> Respondent George Onyango Owaga was enjoined vide a court order dated 2/10/2013. John Ogejo Obongo also passed on and was substituted by Silfanus Osika Obongo. After the consolidation of the suits, the lead file became Kisumu ELC number 530 of 2015.

The basis of the consolidation of the suits was that the plaintiffs claimed that the defendants sold them different portions of their respective parcels of land being Kisumu/Fort Ternan/20 and Kisumu/Fort Ternan/21 and that they separately repudiated the sale of the two portions of land and commenced the separate suits. The 2<sup>nd</sup> Defendant in the two suits is George Onyango Owaga who was introduced to the suit because he was the owner of the two parcels of land.

The Originating Summonses were deemed to be complaints whereas the replying affidavits were deemed to be defences. The plaintiffs' claim in the Originating Summons is property interest by way of adverse possession over the 2 parcels of land namely Kisumu/Fort Ternan/20 and Kisumu/Fort Ternan/21. The plaintiffs claim 2 acres from each of the parcels of land. The gist of the Originating Summons is that the parcel was identified in the mutation forms dated 2<sup>nd</sup> February 1990 as Land parcel Kisumu/Fort Ternan/068/482 (now part of land parcel number Kisumu/Fort Ternan/068/1001).

The deceased Plaintiff sought the court to determine the following issues:

**1. Whether the deceased plaintiff herein is entitled to a portion of the original land parcel No. KISUMU/FORT- TERNAN 068/21 measuring or estimated to measure 2 acres or 0.7 ha. Or thereabouts and identified in the mutation forms dated 2<sup>nd</sup> February, 1990 as land parcel No. KISUMU/FORT –TERNANA 068/482, by reason of his adverse possession of the same for a period exceeding 12 years.**

**2. Whether the Respondent/Defendant's proprietary interest in the said position of the above parcel of land has been**

extinguished by virtue of the plaintiff's adverse possession and whether the Respondent is now holding the title for that portion in trust for the deceased plaintiff.

**3. Whether the Title Deed issued in the name of GRADUS ODHIAMBO AWINO as the absolute proprietor of the whole of land No. KISUMU/FORT- TERNAN 068/21 should now be revoked and cancelled and a fresh sub division carried out in terms of the mutation forms dated 2<sup>nd</sup> February, 1990 and the Applicant's portion identified therein as land parcel No. KISUMU/FORT- TERNAN 068/482, be transferred to the Applicant herein as sole proprietor.**

**4. Whether the sub division of the original land parcel No. KISUMU/FORT- TERNAN 068/21 into land parcel No. KISUMU/FORT- TERNAN/1001 land No. KISUMU/FORT- TERNAN/951, as well as all the subsequent subdivisions from these parcels of land, should be nullified and the mutation forms dated 2<sup>nd</sup> February, 1990 be registered to effect the sub-division of the original land parcel No. KISUMU/FORT- TERNAN 068/21 into land parcel no. KISUMU/FORT- TERNAN 068/483 land parcel No. KISUMU/FORT- TERNAN 068/482.**

**5. Whether the plaintiff should be registered as proprietor of all that portion of the original land parcel No. KISUMU/FORT- TERNAN 068/21 measuring or estimated to measure 2 acres or 0.7ha. or thereabouts and identified in the mutation forms dated 2<sup>nd</sup> February, 1990 as land parcel No. KISUMU/FORT- TERNAN 068/482, in place of the Respondent who is presently registered as proprietor of the said parcel of land. That costs of this summons be provided for.**

In the supporting affidavit of Rev. Simeon Onjala Odak, deceased, it was deponed that Gradus Odhiambo Owino was a village mate and registered proprietor of KISUMU/FORT- TERNAN 068/21 which he bought on loan from Settlement Fund Trustees jointly with his late father James Awino Gutto and it was his late father who was in charge of transactions involving the parcel of land. That in the late 1980's the Respondent and his late father came to the plaintiff and requested him to assist them to repay their loan, and as a result he made loan repayments. That the Respondent and his father expressly agreed that in consideration of the applicant helping them repay their loan to the Settlement Fund Trustees, they would sell to him a portion of the said parcel of land measuring 2 acres at the price of Kshs. 42,000/=.

The plaintiff paid the purchase price in full, and the final instalment was paid to the Respondent on 23<sup>rd</sup> April, 1990, of which the Respondent acknowledged by signing having received the final balance of Kshs. 10,000/=.

That immediately he completed paying for the land, he took possession of the portion sold to him and occupied it. That on 29<sup>th</sup> January, 1990, the Respondent's father invited surveyors to survey the portion sold to him, and after the survey his portion was marked as parcel No. Kisumu/Fort Ternan/482 measuring 0.07ha or thereabouts.

That the relevant land officers were duly notified of the sale and on 17<sup>th</sup> January, 1991, the Ministry of Lands also informed the East African Sugar Industries Ltd (now Muhoroni Sugar Co. Ltd);

That after all the formalities were concluded, they went with Respondent and his late father to the Muhoroni Land Control Board and consent to transfer parcel No. Kisumu/Fort Ternan/482 was granted.

That the Respondent's father also executed a transfer in the applicant's favour. That the transfer could not be registered because their main title (parcel No. 21) had not yet been discharged, and when the applicant made enquiries from the Ministry of Lands, he was informed that there was still some Kshs. 2,647/30 outstanding on land parcel No. Kisumu/Fort Ternan/ 21 which was required to be paid before the title could be discharged.

That the applicant paid the above sum to the Respondent to pay to the Ministry, but for some unknown reason he did not pay the same, and thereafter he refused to cooperate with the applicant.

That the said title was only discharged in 2010, and instead of transferring the applicant's portion to him, the Respondent instead effected a fresh subdivision and his portion is now numbered as land parcel No. KISUMU/FORT- TERNAN/1001.

That the applicant has since learnt that the Respondent has caused the said land parcel KISUMU/FORT- TERNAN/1001 to be registered in his name as proprietor.

That the Respondent has further caused the said land parcel No. KISUMU/FORT- TERNAN/1001 to further sub-divided into the said land parcel No. KISUMU/FORT-TERNAN 068/1067 and 1068.

That despite the registration of the title in the name of the Respondent, the applicant has continued to occupy the portion of the original land parcel No. KISUMU/FORT- TERNAN 068/21 measuring or estimated to measure 2 acres or 0.7ha. or thereabouts which portion was identified in the mutation forms dated 2<sup>nd</sup> February 1990 as land parcel No. KISUMU/FORT- TERNAN 068/482, (now part of land parcel no. KISUMU/FORT- TERNAN/1001) undisturbed, peacefully and as of right without any interference from the Respondents since 1990, a period exceeding 21 years to-date.

That the applicant has been carrying out farming activities on the land, and the sugar cane he had been growing is always delivered to Muhoroni Sugar Co. Ltd in his name, and payments are always made to him in his name.

That in all those years the Respondent has never entered or used the said portion of the original land parcel No. KISUMU/FORT- TERNAN 068/21 measuring or estimated to measure 2 acres or 0.7ha or thereabouts and identified in the mutation forms dated 2<sup>nd</sup> February, 1990 as land parcel No. KISUMU/FORT- TERNAN 068/482 or any portion of it, nor has he received any profits from the land, and he has completely excluded him.

That from the time the Respondent refused to cooperate with the applicant or pay for the discharge of charge, he knew that the applicant was in possession of the suit land contrary to his rights.

That the applicant has requested the Respondent several times to surrender the title deed for the said land parcel No. KISUMU/FORT- TERNAN 068/21 to him so that he may cause the mutation forms dated 2<sup>nd</sup> February, 1990 to be registered so that his portion can be transferred to his name, but he has refused to do so.

That the rate at which the Respondent has been sub-dividing the original land parcel KISUMU/FORT- TERNAN 068/21 shows that the Respondent is dealing with the original title fraudulently and with a view to defeating the plaintiff's interests in the said parcel of land.

That the Respondent's title to and interest in the said portion of the aforesaid parcel of land has been extinguished by operation of the law and that he is now holding the title in trust for the applicant, and that the said portion of the original land parcel No. KISUMU/FORT- TERNAN 068/21 measuring or estimated to measure 2 acres or 0.7ha or thereabouts and identified in the mutation forms dated 2<sup>nd</sup> February, 1990 as land parcel No. KISUMU/FORT- TERNAN 068/482 should now be registered in the applicant's name by virtue of his continuous, peaceful, exclusive and uninterrupted occupation of the same for a period exceeding 21 years from 1990 to-date.

The Claim against John Ogeto Oboyo by the deceased Rev. Simeon Onjala Odak was that the latter was a village mate. He was the registered proprietor of KISUMU/FORT- TERNAN 068/20 which was bought from Settlement Fund Trustee. The basis of the two originating summons is the same, the only difference are the parcel numbers.

PW1, Dorris Atieno testified that John Olego Ogeto sold them land measuring 2 acres at Kshs. 42000 each and the purchase price was paid and sugar cane was grown on the farm. After subdivisions parcel number Kisumu/Fort Ternan/484 was created but changed to Kisumu/Fort Ternan/950 and now it is Kisumu/Fort Ternan/1060. The land he expected is now Kisumu/Fort Ternan/1068, in the names of George Onango Owaga. Gradius Odhiambo Awino was selling his original parcel of land No. Kisumu/Fort Ternan/ 21.

Her husband bought 2 acres out of the parcel. She produced green cards for parcel number Kisumu/Fort Ternan/20 and parcel number Kisumu/Fort Ternan/21.

She claims that they settled on parcel number Kisumu/Fort Ternan/523 in 1994. They bought 2 acres from parcels number 20 and 21 in 1989 and 1990. They took possessions have been planting sugar cane but were stopped by Ogeto in 2012. They used to deliver the cane to Muhoroni Sugar Company.

On cross examination by Mr. Ragot, she states that it was the husband buying the land. They have authority and a limited grant to pursue the suit parcel number Kisumu/Fort Ternan/20 was 2 acres and they were buying the whole land. They were buying the whole of parcel Kisumu/Fort Ternan/20 and Kisumu/Fort Ternan/ 21 measuring 2 acres each.

PW2 Vitalis Ouma Awino testified that his late father sold the suit land to the plaintiff's husband. The plaintiff's husband took possession and planted sugarcane. His father used the purchase price to pay a loan. He states on cross examination that what he was telling the court he was told by his father and that he was not present during the transactions.

PW3 the 2<sup>nd</sup> plaintiff and Eldest son of the deceased Rev. Rev. Simeon Onjala Odak testified that his father bought the land and that they have been utilising the land by planting sugar cane. He relied on his statement which is on record. On cross examination he states that when his father bought the land he was in Nairobi but present in some of the occasions.

When the land was identified he was present. There was no written agreement of sale. His father bought parcel number Kisumu/Fort Ternan/20 and Kisumu/Fort Ternan/21. He was given Kisumu/Fort Ternan/482 from Kisumu/Fort Ternan/ 21 and 484 from Kisumu/Fort Ternan/20. He is seeking adverse possession for parcel number 1068.

The land was registered in the names of Settlement Fund Trustees in 1980 and transferred on 4/10/2010 to the respondent. His father bought the land in 1989 and filed for adverse possession in 2012.

Upon close of plaintiff's case, the defendant called Silfanus Osika Obondo who testified that he hails from Otara settlement scheme. He produced a grant of letter of administration in the estate of John Ogeto Obondo and produced the same as an exhibit. He adopted his statement as evidence in chief. On cross examination by Mr. Ragot, he states that he is the brother to John Ogeto Obondo. The children of John Ogeto Obondo died. There is a granddaughter by the name Penny Atieno.

He was not there when Ogeto sold the land. The witness was adamant that his brother sold the land. It was not a lease. His brother was given money but he did not pay the loan.

DW2, George Onyango Owaga the 2<sup>nd</sup> Defendant relied on the replying affidavit. On cross-examination by Mr. Orengo, he states that he bought the parcels on 14/10/2011. The titles were issued later. KISUMU/FORT- TERNAN/1068 was issued on 8/2/2012 whereas KISUMU/FORT- TERNAN/1001 was issued one month thereafter. Consent was given on 15/9/2011. The transfer was dated 19/9/2011. When he purchased the land, he was not aware that the same had been sold to the plaintiff. DW2 claims to have bought land from Mr. Ogeto and Amos.

DW3 Gradius Odhiambo Awino relied on his affidavits filed on 14/3/2012 and 15/9/2012. On cross examination, he states that he knew Rev. Onjala as a neighbour at Kaubi Awendo at Fort-Ternan. They shared boundaries. He is the owner of Land no. 199 belonged to his father James Amos and is currently subdivided. His land is now 21. He did not know Rev. Onjala's land. Onjala bought the land and his family has lived there. He did succession of his father's land. The land had a loan that was paid by George Onyango Owaga the 2<sup>nd</sup> Defendant. Rev Onjala never gave him any money and did not buy the land. He admits that Rev. Onjala planted sugar cane on the land for 13 years. He was registered in 2002 as the proprietor. He leased the land to Rev. Onjala but he did not pay anything.

I have considered the evidence and submissions on record and do find on the 13/6/1980, the Register for Fort Ternan -68 was opened and parcel number 20 measuring 2.7 ha was created. The first entry was settlement fund Trustees. Twenty years later, on 21/8/07 the parcel of land was registered in the names of J. E. Ogeto (John. Ogeto Obonyo) and title deed was issued on 19/9/2007. On the 5/5/2011, the title was closed on subdivision and the new numbers created were Kisumu/Fort Ternan/950 and Kisumu/Fort Ternan/931.

On 5/5/2011, John Ogeto Obonyo was registered as proprietor of 950 measuring 1.82Ha. Moreover, the title was closed on 31/1/12 upon creation of new parcel numbers 1067 and 1068. Parcel number 951 was registered in the names of John Ogeto Obonyo and title issued on 31/1/2012. I do find that John Ogeto Obonyo bought the property through a Settlement Fund Trustee loan which he did not repay but the late Rev. Simeon Onjala Odek paid.

The said John Ogeto Obonyo was to sell him a portion of land. The said Rev. Simeon Onjala took possession of the land in 1990.

This court finds that the evidence on record demonstrates that Mr. John Ogeto Obonyo was unable to pay the Settlement Fund Trustee loan and therefore the plaintiff paid for him and they agreed that the money would form a consideration for the sale.

However, the plaintiff's claim herein is based on adverse possession and not specific performance and therefore the principles are different.

Conversely, in the other consolidated case, parcel number KISUMU/FORT- TERNAN/21 of approximate area 2.7 Ha was opened on 13/6/1980 and registered under the settlement fund trustees. 30 years later, it was transferred to Gradius Odhiambo Awino and title issued on 4/10/2010. On the 12/10/2011, title was closed on subdivision and new numbers were created that is parcel number Kisumu/Fort Ternan/999- Kisumu/Fort Ternan/1001. On 12/10/2011, the register for KISUMU/FORT- TERNAN/999 was created. On the same date, the register for 1000 was equally created. On 12/10/12 the register for KISUMU/FORT- TERNAN/1001 was also created. The plaintiffs are claiming 1001. The land is registered in the respondent's name.

The principle of adverse possession is found in Section 7 of the Limitation of Actions Act that provides: -

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

Further in **Section 13** provides that:-

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

**Section 16** provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

**Section 17** goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, **Section 38**(1) and (2) states;

“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The import of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

In this matter I do find that the plaintiffs have proved that they have been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the intended owners.

However, I have discerned the evidence on record and do find that between 1980 – 2007 parcel number Fort Ternan -068/20 was still Government Land registered in the names of Settlement Funds Trustees, and between 1980 – 2010 for parcel number Fort Ternan /21 was also registered as the property of Scheme fund trustee and therefore public land.

Section 41 of the Limitation of Actions Act excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

#### **41. Exclusion of public land**

**This Act does not -**

**(a) enable a person to acquire any title to, or any easement over -**

**i. Government land or land otherwise enjoyed by the Government;**

**ii. Mines or minerals as defined in the Mining Act (Cap. 306);**

**iii. Mineral oil as defined in the Mineral Oil Act (Cap. 307);**

**iv. Water vested in the Government by the Water Act (Cap. 372);**

**v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered Land Act (Cap. 300));**  
**or**

**vi. Land vested in the Trustees of the National Parks of Kenya; or**

In this matter, section 7 Cap 22 applies as from 2007 and 2010 respectively when the land became private land and therefore at the time of filing the suits, the defendants had not lost their rights in the property as 12 years had not lapsed and therefore the principle of adverse possession does not apply. The upshot of the above is that I do find that the Plaintiffs have not proved their cases on the required stand of proof and the suit is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>st</sup> DAY OF MARCH, 2022**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*



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