



Mboss & another v Opiyo (Sued as the Administrator of the Estate of Stephen Opiyo Onyango) & 2 others (Environment & Land Case 24 of 2021) [2023] KEELC 16455 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 24 OF 2021
AY KOROSS, J
MARCH 23, 2023**

BETWEEN

JOSEPH MBOSS 1ST PLAINTIFF

ELIZABETH MBOSS 2ND PLAINTIFF

AND

JACOB OWINO OPIYO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF STEPHEN OPIYO ONYANGO) 1ST DEFENDANT

JACOB OWINO OPIYO 2ND DEFENDANT

FRANCIS AMINA JUMA 3RD DEFENDANT

JUDGMENT

1. By an originating summons dated May 10, 2021, the plaintiffs instituted suit against the defendants claiming they were entitled to land parcel no Siaya/Ambira/1783 (hereinafter referred to as ‘the suit property’) by adverse possession. The plaintiffs are respectively husband and wife.
2. The 1st defendant is allegedly sued in his capacity as an administrator of the estate of Stephen Opiyo Onyango (‘Stephen’) while as a 2nd defendant, he is sued as a previous registered owner having acquired the suit property by transmission. The 3rd defendant is sued in his capacity as the current registered proprietor of the suit property.
3. The plaintiffs’ raised the following issues for this court’s determination:-
 - a. Whether the plaintiffs had purchased the suit property from Stephen;
 - b. Whether the plaintiffs had been in actual, hostile, open, continuous and uninterrupted possession of the suit property for a period of over 12 years;



- c. Whether the plaintiffs had been in possession/occupation at the exclusion of the defendants;
 - d. Whether defendants' title to the suit property had extinguished and the defendants held it in trust for them;
 - e. Whether the plaintiffs were adverse possessors of the suit property and the honourable court ought to vest it upon them; and
 - f. If the answers above are in the affirmative, whether the Siaya County Land Registrar should register the rights and interests of the plaintiffs over the suit property.
4. With the authority of the 2nd plaintiff, the originating summons was accompanied by the supporting affidavit of the 1st plaintiff dated May 10, 2021. The supporting affidavit had several annexures which the plaintiff produced in support of his case.
 5. Despite service by substituted means, the defendants never participated in these proceedings. The suit proceeded as an undefended claim.

Plaintiff's evidence

6. The 1st plaintiff testified as PW1. His evidence was contained in his oral testimony, supporting affidavit which he adopted as his evidence in chief and documents annexed thereto.
7. In brief, it was PW1's case that by an agreement of sale, the plaintiffs purchased the suit property from Stephen on August 23, 2000 at a consideration of Ksh 350,000/- and thereafter took possession.
8. They paid the purchase price in 3 instalments; Ksh 120,000/- at execution, Ksh 130,000/- on September 13, 2000 and a final balance of ksh.100,000/- was paid at a later date. On completion of the final payment, he fenced the suit property. Sometimes in 2009, he constructed dwelling structures. He contended he had been in peaceful occupation for 23 years.
9. PW1 testified Stephen died in 2008 without transferring the suit property to him. In 2014, he was notified some strangers including the 2nd defendant intended to purchase the suit property. He had a meeting with Stephen's wives in the presence of the area chief, where it was agreed he would pay the widows Ksh 15,000/- *ex gratia* payments in order for them to assist him secure a title document over the suit property. During another meeting held on January 13, 2015, the plaintiffs agreed to pay the 2nd defendant *ex gratia* payments of Ksh 15,000/- of which he paid Ksh 7,500/- the balance was to be paid by January 27, 2015. All these agreements were to ensure the plaintiffs' secured a title document to the suit property.
10. Notwithstanding the agreement, the 2nd defendant secretly conducted probate proceedings on Stephen's estate and sold the suit property to the 3rd defendant.
11. It was PW'1 s testimony he took over the suit property in 2000 and had been utilising it since then peacefully for a period of 23 years.

Plaintiff's submissions

12. Miss Imbaya, counsel for the plaintiffs, filed written submissions dated January 28, 2023. She identified 3 issues for determination; (i) whether the plaintiffs purchased the suit property from the Stephen (ii) whether the plaintiffs were the lawful owners of the suit property by virtue of adverse possession and,



- (iii) whether the county land registrar Siaya should be directed to register the rights and interests of the plaintiffs over the suit property.
13. On the 1st issue, counsel submitted the agreement of sale between the plaintiffs and Stephen complied with the repealed Section (3) (7) of the [Law of Contract Act](#) and it was not in doubt the plaintiffs purchased the suit property.
 14. On the 2nd issue, counsel contended that the plaintiffs entered the suit property in 2000. For purposes of computation of time, time started running from 2000. Counsel contended that since entry, the plaintiffs had been in open, visible, uninterrupted and continuous occupation of the suit property.
 15. Counsel contended from the green card, the logical deduction was that the 2nd defendant had succeeded Stephen's estate. Counsel submitted at the time the 2nd defendant was transferring the suit property to the 3rd defendant, the 1st defendant's title over the suit property had extinguished. Counsel placed reliance on several authorities including the Court of Appeal decision of [Peter Mbiri Michuki v Samuel Mugo Michuki](#) [2014] eKLR where the court expressed itself thus:

‘The year 1964 is the year of the sale agreement between the parties and in this year the plaintiff took legal possession of the suit property... The evidence on record shows that in each of these years, the plaintiff/respondent was in actual and or constructive possession of the suit property; that the possession by the plaintiff was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value. From whichever year adverse possession is computed, as at the time of filing the Originating Summons in 1991, twelve (12) years had lapsed and the plaintiff's right and claim based on adverse possession had arisen, accrued and vested.’

16. On the 3rd issue, counsel contended flowing from the outcomes of the 1st and 2nd issues, the county land registrar Siaya should register the plaintiffs as proprietors of the suit property. Counsel submitted that in line with Section 27 (1) of the [Civil Procedure Act](#), the plaintiffs should be awarded costs.

Analysis and Determination

17. I have carefully examined the plaintiffs' pleadings, evidence and submissions and in my view the issues falling for determination are:
 - i. Whether the 1st and 2nd defendants were properly joined in these proceedings;
 - ii. Whether the plaintiffs had proved their claim of adverse possession over the suit property;
 - iii. What appropriate orders should be granted; and
 - iv. Who should bear the costs of the suit.

Whether the 1st and 2nd defendants were properly joined in these proceedings.

18. It is trite law that a cause of action on adverse possession is maintainable against a registered proprietor and not otherwise. From the green card of the suit property that was produced by the plaintiff, Stephen and the 2nd defendant were previous registered proprietors and no cause of action was sustainable against them.
19. However, it should be noted that adverse possession being an encumbrance to land, the plaintiffs' claim to the suit property ran against the current title holder and all his predecessors in title. It is my finding



the suit is incompetent against the 1st and 2nd defendant and I hereby strike out the suit against them. I place reliance on the Court of Appeal decision of *Chevron (K) Ltd v Harrison Charo Wa Shutu* (2016) where the court stated: -

‘It is a settled principle that a claim for adverse possession can only be maintained against a registered owner...’

Whether the plaintiffs have proved their claim of adverse possession over the suit property.

20. The doctrine of adverse possession is underpinned in various statutes; namely, Sections 7, 13 and 38 of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*.
21. Section 7 of the *Limitation of Actions ACT* intimates that a proprietor cannot, after 12 years, recover land that had been acquired by adverse possession. Section 13(1) of the said ACT states that an adverse possessor must be in possession of land in order for a right of adverse possession to accrue. Section 13(1) of the same ACT states that if adverse possession is interrupted, the period of adverse possession starts running afresh when the adverse possessor once again takes possession of the land.
22. Sections 38 (1) and (2) of the *Limitation of Actions ACT* states that “where a person claims to have become entitled by adverse possession to land, 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.”
23. Section 28 (h) of the *Land Registration ACT* recognises that all registered land is subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register; rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
24. The decisions cited by counsel lay down the principles of adverse possession. Prove of such elements such as actual, open, notorious and exclusive occupation are not sufficient enough to make the provisions of the *Limitation of Actions Act* become operative in respect of adverse possession.
25. Notwithstanding the suit was undefended, the plaintiffs were required to discharge the burden of proof the 3rd defendant had either been dispossessed or had discontinued his possession of it during the statutory period of 12 years.
26. In dealing with a claim of adverse possession, the primary function of the court is to draw legal inferences from proved facts and such inferences are clearly matters of law. The Court of Appeal in *M’Mbaoni M’Ithara v James Mbaka* [2019] eKLR cited the case of *Kweyu v Omutut* [1990] KLR 709 which was also cited by the plaintiffs’ counsel where Gicheru JA stated at page 716 stated thus: -

A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.’
27. All elements stated in *Kweyu v Omutut* (*Supra*) need to co-exist if title is to be acquired by adverse possession. The character, location, present state of the land and its uses are evaluated on a case to case basis.



28. On the requirements of statutory period and permission, the plaintiffs' needed to prove they had been in actual and exclusive possession of the suit property continuously and uninterrupted for a period of 12 years.
29. If adverse possession arose out of an agreement of sale in which the purchase price was to be made by instalments and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. See *Gabriel Mbui v Mukindia Maranya* [1993] eKLR
30. It is not in doubt there existed an agreement for sale between the plaintiffs and Stephen. The 1st plaintiff testified the plaintiffs had been in possession of the suit property from 2000 which was when the parties entered into an agreement of sale. This was on August 23, 2000. There is evidence the plaintiffs' paid an initial deposit of Ksh 120,000/-. A 2nd instalment of Ksh 130,000/- was made by them. From there, the trail gets cold on when or if the last instalment of Kshs 100,000/- was ever made. In the absence of proof of payment of the final balance, this court is constrained from calculating time on the basis of payment of the balance of the purchase price.
31. The letter dated November 3, 2008 by an area chief implied the suit property had already been sold. This infers any permission became ineffective from November 3, 2008. On that basis, and for purposes of computation of time, this court finds the period of time ran from November 3, 2008 to May 11, 2021 which was when this suit was filed. This was a period of 13 years.
32. On the 2nd requirement, the plaintiffs' possession needed to be open and notorious. Their possession needed to be obvious to the whole world as to put the true owner on notice that a trespasser was in possession.
33. The plaintiffs alluded that because they had put up a fence and dwelling house, their possession was notorious. Save for assertions in PW1's affidavit, PW1 did not tender any shred of evidence to confirm that indeed he and the 2nd plaintiff had occupied the suit property. The burden was on them to prove their assertions.
34. The plaintiffs neither called neighbours as witnesses to affirm that indeed they were in open and notorious possession nor did tender any photographs to this court. It is the finding of this court it has not satisfied itself the plaintiffs are in possession and occupation of the suit property, have lived there continuously and uninterrupted for a period of 13 years or have held title hostile to that of the owner.
35. Having evaluated the adduced evidence and also considered the applicable law, I find that the plaintiffs did not prove their case on a balance of probabilities to enable this court declare they had acquired title to the suit property by virtue of being in adverse possession.
36. What orders should this court grant? For the foregoing reasons and findings, I dismiss the plaintiffs' claim of adverse possession and because it is trite law that costs follow the event and considering the defendants did not participate in these proceedings, the plaintiffs shall bear their own costs of the suit.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

