



**Opot v Osoma & another (Environment & Land Case 26 of 2021)
[2023] KEELC 16453 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 26 OF 2021
AY KOROSS, J
MARCH 23, 2023
[ORIGINALLY KISUMU ELC APP. NO. 55 OF 2018 (O.S.)]**

BETWEEN

GEORGE OHALA OPOT PLAINTIFF

AND

JAMES AWIMBO OSOMA 1ST DEFENDANT

DANIEL OTIENO ATIENO 2ND DEFENDANT

JUDGMENT

Introduction

1. By way of originating summons dated October 27, 2018, the plaintiff instituted suit against the defendants. The 1st defendant is the registered proprietor of land parcel no North Gem/Malunga/2234 while the 2nd defendant is the registered proprietor of land parcels no North Gem/Malunga/2235 and North Gem/Malunga/658.
2. The bulwark of the plaintiff's claim was that by adverse possession, he had acquired 1 acre of North Gem/Malunga/658 and 2.5 acres which traversed North Gem/Malunga/2234 and North Gem/Malunga/2235. It was the plaintiff's position that North Gem/Malunga/2234 and North Gem/Malunga/2235 were subdivisions of North Gem/Malunga/657.
3. All these parcels of land known as North Gem/Malunga/658, North Gem/Malunga/2234 and North Gem/Malunga/2235 shall hereinafter be referred to as ('the suit properties') while the portions that were allegedly purchased by the plaintiff from the 1st defendant from North Gem/Malunga/658 and the original parcel of land known as North Gem/Malunga/657 shall hereinafter be referred to as ('the disputed portions').
4. The plaintiff raised the following issues for this court's determination;



- a. Whether the plaintiff purchased the disputed portions from the 1st defendant.
 - b. Whether the plaintiff had an overriding interest over the disputed portions.
 - c. Whether the plaintiff had acquired the disputed possessions by adverse possession.
 - d. Whether the Siaya county land registrar should cancel the registration of North Gem/Malunga/2234 and North Gem/Malunga/2235 and revert them back to North Gem/Malunga/657.
 - e. Whether the court should vest the disputed portions upon the plaintiff.
 - f. If issues (a) (b) (c) and (d) above are in the affirmative, whether the Siaya county land registrar should be directed to register the rights and interests of the plaintiff over the disputed portions.
 - g. Whether the plaintiff was entitled to costs.
5. The originating summons was accompanied by the plaintiff's supporting affidavit deposed on October 27, 2018 together with several other documents that were annexed thereto.
 6. In opposition, the 2nd defendant, with authority of the 1st defendant, filed a replying affidavit dated February 15, 2019.
 7. An ex parte judgement that was entered in the plaintiff's favour on May 12, 2022 was set aside by this court on September 29, 2022. The suit thereafter proceeded for hearing by viva voce evidence on November 22, 2022.

The plaintiff's case and evidence

8. The plaintiff testified as PW3. His evidence was led by his witnesses Benson Nyaim and Mary Anyango Ochola who respectively testified as PW1 and PW2 respectively. Apart from the plaintiff's testimony which was contained in his oral evidence, adopted witness statement, supporting affidavit and documents contained in his list of documents, PW1 and PW2's evidence were contained in their adopted witness statements and oral testimonies.
9. PW1 testified that he neighboured North Gem/Malunga/657 and North Gem/Malunga/658 and the plaintiff was his neighbour. These parcels of land were originally owned by the 1st defendant's father Osoma Odeyo and upon his demise, the plaintiff sold the disputed portions to the plaintiff in 1993. The plaintiff entered the disputed portions in 1993. There was interference in 2018 when the 1st defendant sold the disputed portions to the 2nd defendant. The plaintiff's occupation had been open, without force, secrecy or interruption.
10. On cross examination, PW1 testified he witnessed execution of the agreement and the 2nd defendant's house stood on the suit property. On re-examination, PW1 confirmed that he was present when the agreement was being entered into between the 1st defendant and plaintiff but did not execute it.
11. PW2 corroborated PW1's evidence in chief. During cross examination, PW2 stated that she was present when the agreement was executed. Notwithstanding not signing it, money exchanged hands between the plaintiff and 1st defendant.
12. On re-examination, PW2 testified whereas she was present when the plaintiff parted with money, she was not present when the agreement was being signed.



13. The plaintiff testified as PW3. The plaintiff corroborated PW1 and PW2's testimonies. Additionally, it was his testimony that he fully paid for the disputed portion, entered it in 1993 and had been cultivating it since then before interruption by the 2nd defendant. He produced the agreement of sale.
14. A casual worker informed him the 1st defendant had brought strangers to the disputed portions. He immediately lodged a caution which was unceremoniously removed by the land registrar. This laxity paved room for subdivision of North Gem/Malunga/657 and eventual transfers to the 1st and 2nd defendants. A meeting was held with the chief and he rejected the 1st defendant's offer of a refund of the purchase price.
15. He asserted he ploughed the disputed portions during planting seasons without interruption. He was privy the 2nd defendant was ploughing portions of the suit properties and had built a home on it. An attempt to take photographs of trees which he had planted on the suit properties and subsequently chopped off by the 2nd defendant was rebuffed by the 2nd defendant. He was only claiming the disputed portions which now formed the suit properties.
16. On re-examination, he testified issues arose in 2015. In the chief's meeting, the defendants were both present. The 2nd defendant had continued to chop of his trees including sometimes on May 5, 2022.

The defendants' case and evidence

17. The 2nd defendant testified as DW1. His evidence was contained in his oral testimony, replying affidavit and annexures thereto.
18. The 2nd Defendant testified he was the rightful owner and bona fide purchaser for value without notice of some of the suit properties. He purchased North Gem/Malunga/2234 in 2015 from the 1st defendant and North Gem/Malunga/658 from one Beatrice Adhiambo Mala in 2016.
19. He took vacant possession in 2015 and had continued to cultivate them since then. He discovered the plaintiff had lodged a caution over North Gem/Malunga/657 which was subsequently lifted by the land registrar. The agreement being waived by the plaintiff was fraudulent for several reasons; at the time, the 1st defendant's father was the registered proprietor.
20. He asserted he had planted trees on the suit property and had occupied it since 2012 without interruption and had done several developments on it including building a house. He had tried to refund the plaintiff the purchase price of kshs 140,000/= in vain.
21. On cross examination, he testified he had used some of the suit properties from 2012 which was prior to the purchase but did not have a lease. He was not aware the plaintiff owned the suit properties. Siala trees which were on the suit properties were planted by 1st defendant.

The Plaintiff's submissions

22. Mr Odeny, counsel for the plaintiff, filed written submissions dated December 14, 2022. He identified 3 issues: (a) whether the plaintiff lawfully purchased the suit properties from the 1st defendant (b) whether the plaintiff acquired registrable interests over the disputed portions (c) whether the plaintiff was entitled to the orders sought in the originating summons.
23. On the 1st issue, counsel submitted the agreement was proof of sale. It had been duly executed, attested and the 2nd defendant was privy to it.



24. On the 2nd issue, counsel submitted the plaintiff had been in occupation of the disputed portions for 22 years prior to interruption and the agreement of sale evidenced the circumstances of the plaintiff's entry to the disputed portions.
25. Counsel submitted the plaintiff's claim overrode that of the 2nd defendant. He relied on the well cited decision of *Public Trustee v Wanduru Ndegwa* [1984] eKLR where in this decision, Kneller JA expressed himself as follows;
- ‘...Wanduru and later Kamau’s registration were subject to the Muthonis rights. What were they? They had none under the contract for it was null and void. They had no equitable interest in the land. They could not bring an action for specific performance by a conveyance of the legal estate...This brings in the *Limitation of Actions Act* (cap 22) which applies to registered land in a special way. The title of the registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the *Limitation of Actions Act*, has acquired title against the proprietor... The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it.’
26. It was counsel’s submission that the 2nd defendant purchased the suit properties despite glaring red flags. The existence of trees evidenced the plaintiff’s occupation. Counsel relied on the case of *Manason Ogendo Afwanda v Alice Awiti Orende & Another* [2020] eKLR where the court held that the existence of trees and structures evidenced actual, physical and continuous occupation with the knowledge of the defendant.
27. On the 3rd issue, counsel contended the plaintiff was entitled to the orders sought.

2nd Defendant’s submissions

28. Mr Madowo, counsel for the 2nd defendant, filed his written submissions dated January 26, 2023. Counsel identified 4 issues for determination: (a) whether the plaintiff lawfully purchased the disputed portions in 1993, (b) whether the plaintiff acquired registrable interests over the suit properties (c) whether the 2nd defendant was a purchaser for value over the suit properties (d) whether the originating summons ought to be dismissed with costs.
29. On the first issue, counsel questioned the authenticity of the agreement on several grounds inter alia, the 1st defendant denied signing the agreement; the agreement was computer generated using Calibri 12 font which was non-existent as at 1993; there was no thumbprint certificate to prove that the 1st defendant actually affixed his thumbprint on the sale agreement; PW1 and PW2 were not present during the execution of the agreement and witnesses to the agreement did not testify.
30. Counsel submitted Section 97 of the *Evidence Act* mandated the plaintiff to call his witnesses who attested to the agreement to testify. To buttress his position, counsel relied on the case of *Kimotho v Kenya Commercial Bank* (2003) 1 EA 108 where the court held that failure to call attestors inferred they were insignificant in supporting a party’s case.
31. Further, counsel argued the agreement was void because at the time of the agreement, it was registered in the 1st defendant’s father’s name one Osoma Odeyo. Additionally, North Gem/Malunga/658 had changed hands severally. Counsel placed reliance on the case of *Zacharia Wambugu Gathimu & another v John Ndungu Maina* [2019] eKLR where it was held that where letters of administration had not been taken out in respect of a deceased’s estate, nobody had the right to dispose it off or interfere with it.



32. On the 2nd issue, counsel submitted time could only run from 2002 and 2004 because that was when North Gem/Malunga/657 and North Gem/Malunga/658 were respectively registered in the 1st defendant's name. It was counsel's submission that time started to run in 2004 and 12 years lapsed in 2016 and this period was interrupted by the 2nd defendant in 2012 which was before 12 years had lapsed.
33. Counsel cited the case of *Samuel Miki v Jane Njeri Richu* CA no 122 of 2001 and *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR where the court stated that claims of adverse possession cannot succeed if there was permission.
34. On the 3rd and 4th issues, counsel submitted the plaintiff did not controvert the fact that the 2nd defendant was an innocent purchaser for value and he acquired some of the suit properties lawfully, procedurally and without notice of fraud. He relied on the well cited case of *Katende vs Haridar & Company Limited* [2008] 2EA 173 which expounded on the legal doctrine of bona fide purchaser for value. Counsel urged this court to dismiss the plaintiff's claim with costs.

Analysis and determination

35. I have considered the parties' pleadings, evidence including produced documents as well as the submissions by counsel. The provisions of law and judicial precedents have been well articulated in counsels' submissions and I will be guided by them. In my view, the issues falling for determination are; (a) whether the plaintiff proved that he was an adverse possessor (b) what appropriate orders should be granted? and (c) who should bear the costs of this suit?

Whether the plaintiff proved that he was an adverse possessor

34. Sections 7, 13 (1) and (2), 17 and 38 (1) and (2) of the *Limitation of Actions Act* are the statutory underpinnings of adverse possession. Section 7 provides that a person may not bring an action-

‘...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.’
35. At the expiration of the twelve-year period, the proprietor's title was extinguished by operation of law and Section 38 of the *Act* permitted the adverse possessor to apply to the courts handling ELC cases to seek an order that he be registered as the proprietor of the particular parcel land.
36. Therefore, the critical period for determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission and that the owner was dispossessed or discontinued his possession of the land.
37. Section 28 (h) of the *Land Registration Act* recognises adverse possession as an overriding interest over land. The doctrine of adverse possession is well settled and the Court of Appeal case of *Mtana Lewa v Kabindi Ngala* (2015) eKLR stated as follows: -

‘The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.’



38. In the case of *Ernest Wesonga Kweyu v Kweyu Omuto* CA Civ Appeal no 8 of 1990 the court stated thus:-
- ‘...the primary function of a Court is to draw legal inferences from prove (sic) facts which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from the fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on a given fact.’
39. Although both counsels made heavy weather on the purported agreement between the plaintiff and 1st defendant, the agreement was null and void.
40. At the time of execution of the agreement, the estate of Osoma Odeyo had not been succeeded by the 1st defendant. The actions of the plaintiff and 1st defendant amounted to intermeddling with the estate of a deceased person. See Section 45(1) of the *Law of Succession Act* and the Court of Appeal decision of *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* [2004] eKLR where the court cited with approval the case of *Heptula vs Noormohamed* [1984] KLR 580.
41. Suffice to say, a null and void agreement would deem an entry to land as wrongful. This resonates with the essence of adverse possession; holding title adverse to the owner. Such illegal agreements have the tenacity of establishing the circumstances under which a party entered a parcel of land for purposes of laying a claim of adverse possession. See *Public Trustee v Wanduru Ndegwa* (Supra).
42. Even if the agreement was null and void, has this court satisfied itself it was duly executed by the plaintiff and 1st defendant? My answer is in the affirmative. I say so for several reasons, by the minutes of the chief which was produced as PEX5, the 1st defendant breached the agreement of sale and he was willing to compensate the plaintiff. The 2nd defendant testified that although he was suspicious of this agreement, he was willing to refund the plaintiff his purchase price.
43. PW1 and PW2 were inconsistent on how the agreement was executed and settled. However, it is evident they never attested to it and their evidence on this was of no probative value since they could not verify its authenticity.
44. The 2nd defendant’s counsel submitted the agreement was fraudulent. It is trite law that fraud must be strictly pleaded and proved above a balance of probabilities but not beyond reasonable doubt; this was not so in the circumstances of this case.
45. I have looked at Section 97 of the *Evidence Act* and I disagree with defendant’s counsel’s interpretation of this provision of law. It provides that a contract, grant or other disposition of property shall be proved by the document itself in this case the agreement or secondary evidence if admissible. The agreement proved existence of the sale between the plaintiff and 1st defendant.
46. The plaintiff’s testimony and those of his witnesses that the plaintiff entered the disputed portions upon purchase was not controverted.
47. In adopting the decision of *Public Trustee v Wanduru Ndegwa* (Supra), the final balance of the purchase price of kshs. 67,000 was paid on December 26, 1993. For purposes of computation, time ran from this date and his claim of adverse possession became ripe from December 27, 2005. See also *Wanyoike v Kabiri* [1979] KLR.
48. As from this date of December 27, 2005, the 1st defendant who was then the registered owner of the disputed portions, held them in trust for the plaintiff. The subsequent subdivision of North Gem/Malunga/657 and transfer of its subdivisions or transfer of North Gem/Malunga/658 to 3rd parties one



of whom transferred it to the plaintiff did not negate the plaintiff's rights over the suit properties. This is because adverse possession is an overriding interest over land. In other words, it was an encumbrance.

49. There was contention who between the plaintiff and 1st defendant planted Siala trees on the suit properties. The plaintiff and his witnesses corroborated the plaintiff planted those trees. The 2nd defendant asserted the 1st defendant planted them. The 2nd defendant did not lead evidence if the 1st defendant ever lived on the suit properties. The import of the 2nd defendant's testimony was that he found trees already growing on the disputed portions. It is strange the 1st defendant who was the nexus between the plaintiff, 2nd defendant and suit properties never testified and for some reason gave the 2nd defendant authority to plead and testify.
50. From the evidence, the plaintiff lodged a caution on North Gem/Malunga/657 on June 30, 2015 which was immediately he was notified someone had been sighted on the disputed portions. It would appear this unknown person was the 2nd defendant. In my considered view, this demonstrated the plaintiff was abreast of the day to day activities appertaining to the disputed portions and was not an absent land owner.
51. This, compounded with evidence that he cultivated the disputed portions and planted trees from 1993 evidenced his possession and occupation was open, notorious, actual, physical and continuous with no attempts to re-enter or enter the disputed portions to break the continuous possession by the plaintiff during the 12-year period.
52. The 2nd defendant's defence that he was an innocent purchaser for value does not hold water. I say so for several reasons, the title documents for North Gem/Malunga/2235 and North Gem/Malunga/658 were transferred to him respectively on May 25/2017 and 19/4/2018. He admitted he offered to compensate the plaintiff. He also alluded he was aware the plaintiff had lodged a caution alleging purchaser's interest which was removed by the registrar. He further acknowledged he found trees growing on the disputed portions.
53. For the reasons stated above, it is my ultimate finding the plaintiff proved on a balance of probabilities his claim of adverse possession. It is trite law costs follow the event and in the absence of special circumstances, I award costs to the plaintiff. In the end, I make the following disposal orders;
 - a. Land parcel numbers North Gem/Malunga/2234 and North Gem/Malunga/2235 that were subdivisions of land parcel number North Gem/Malunga/657 and their subsequent transfers are hereby cancelled and its original land parcel number North Gem/Malunga/657 is hereby restored in the name of James Awimbo Osoma.
 - b. A declaration that the title for land parcel no North Gem/Malunga/657 measuring 2.5 acres has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act.
 - c. A declaration that the title for land parcel no North Gem/Malunga/658 measuring 1 acre has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act.
 - d. At the plaintiff's cost, it is hereby ordered that within ninety (90) days from the date hereof, a subdivision and transfer be conducted by the Land Registrar, Siaya or such other officer as shall be delegated by the Land Registrar, Siaya to survey, ascertain and excise a portion measuring 2.5 acres within land parcel no North Gem/Malunga/657 and 1 acre within land parcel no North Gem/Malunga/658 for purposes of registration in the plaintiff's favour.



- e. At the 2nd defendant's cost, it is hereby ordered that any residual portion of North Gem/Malanga 2235 after the restoration of North Gem/Malanga /657 and subsequent hiving off of the plaintiff's portion, shall be registered in the 2nd defendant's favour.
- f. In default of compliance with the orders, the deputy registrar or authorized officer do execute all the necessary documents to confer a portion measuring 2.5 acres within land parcel no North Gem/Malunga/657 and 1 acre within land parcel no North Gem/Malunga/658 to the plaintiff.
- g. Costs to the plaintiff.

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

HON. A. Y. KOROSS

JUDGE

23/03/2023

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

In the Presence of

No appearance for the plaintiff

No appearance for the 1st for defendant

No appearance for the 2nd defendant

Court assistant: Ishmael Orwa

