



**Osundwa v Adhiambo & another (Environment & Land Case
12 of 2021) [2023] KEELC 16551 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16551 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 12 OF 2021**

AY KOROSS, J

MARCH 23, 2023

BETWEEN

ZAKARIA MARI OSUNDWA PLAINTIFF

AND

MORRIS SHYALLA ADHIAMBO 1ST DEFENDANT

BONFACE WESONGA WANEKAYA 2ND DEFENDANT

JUDGMENT

1. The registered proprietor of Uholo/Tingare/319 (hereinafter referred to as ‘the suit property’) was and still is Domsiano Adhiambo (‘Domsiano’) who is deceased. The plaintiff’s father one Osundwa and Domsiano were step brothers; their father was called Siala. The 1st defendant is Domsiano’s son while the 2nd defendant is Domsiano’s grandson. The defendants are also the administrators of Domsiano’s estate; grant of letters of administration were issued to them on 4/11/2011.
2. By an originating summons dated August 8, 2016, the plaintiff instituted suit against the defendants claiming he had acquired one half portion of the suit property by adverse possession.
3. The plaintiff identified the following questions for this court’s determination;
 - a) Whether the plaintiff was born and raised on the suit property and constructed his home on a marked portion therein in 1966. The said portion being approximately one half of the suit parcel (hereinafter ‘disputed portion’);
 - b) Whether Domsiano died on February 16, 1977 long after the plaintiff had lived and built his home on the disputed portion;
 - c) Whether Domsiano was the registered proprietor of the suit property from 1970;



- d) Whether the plaintiff had continuously, openly and without any interruption by any person occupied and been in possession of the disputed portion for a period of 50 years;
 - e) Whether the plaintiff had acquired an overriding interest on the disputed portion under section 28 (h) of the *Land Registration Act*;
 - f) Whether the plaintiff had acquired the disputed portion by adverse possession; and
 - g) Whether the honourable court ought to order for the registration of the plaintiff as the proprietor of the disputed portion.
4. The summons was supported by the plaintiff's supporting affidavit which was deponed on 8/08/2016 together with documents he filed in support of his case.
 5. In opposition, the defendants by their counsel on record, C.M Mwebi & Co Advocates filed replying affidavits which were respectively deposed on 12/2/2016 and September 26, 2016. Upon the suit being set down for hearing, it proceeded by *viva voce* evidence.

Plaintiff's Evidence

6. The plaintiff testified as PW1. His evidence was composed of his oral evidence, supporting affidavit, witness statement dated July 27, 2021 and documents. His evidence was led by Alfred Ouma Mariko who testified as PW2.
7. It was the plaintiff's case he was born in the year 1941 and from that time, he had always lived on the suit property which he occupied as of right. Domsiano fraudulently registered the suit property in his name. He had lived on the disputed portion continuously, openly, without interruption and permission for a period of 50 years having put up a home therein in 1966. In Siaya land dispute tribunal ('tribunal') case no Sya/566/99, judgment was entered in his favour which was later adopted as a judgment of the court.
8. On cross examination, he asserted during land adjudication process, he was given land parcel no Uholo/Tingare/352 which was ostensibly not his and it had been registered in the name of his brother Mario Osundwa alias Markos. He had never changed the particulars of this specific parcel of land despite his ID card particulars being on Uholo/Tingare/352. The registration of Uholo/Tingare/352 and that of the suit property were never conducted on the same date. However, these two parcels of land bordered each other and there was a public road that traversed them. A site visit by the court established the boundary had been obliterated.
9. He had lived peacefully on the suit property before Joseph Wanekeya a son of Domsiano, and now deceased, lodged a case against him before the tribunal in the year 1999. The parties have had several court cases between them since 1999.
10. In his exam in chief, PW2, a photographer, produced several photographs allegedly of the disputed portion. In cross-examination, he testified that despite them showing a house, he did not establish the particulars of the land where the house was located.

Defendant's evidence

11. The 2nd defendant testified as DW1. His evidence was composed of his oral evidence, supporting affidavit, witness statement dated October 12, 2021 and documents.



12. It was his testimony the proceedings of the tribunal were a nullity since they had been stayed pending an appeal to the Nyanza provincial land appeals committee which was upon the enactment of the ELC, subsequently transferred to Kisumu HC. The judgment of the tribunal was never adopted as a judgment of the court. After Domsiano's demise, the plaintiff encroached on the suit property from Uholo/Tingare/352. The plaintiff's stay had never been peaceful. The plaintiff had constructed on the suit property.
13. On cross examination, he testified that when he was born in 1983, he found the plaintiff residing on the suit property. The plaintiff had been in occupation for 21 years prior to the tribunal case. On re-examination, he testified the plaintiff had houses on the suit property and Uholo/Tingare/352.
14. The 1st defendant, whose evidence was contained in his oral evidence, supporting affidavit and witness statement dated October 10, 2021 testified as DW2. In his exam in chief, he corroborated DW1's testimony. Additionally, he testified that in 2012, the plaintiff's agents burnt homes that were located on the suit property.
15. On cross examination, he testified he went to Uganda in 1969 and came back to Kenya in 1974 and again left for Uganda in 1976. The photographs produced by PW2 were the plaintiff's houses and they were located on the disputed property.
16. The defendants' evidence was led by Julius Otieno Odwor who testified as DW3. His evidence was contained in his oral testimony and witness statement dated October 12, 2022. He testified he was a neighbour and was aware of intricacies of the suit property. He corroborated DW1 and DW2's evidence.

The Plaintiff's Submissions

- a. Mr Odeny, counsel for the plaintiff, filed his written submission dated December 14, 2022. Counsel identified two issues for determination; (a) whether the plaintiff had acquired registrable interests over the disputed portion and, (b) whether the plaintiff was entitled to orders sought in the summons.
17. On the 1st issue, counsel submitted the tribunal's judgment was adopted as a judgment of the court in Siaya PMCC Land Case No 130 of 199 on 30/08/2011. This case amounted to interruption which was more than 12 years of the plaintiff's occupancy which was without secrecy, force or interruption. Because of the foregoing, it was counsel's submission that the plaintiff had acquired registrable interests on the disputed portion.
18. On the 2nd issue, counsel highlighted the legal framework as founded by sections 7, 13, 16, 17 and 38 of the *Limitation of Actions Act* and section 28 (h) of the *Land Registration Act*. He contended the plaintiff had met the principles of adverse possession as settled by the Court of Appeal decision of *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* (2004) eKLR where the court held: -

'...in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition.'

The Defendants' Submissions

19. Mr Mwebi, counsel for the defendants, filed his written submissions dated 20/02/2023. Counsel identified 4 issues for this court's determination; (a) whether the plaintiff had occupied the suit property for 12 years (b) whether the occupation had been peaceful, without interruption and within



the knowledge of the defendants (c) whether the plaintiff was entitled to the reliefs sought (b) who shall bear the costs of the suit.

20. On the 1st issue, counsel contended the plaintiff was untruthful. Despite testifying he was not present during land adjudication process, he had been registered as the 1st proprietor of Uholo/Tingare/352 which had suspiciously changed hands to the name of the plaintiff's nephew one George Otuweyo Gwanyi. The plaintiff had intentionally destroyed the boundary between the suit property and Uholo/Tingare/352.
21. On the 2nd and 3rd issues, counsel submitted the myriad of court cases evidenced interruption and the plaintiff's occupancy was cloaked with deceit and fraud. Further, counsel submitted it was uncertain when the plaintiff entered the suit property and it was undisputed he was not in exclusive occupation and possession.

Analysis and Determination

22. I have perused and considered the parties' pleadings, the evidence adduced by witnesses before this court, counsels' submissions and well cited provisions of law and authorities. In my considered view, the issues falling for determination are;
 - a. Whether the plaintiff proved his claim of adverse possession to the required standards.
 - b. What appropriate orders should be granted.
 - c. Who should bear the costs of the suit.

a. Whether the plaintiff proved his claim of adverse possession to the required standards;

23. The doctrine of adverse possession arises where a person in possession of land owned by a registered proprietor may by some colour of right acquire valid title to it, so long as certain common law requirements are met and the adverse possessor is in possession of it for a sufficient period of time as defined the *Limitation of Actions Act*. Mr Odeny's submissions have captured the relevant provisions of law and settled principles. I am in concurrence with them and they are binding on this court.
24. Section 7 of the *Limitation of Actions Act* states the definition of adverse possession as follows:
'an action that may not be brought by any person to recover land after the end of 12 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.'
25. Section 38 of the *Limitation of Actions Act* authorizes a person who claims to have been entitled to land by adverse possession to apply to court for an order that he be registered as the proprietor in place of the registered owner.
26. Section 28 (h) of the *Land Registration Act* is also key. It states that land is subject to certain overriding interests such as rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. This overriding interest subsists and affects the interests of proprietors even when it is not noted on the register.
27. When 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. In other words, the court perceives the plaintiff's activities on the land and arrives at legal conclusions from these observations. All the principles must co-exist for one to prove a claim of adverse possession.



28. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal set down the issues a claimant must address when seeking to be deemed an adverse possessor;
- ‘A person who claims adverse possession must *inter alia* show: (a) on what date he came into possession. (b) what was the nature of his possession? (c) whether the fact of his possession was known to the other party. (d) for how long his possession has continued and (e) that the possession was open and undisturbed for the requisite 12 years.’
29. There are several undisputed facts that emerged from the case as shall be elaborated. The plaintiff and defendants are relatives. During land adjudication process, the plaintiff and Domsiano and other close family members were registered as proprietors of various parcels of land. The plaintiff was at one time registered as the proprietor of Uholo/Tingare/352 while the suit property was registered in Domsiano’s name. These two properties are close to each other with an obliterated public road traversing it. In 1999, the tribunal entered judgment in the plaintiff’s favour over a portion of the suit property. The plaintiff’s house was on the suit property. Domsiano was deceased and the defendants were the administrators of his estate having been so appointed.
30. What was disputed was when the plaintiff entered the disputed portion and the circumstances of his entry. The plaintiff was categorical he was born on the suit property in the year 1941, built his homestead therein in 1966 and, owned one share of it as of right. On the other hand, the defendants and their witness maintained the plaintiff entered the suit property by way of encroachment in the years between 1978 to 1980.
31. From adduced evidence, the 1st defendant was away in Uganda during the intervening period of between 1969-1974 and from 1976 to an undisclosed date. The 2nd defendant was born in 1983 and he found the plaintiff already living on the suit property. There was high like hood the 1st defendant was not present between 1978 to 1980 when the plaintiff allegedly entered the disputed portion. In my honest opinion, the plaintiff’s evidence of being born on this property was credible.
32. This is compounded by evidence that close family members of the parties’ common patriarch Siala were allocated land during land adjudication process including the plaintiff and Domsiano. The greencards of the various properties were produced and they were all registered on 17/2/1970. Since the *Land Adjudication Act* was to ascertain interests over land, the logical deduction would be the family at one time or the other lived together before registration took place and each person was allocated their respective portions. This may explain why the plaintiff contended he owned the disputed portion as of right.
33. Despite the defendants alleging disputes subsisted over the suit property prior to 1999, none was tendered before this court. If one were to compute time from either 1941, 1978 or 1980 to 1999, 12 years would have accrued. There was no evidence to contradict the plaintiff’s testimony that during this intervening period, his occupation was peaceful, open and uninterrupted. The question that suffices was whether these facts were sufficient to deem the plaintiff an adverse possessor. My answer to this is in the negative.
34. The Court of Appeal decision of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR cited with approval the decision of *Littledale v Liverpool College* [1900] 1 Ch 19, 21 which dealt with two concepts of adverse possession; possession and discontinuance of possession. In other words, dispossession was where a person comes in and drives another out of the land; discontinuance of possession is where the



person in possession goes out and another person takes possession. In Littledale Lindley MR expressed himself as follows: -

‘The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.’

35. The plaintiff had claimed the suit property as of right and not by discontinuance of possession or dispossession of Domsiano or his heirs. In my view, he did not satisfy this limb of adverse possession.

36. Claims of adverse possession amongst close family relations have posed and continue to pose challenges in Kenya. The law is now settled that such claims amongst relatives have to be traded with carefully. See *Mbui v Maranya* [1993] KLR 726, *Rodgers Mwamboje v Douglas Mwamboje* [2014] eKLR, *John Baraza Ojiambo v Veronica Auma Ojiambo & 3 others* [2013] eKLR and *Samuel Kihamba v Mary Mbaisi* [2015] eKLR.

37. When confronted with an appeal concerning a claim of adverse possession between a step son and mother, the Court of Appeal in the case of *Samuel Kihamba v Mary Mbaisi* (Supra), expressed itself as follows;

‘Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various *dicta* which we have quoted and relied upon in this judgment and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.’

38. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (Supra) the court expressed thus in its *dicta*;

‘...the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession...’

39. In the case of *Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja* [2013] eKLR, the appellant's case was that she lodged a claim of adverse possession against her brother because the land that was the subject of dispute was customary land. She had resided on it for a long period of time. Had built a house on it. Being a woman, she could not be registered as the owner during land adjudication process and as a result, she registered her a younger brother who was then a minor as the registered proprietor. The High Court dismissed her case against her younger brother. On appeal, the Court of Appeal held as follows: -

‘Customary practices did not favour women for registration of ancestral land, thus it was necessary to examine the circumstances under which Eunice caused the title to land be registered in Mwirigi's name. If those circumstances were considered, the trial Judge would have discerned the intention was for Mwirigi to hold the title in trust of Eunice.’

40. In applying the *dicta* of these decisions which are all from the Court of Appeal and are binding on this court, I am not satisfied the plaintiff has satisfied the ingredients of adverse possession.

41. There was never discontinuance of possession or dispossession of the suit property, his claim that he owns the disputed portion as of right negates his claim of adverse possession, and even if this court was to interrogate the claim of customary trust and adopt the decision of *Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja* (Supra), it would not suffice. I say so because it is evident the intent of



family members at the time of adjudication was to ensure each of Siala's sons or their heirs held their respective individual parcels of land and not in trust for each other.

42. Domsiano was registered as the proprietor of the suit property, the plaintiff was registered as the proprietor of Uholo/Tingare/352 and other family members were similarly allocated land. Mariwa Osundwa was given Uholo/Tingare/345, Peter Osundwa was given Uholo/Tingare/366 and Wawichi Gweyu was given Uholo/Tingare/321. I need not say more.
43. Before I pen off, I made certain observations pertaining to these proceedings. The plaintiff and defendants counsel submitted in their rival submissions that the tribunal's decision was adopted as a judgement of the court on August 30, 2011.
44. Submissions are arguments and not evidence. In the absence of supporting evidence, it would appear the decision of the tribunal was not adopted pursuant to the provisions of section 7(2) of the repealed *Land Disputes Tribunal Act*. Additionally, despite the defendants being administrators of the estate of Domsiano, they were sued in their individual capacities. It would appear there was oversight by the plaintiff.
45. Having evaluated the adduced evidence and also considered the applicable law and precedents, I find that the plaintiff did not prove his case on a balance of probabilities to enable this court declare that he had acquired title to Uholo/Tingare/319 by virtue of being in adverse possession.
46. What orders should this court grant? For the foregoing reasons and findings, I dismiss the plaintiff's claim of adverse possession. The plaintiff and defendants are close family relations and because of the close relations, each party will bear their own costs.

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:

No appearance for the plaintiff

No appearance for the defendants

Court assistant: Ishmael Orwa

