



Odeny v Aboge (Sued in his Capacity as Administrator of the Estate of Polentinus Owaga) & another (Environment & Land Case 23 of 2020) [2023] KEELC 17373 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 23 OF 2020**

MN KULLOW, J

APRIL 27, 2023

BETWEEN

HENRY OCHIENG ODENY PLAINTIFF

AND

JOSEPH DALMAS ABOGE (SUED IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF POLENTINUS OWAGA) 1ST DEFENDANT

MICHAEL OLANGO NYANGWECHA 2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein commenced this suit by way of an originating summons dated 9/12/2020 against the defendant for a determination of the following Issues: -
 - i. A declaration that the defendant's right to recover a portion of the suit land measuring 10.5 Acres now known as Suna East/Kakrao/8215 which is a subdivision of the original Title Number Suna East/Kakrao/724 in its entirety is barred under the *limitation of Actions Act* and the defendants' Title thereto extinguished on the ground that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of the suit land for a period exceeding 12 years.
 - ii. There be an order that the plaintiff be registered as the proprietor of a portion measuring 10.5 Acres from L.R No Suna East/Kakarao/8215 which land measures approx. 22.16 Acres in total and that the said portion be removed from the title held by Michael Olango Nyangwecha who currently holds the title of the suit land.
 - iii. There be an order restraining the defendants by themselves, servants, agents or otherwise howsoever from interfering with the plaintiff's peaceful possession and occupation of the



portion aforesaid of the suit land namely Sunaeast/Kakrao/8215 in any manner howsoever and whatsoever.

- iv. The Deputy Registrar/or the Executive Officer of this honourable court be directed and be ordered to execute the transfer document and all attendant documents to facilitate the transfer of the said portion from title name Suna East/Kakrao/8215 measuring 10.5 Acres in favour of the plaintiff.
- v. Costs of the originating summons be borne by the defendants.
- vi. Such further and or other orders be made as the court may deem fit and expedient in the circumstances of this case. Which summons upon the following grounds:
 2. The originating summons is premised on the 6 grounds thereon and on the plaintiff's supporting affidavit sworn on even date. The plaintiff avers that he bought a portion of land parcel No. Suna East/Kakrao/724 measuring 10.5 Acres on 25/07/2007 from Janes Owiti Oduoga and Dominic Wasonga Oduoga; who had earlier bought the suit land from Joseph Ogada Owaga alias Nyangwecha on 2/12/1988 or thereabout. That pursuant to the said purchase, he immediately took possession of the said portion of land and started occupying and developing the same by planting trees, cultivating and has even constructed a posho mill thereon.
 3. It is therefore his claim that his possession and occupation of the suit land for over 13 years in the manner aforesaid has extinguished the defendants' title over the same and he qualifies to be registered as the bona fide owner thereof by virtue of adverse possession. He thus urged the court to allow his claim as sought.
 4. The defendants entered appearance and filed a replying affidavit sworn by the 1st defendant on December 6, 2017 on his own behalf and on behalf of the 2nd defendant. He averred that he is the administrator of the estate of Polentinus Owaga, who was the registered proprietor of the original parcel L.R. No. Suna East/Kakrao/724. He instituted succession proceedings and was subsequently registered as the proprietor by way of transmission and he thereafter distributed the said parcel to all the beneficiaries of the estate of Polentinus Owaga. The original title was subdivided into 4 portions L.R Nos. Suna East/Kakrao/8213, 8214, 8215 and 8216. That parcel No. 8215 was transferred to the 2nd defendant, who has been in occupation and use of the same and holds the land in trust for his family members since the death of the original proprietor to date.
 5. He dismissed the allegations of sale of the suit land by the plaintiff and maintained that the alleged sellers had no transferable interest in the suit property hence could not enter into any valid agreements of sale of the subject land or capable of putting the him into possession.

Trial

6. The plaintiff's case proceeded for hearing on 6/6/2022. The plaintiff testified as PW1. He further stated that he purchased the suit land measuring 10 ½ Acres from one Janes Owiti, who had also purchased the same from one Joseph Nyangwecha who is since deceased. Pursuant to the said purchase, he has been occupying, cultivating and using the suit land for over 13 years; he has a house and posho mill thereon.
7. He produced the following documents as PExhibits in support of his case; Sale Agreement between the deceased Joseph Nyangwecha and Janes Owiti dated 2/12/88 as Pexh. 1, Sale Agreement between him and Janes Owiti dated 21/3/1991 as Pexh.2, copy of the Green Card as Pexh. 3 & 4 in respect of the original parcel No. 724 and the suit land No. 8215 respectively.



8. On cross-examination, he conceded that he had not adduced any photographs to show that he has been cultivating the land or a Report from the Agricultural Officer to show the destruction caused to the land.
9. He further stated that at the time of the purchase, the 1st defendant was holding the title to the land and he was supposed to transfer the purchased portion to him. He reiterated that he has a house on the land, posho mill and has planted trees. On re-examination he reiterated that he took possession of the land in the year 1991.
10. Jannes Owiti Oduogo testified as PW2. He confirmed to have entered into a sale agreement with one Joseph Ogada for the purchase of the suit parcel measuring 6 Acres as evidenced in Pexh.1 and he later sold the land to the plaintiff.
11. On cross-examination, he stated that he sold 6 Acres of land to PW1 and the plaintiff bought an additional 4.5 Acres from his brother. That at the time of the said sale, the defendants had the title to the land but they refused to transfer the land to him and instead became hostile. On re-examination he reiterated that there were 2 Agreements for sale, one was by him and the other by his brother thus making the total land purchased by the plaintiff to be 10.5 Acres.
12. The defence case was heard on 07/12/2022. The 1st defendant testified as DW1, he adopted his witness statement as his evidence in chief. He further stated that the suit land No. 724 is registered in the name of his late father. He denied the claims of purchase by the plaintiff and maintained that the plaintiff has neither been in occupation of the suit land nor constructed any structures thereon.
13. It was his testimony that the suit land forms part of the estate of his late father and the 2nd defendant cultivates the land parcel together with his other members of the family.
14. On cross-examination, he stated that he was not present when the land was being sold in the year 1988. He also denied having destroyed the plaintiff's trees on the suit land or being aware of any court order touching on the subject land.
15. The 2nd defendant testified as DW2. He stated that suit land was donated to him as part of the family of the late Polentinus Owago. It was his testimony that the plaintiff has never purchased the land nor been in possession or use thereof.
16. On cross- examination, he stated that he is the son the late Joseph Ogada Owaga but he was not aware whether his father sold any portion of the land and maintained that the land is family land.
17. Upon close of the defence case, directions were issued on the filing of final submissions. Both parties filed their rival submissions and authorities which I have read and taken into account in arriving at my decision as hereunder;

Analysis And Determination

18. I have looked at the pleadings, evidence adduced in court and the rival submissions filed in totality and in my view, the issues arising for determination are as follows: -
 - a. Whether the plaintiff has proved his claim on Adverse Possession.
 - b. Whether the plaintiff is entitled to the reliefs sought.



A. Whether the Plaintiff has proved his claim on Adverse Possession.

19. The legal framework for adverse possession is provided undersections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and section 28 (h) of the *Land Registration Act*.
20. The elements to be proved in a claim of adverse Possession are now well settled. The Court of Appeal in *Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & anor* [2015] eKLR as follows: -

“From all these provisions what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant., the applicant must be in open, and exclusive possession of that piece in adverse manner to the title of the owner, lastly he must have been in that occupation for a period in excess of twelve years (12) having dispossessed the owner or there having been discountenance of possession by the owner...”
21. It is the plaintiff’s case that his entry into the suit land was permissive and consensual by virtue of a sale agreement as exhibited by Pexh. 2. The court of Appeal in addressing the issue of consent/ permission/ license in a claim of adverse possession in the case of *Ndiema Samburi Soti v Elvis Kimtai Chepkeses* (2010) eKLR, held as follows:

“A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal (*Wanje v Saikwa* (No 2) (1984) KLR 284).”
22. However, it has been held that where such entry and occupation is as a result of a license or permission in the form of a sale agreement, such possession does not become adverse until the end of the period for which permission to occupy was granted. See *Jandu v Kirpal* [1975] EA 225.
23. The question that therefore follows is whether the plaintiff’s occupation and use of the said land was adverse to the title holders of the suit land and whether he has acquired prescriptive rights capable of registration. The burden of proof lies on the plaintiff to not only demonstrate to the required standard that he has been in open, peaceful, continuous possession and occupation of the suit land but to also demonstrate that he dispossessed the title owner of the said land.
24. He who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
25. The defendants herein maintained that the plaintiff was not and had never been in possession and occupation of the suit land for an uninterrupted period of 12 years or at all. Further, it is their claim that the plaintiff in his own testimony confirmed that the defendants had interfered with his possession and threw him out of the suit land.
26. Justice Kuloba J, (as he then was,) in Nairobi Civ No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR held that: -

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and *de facto* occupation must be shown” (emphasis mine)



27. I have noted that the Plaintiff only produced Pexh. 1 & 2 in support of his claim of purchase and Pexh. 3 & 4 in respect to the original parcel of land No. 724 and the suit parcel No. 8215 respectively. He did not adduce any evidence to prove that he was in actual occupation and use of the suit land as alleged for the statutory period in the form of photographs. PW2 only confirmed that he sold the parcel of land to the Plaintiff but he did not comment on who is in occupation or adduce any evidence thereof. Mere averments of occupation and use of the suit land cannot sustain a claim for adverse possession.
28. In the absence of proof of actual occupation and use by the plaintiff and in light of the allegations by the defendants that the plaintiff has never been in occupation of the said land; this court is unable to find with certainty who is actually in possession of the said parcel and/or whether the plaintiff's occupation thereof was for an uninterrupted period of 12 years.
29. In view of the foregoing and owing to the nature and extent of the orders for adverse possession which may lead to the extinction of the defendants' right to property; I find and hold that the plaintiff has failed to sufficiently prove his on adverse possession on a balance of probabilities to warrant the reliefs sought.

B. Whether the Plaintiff is entitled to the reliefs sought

30. Having failed to sufficiently prove his claim to the required threshold, I find that the plaintiff is not entitled to the reliefs sought in the Originating Summons.

Conclusion

31. The upshot of the above is that the plaintiff has not proved to the required threshold and I accordingly dismiss the originating summons dated December 9, 2020 with costs to the defendants. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF APRIL, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

..... for the Plaintiff

..... for the Defendants

Court Assistant- Tom Maurice/ Victor

