



Orawo v Apela & another (Enviromental and Land Originating Summons E005 of 2020) [2025] KEELC 1465 (KLR) (24 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2020
SO OKONG'O, J
MARCH 24, 2025**

BETWEEN

PROF CHARLES NYAKITI ORAWO PLAINTIFF

AND

ALBERT ODHIAMBO APELA 1ST DEFENDANT

ZACHARIA BOYWA APELA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendants by way of an Originating Summons dated 8th October 2020 seeking the determination of following questions;
 1. Whether the Plaintiff is entitled to a portion of all that parcel of land known as Kisumu/West Sidho/1797 measuring approximately 1 ½ acres (hereinafter referred to as “the suit property”) by reason of his adverse possession of the same for a period exceeding 12 years.
 2. Whether the Defendants’ interest in the said portion of the suit property has become extinguished by the Plaintiff’s adverse possession.
 3. Whether the Defendants are holding the tile for the said portion of the suit property in trust for the Plaintiff.
 4. Whether the suit property should be subdivided so that the portion thereof occupied by the Plaintiff is transferred and registered in the name of the Plaintiff in place of the 2nd Defendant.
 5. Whether the Defendants should be ordered to pay the costs of the suit.



The Plaintiff's case

2. The Plaintiff swore an affidavit dated 8th October 2020 in support of the Originating Summons in which he stated as follows: The suit property and another parcel of land known as Kisumu/West Sidho/2683(hereinafter referred to only as "Plot No. 2683") were both registered in the name of Mathius Oloo Sinawa (hereinafter referred to as "Sinawa") as the first registered owner thereof. Sinawa's homestead was on the suit property. Sinawa gave his daughter, Philister Adongo Odida (hereinafter referred to as "Adongo") a portion of the suit property outside his homestead measuring approximately 1¼ acres (sic). Adongo sold him the said portion of the suit property in 1994 at a consideration of Kshs. 20,000/-. He immediately took possession of the said portion of the suit property and started using it. The family of Adongo mistakenly thought that Adongo had sold to him a portion of Plot No. 2683, but that was not the case. Sinawa sold the whole of Plot No. 2683 to Richard Apela Okiro, deceased. Although the land that was sold to Richard Apela Okiro (hereinafter referred to as "Okiro") was Plot No. 2683, Okiro was told that the land that was sold to him was Kisumu/West Sidho / 1797 (the suit property). Okiro took possession of the correct parcel of land, Plot No. 2683, that was sold to him. Okiro and members of his family including the Defendants herein had been occupying and using Plot No. 2683 since 1995 when Okiro purchased the same. Because Okiro was made to believe that the land that was sold to him was the suit property, Sinawa proceeded to transfer the suit property to Okiro on 12th September 1995 even though Okiro was occupying Plot No. 2683. By the time the suit property was transferred to Okiro, the Plaintiff was in possession thereof and Okiro and the members of his family were aware of his occupation of the property. Okiro was aware that he was registered by mistake as the owner of the land that he did not purchase. The Defendants were the sons and legal representatives of the estate of Okiro. Following the death of Okiro, the suit property was transferred to the administrators of his estate, the 1st Defendant, Albert Odhiambo Apela, and Penina Odeny Apela. The 1st Defendant and Penina Odeny Apela thereafter transferred the suit property to the 2nd Defendant, Zacharia Boywa Apela who was the registered owner of the property. During all these transactions involving the suit property, the Plaintiff was in possession of the portion thereof which was the subject of his claim.
3. The Plaintiff averred further that he had occupied and used the said portion of the suit property since 1994 when he purchased it. He averred that he used the said portion of the suit property for millet, maize, beans, peas and sugarcane cultivation. He averred that his son, Kevin Ochieng Nyakiti had also used the land with his permission to grow millet. He averred that in early 2020 he permitted his son, Paul Omondi Nyakiti to put up his homestead on the said portion of the suit property and to occupy the land permanently. The Plaintiff stated that he had requested the Defendants to subdivide the suit property so that his portion thereof could be transferred to him but they had refused to do so. He averred that for over 25 years he had excluded the Defendants from the said portion of the suit property and they had not used the same. He stated that the 2nd Defendant's interest in the said portion of the suit property had become extinguished by operation of law.
4. At the trial, the Plaintiff gave evidence as PW1. He adopted his affidavit in support of the Originating Summons the contents of which I have highlighted above as part of his evidence in chief. He produced a copy of the register for the suit property, a copy of the certificate of official search on the register of the suit property and a copy of the certificate of official search on the register of Plot No. 2683 as Plaintiff's exhibits 1, 2 and 3 respectively. The Plaintiff reiterated that the portion of the suit property that he was claiming was sold to him by Adongo the daughter of Sinawa after the death of Sinawa. He stated that that portion of the suit property was given to Adongo by her father Sinawa. He stated that the agreement of sale between him and Adongo was oral. He stated that he had used the land continuously since he purchased it.



5. The Plaintiff stated that he learnt of Okiro's interest in the suit property 10 years after purchasing the property from Adongo. He stated that he was unable to reach Okiro. He stated that he brought this suit 15 years after learning of Okiro's claim over the suit property. He stated that he came to court after the Defendants came with surveyors to the suit property and started fixing beacons. He stated that the Defendants took measurements and then left. The Plaintiff stated that the Defendants did not occupy the suit property and have never used the property. He urged the court to order that the suit property be subdivided and the portion thereof that he purchased be transferred to him. He stated that he was not interested in the costs of the suit.
6. The Plaintiff called Josephine Alaro Onyango (PW2) as his first witness. PW2 adopted her witness statement dated 21st April 2021 as her evidence in chief. PW2 stated that Sinawa was her father-in-law. She stated that Sinawa started ailing in 1985. She stated that Sinawa shared the suit property between her and his daughter, Adongo. She stated that Adongo sold her share of the suit property to the Plaintiff. She stated that she was still occupying her portion of the suit property. She stated that during the COVID-19 pandemic, people arrived at her home in 9 vehicles. She stated that that was when she heard that she was staying on the Defendants' land which was shocking news to her. She stated that it was the Plaintiff who had been using the portion of the suit property that was sold to him by Adongo. PW2 stated that Adongo was deceased.
7. The Plaintiff's next witness was Zakayo Aluoch Ongulo (PW3). PW3 adopted his witness statement dated 8th October 2020 as his evidence in chief. In the statement, he stated that Sinawa was his grandfather and was the owner of the suit property. He stated that Sinawa gave his only daughter Adongo a portion of the suit property. He stated that Adongo in turn sold the said portion of the suit property to the Plaintiff in 1994. He stated that the Plaintiff took possession of the said portion of the suit property and was the one who had cultivated it over the years. He stated that the Plaintiff's son Paul Omondi Nyakiti had put up his homestead on the land. He stated that Okiro never visited the suit property.

The Defendants' case

8. The 2nd Defendant swore an affidavit on his behalf and on behalf of the 1st Defendant on 1st February 2021 in opposition to the Originating Summons. In his affidavit, the 2nd Defendant stated as follows: He was the registered owner of the suit property. The suit property was purchased by his father, Richard Apela Okiro (Okiro) from Sinawa on 12th September 1995. Adongo who purported to sell a portion of the suit property to the Plaintiff was a stranger to the property and had no interest in it. The purported sale was not in writing as required by the law. The Plaintiff could not possess what was not available for sale to him. Okiro never purchased Plot No. 2683 and had no claim over it. He acquired the suit property after the succession proceedings in respect of Okiro's estate in which the Plaintiff never participated. The Plaintiff had never occupied the suit property until 2020 when he instructed his son to invade and occupy the property. They became aware of the Plaintiff's alleged occupation of the suit property in 2020 when his son entered and settled on the property.
9. At the trial, the 2nd Defendant gave evidence as DW1. DW1 told the court that he was the registered owner of the suit property. He stated that he acquired the suit property on 5th September 2013. He stated that before that the suit property was registered in the name of his deceased father, Richard Apela Okiro (Okiro). He stated that Okiro acquired the suit property on 12th September 1995. He stated that Okiro acquired the property from Mathius Oloo Sinawa (Sinawa). He stated that he did not know the Plaintiff and had never interacted with him. He stated that he was using the suit property for sugarcane cultivation. He stated that the land had been used for sugarcane cultivation since it was acquired by his deceased father Okiro in 1995. He stated that he took over the land after the death of his father in



2001. He stated that they used the suit property until the period of the COVID-19 pandemic when he was unable to travel to Kenya. He stated that he came to Kenya in 2021 and visited the suit property. He stated that he found all the sugarcane cleared from the property and a structure put up thereon without his permission. He stated that the Plaintiff had never occupied the suit property. He stated that the administrators of his father's estate who were his mother and the 1st Defendant transferred the suit property to him in 2013. He urged the court to dismiss the suit with costs.

10. The 1st Defendant, Albert Odhiambo Apela (DW2) was the last witness for the Defendants. He stated that he was not the owner of the suit property. He stated that the suit property was owned by the 2nd Defendant who inherited the same from their deceased father, Okiro. He stated that their father Okiro started occupying the suit property in 1998 or part of it. He stated that it was in that year that their father took him to the suit property. He stated that he had never interacted with the Plaintiff or his sons. He stated that the Plaintiff's son took advantage of COVID-19 pandemic to put up a structure on the suit property. He stated that there was sugarcane on the suit property that he was looking after. He stated that the Plaintiff must be the one who destroyed the sugarcane. He stated that the Plaintiff had never occupied the suit property personally. He stated that he had not seen PW2's residence on the suit property. He stated that they had never lost possession of the suit property. He stated that he was praying for vacant possession of the suit property and damages for loss of use and destruction of the land.
11. After the close of evidence, the court directed the parties to make closing submissions in writing. None of the parties filed written submissions.

Analysis and Determination

12. I have considered the Plaintiff's Originating Summons and the response thereto by the Defendants. I am of the view that the only issues arising for determination in the suit are the following;
 1. Whether the Plaintiff has proved his adverse possession claim over the suit property; and
 2. Who is liable for the costs of the suit?
13. In *Gabriel Mbui v. Mukindia Maranya*[1993] eKLR, which was cited by the Defendants in their submissions in support of their application dated 1st February 2021, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following;
 1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or



squatter unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
14. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:
- “The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”
15. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:
- “First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. 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 for the requisite number of years.”
16. In *Mwangi Githu v. Livingstone Ndeete* [1980] eKLR, Potter J. quoted volume 24 of Halsbury's Laws of England, 3rd edition, page 252 where the authors stated as follows:
- “To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”
17. In *Githu v. Ndeete* [1984] KLR 776 it was held that:



1. “Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.
 2. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”
18. It is on the foregoing principles that the Plaintiff’s claim falls for consideration. The burden was on Plaintiff to establish the elements of adverse possession set out in the above cases. In *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J. stated that:

Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.

19. I have carefully considered the evidence adduced by the parties. I am not persuaded that the Plaintiff has proved his adverse possession claim against the Defendants. A part from the oral testimony which was vigorously challenged in cross-examination, the Plaintiff placed before the court no evidence of his possession of the suit property. Both the Plaintiff and the Defendants claimed to have been cultivating the suit property. None produced evidence of the alleged cultivation. The Plaintiff who claimed to have been in possession of a portion of the suit property measuring 1 ½ acres (according to the Originating Summons) did not even present to the court a survey report demarcating this portion of the suit property. There was even no evidence of the residence of his son whom he claimed to have settled on the suit property in early 2020. The Plaintiff also claimed that the Defendants had since 1995 been occupying and using Plot No. 2683. The Defendants denied this claim and contended that they were not in occupation of the plot and had no claim or interest over the same. The Plaintiff placed no evidence before the court in proof of the Defendants’ alleged occupation of Plot No. 2683. There was also no evidence of the alleged mistake in the transfer of the suit property to Richard Apela Okiro (Okiro) instead of Plot No. 2683. I therefore find no concrete evidence in support of the Plaintiff’s claim over the suit property by adverse possession. In circumstances, I will determine all the issues raised in the Plaintiff’s Originating Summons in the negative. The Defendants did not bring a counter-claim against the Plaintiff. The court cannot therefore grant any relief to the Defendants against the Plaintiff.

Conclusion

20. For the foregoing reasons, I hereby dismiss the Plaintiff’s claim against the Defendants with costs to the Defendants.

DELIVERED AND DATED AT KISUMU ON THIS 24TH DAY OF MARCH 2025

S. OKONG’O

JUDGE

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

Mr. M.J.A. Orengo for the Plaintiff

Ms. Ohayo h/b for Mr. Osur for the Defendants



Ms. J. Omondi-Court Assistant

