



REPUBLIC OF KENYA



**Saka & 2 others v Otieno & 2 others (Environment & Land Case
25 of 2021) [2023] KEELC 16878 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT & LAND CASE 25 OF 2021
AY KOROSS, J
APRIL 20, 2023
[ORIGINALLY KISUMU 33 OF 2018 (O.S.)]**

BETWEEN

**JOAN LUDIA SAKA 1ST PLAINTIFF
DENNIS OCHIENG SAKA 2ND PLAINTIFF
JASSON WILFRED MUMBO SAKA 3RD PLAINTIFF**

AND

**PAMELA GETRUDE OTIENO 1ST DEFENDANT
HABAKUK ONYANGO ABOGNO 2ND DEFENDANT
ESTATE OF ABUOR NYASEME ALIAS AGER NYASEME
(DECEASED) 3RD DEFENDANT**

JUDGMENT

Background of the case

1. By way of originating summons dated 06/07/2018, the plaintiffs instituted suit against the defendants. The plaintiffs and 1st defendant are close relatives; they derive close relations from Abuor Nyaseme alias Ager Nyaseme ('deceased') whose estate has been sued as the 3rd defendant.
2. Armed with a confirmation of grant, the 1st defendant as the administrator of the estate of the 3rd defendant, sold East Gem/ Ramula 206 ('suit property') to the 2nd defendant. The suit property changed hands from the deceased who was registered as the 1st proprietor on 25/11/1976 to the 1st defendant on 11/6/1999. It was subsequently transferred and registered in the 2nd defendant's name jointly with his son Jacob Thomas Mboya Onyango ('Onyango') on 29/2/2012. Onyango is believed to be deceased.



3. At the instigation of some of the plaintiffs, the 1st defendant's grant of letters of administration and confirmation of grant on the deceased's estate was revoked in Kisumu HC Succession Cause No. 198 of 1999.
4. In Maseno PMCC no. 290 of 2010, the 1st defendant obtained orders of eviction against the 1st plaintiff.
5. After all these court proceedings, the plaintiffs filed the instant suit in which they raised the following issues for this court's determination;
 - a) Whether the plaintiffs were entitled to the suit property by adverse possession.
 - b) Whether the defendants' proprietary interests in the suit property had been extinguished by virtue of the plaintiffs' adverse possession and the 2nd defendant was holding it in trust for them.
 - c) Whether the title deed issued in the name of Onyango and the 2nd defendant over the suit property should be revoked, cancelled and transferred to the plaintiffs as the sole proprietors.
 - d) What about costs.
6. With authority of her co-plaintiffs, the originating summons was accompanied by the 1st plaintiff's supporting affidavit deposed on 6/07/2017.
7. In opposition, the 1st and 2nd defendants filed their replying affidavits respectively sworn on 24/01/2019 and 11/06/2019.
8. The plaintiffs' case and evidence
9. The 1st plaintiff testified as PW1. Her evidence was contained in her oral evidence, supporting affidavits sworn on 6/07/2017 and 23/10/2020 and, documents attached thereto.
10. PW1 testified the suit property was originally owned by the deceased who was her father in law. In 1965, she got married to the deceased's son one Percival Saka Abuor ('Percival') who died on 29/10/2003. Since her marriage, her family including Percival and their children some of whom are plaintiffs herein had always lived and cultivated the suit property.
11. The 1st defendant secretly and fraudulently sold the suit property to the 2nd defendant without their involvement. The defendants were privy her family's occupation was peaceful, continuous and without interruption for a period of 52 years. The defendants title to the suit property had extinguished by operation of law and they held the suit property in trust for her. Despite injunctive orders from this court, the 2nd defendant's agents had disturbed her peace and assaulted the 2nd and 3rd plaintiffs.
12. On cross examination, PW1 testified the 1st defendant filed suit against her in Maseno PMCC no. 290 of 2010 but was not aware an eviction order was made against her. The 2nd defendant obtained title from the 1st defendant who had succeeded the deceased's estate. In Kisumu HC Succession Cause No. 198 of 1999, the court conferred the suit property to the 2nd defendant and she was unsure if the probate court gave her one acre which was to be hived off from the suit property. The 2nd defendant had utilised the suit property.
13. On re-examination, she testified that at the point of transactions between the 1st and 2nd defendants, she was in occupation. Except the 2nd defendant, nobody had attempted to remove her from the suit property.



The defendants' case and evidence

14. The 2nd defendant testified as DW1. His evidence was contained in his oral testimony, replying affidavit and annexures thereto.
15. The 2nd Defendant testified he and Onyango were bona fide purchasers for value having purchased the suit property from the 1st defendant who had capacity. Kisumu HC Succession Cause No. 198 of 1999 declared he was the owner of the suit property and the only remedy available was for the plaintiffs to pursue the 1st defendant for the proceeds of sale.
16. In Kisumu HC Succession Cause No. 198 of 1999, the court directed he cedes one acre to the plaintiffs which was where their home stood. According to him, the dispute was settled. Since 2012, he had used the entire portion except the one acre. The plaintiffs had disturbed his occupancy by chasing his workers and destroying his crops and there were pending criminal proceedings.
17. On cross examination, he testified that when he was purchasing the suit property in February 2012, the 1st plaintiff and her family were in occupation; she was a squatter. The 1st defendant had attempted to evict the 1st plaintiff. He was conversant with the suit property since he lived within its neighborhood.
18. PW2 was the 1st defendant. Her evidence was contained in her oral evidence, written statement dated 26/03/2020 and documents she produced.
19. In her exam in chief, she testified she was the deceased's daughter, Percival's sister, 1st plaintiff's sister in law, aunty to the 2nd and 3rd plaintiff's and vendor.
20. The plaintiffs owned another parcel of land known as East Gem Ramula 143. In 2009, the plaintiffs invaded the suit property and this forced her to institute Maseno PMCC no. 290 of 2010 where eviction orders were issued. Percival was buried on the suit property in a forceful manner. After Kisumu HC Succession Cause No. 198 of 1999 ordered her to account for proceeds of sale, she entered into a consent with the 2nd defendant who agreed to cede one acre; this was adopted as an order of the court.
21. On cross examination, she testified Percival and the plaintiffs initially lived in the suit property before relocating to East Gem Ramula 143. The 2nd plaintiff purchased the suit property when her mother was the only one in occupation. The court had ordered her to cede one acre to the plaintiff.

The plaintiffs' submissions

22. M/s Atieno, counsel for the plaintiffs, filed written submissions dated 22/03/2022. Counsel relied on the Court of Appeal case of *Mtana Lewa v Kabindi Ngala* (2015) eKLR which expressed itself 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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.’
23. According to counsel, albeit the 2nd defendant being the registered owner, he had never taken possession yet the plaintiffs had been in open and notorious possession of the suit property to the knowledge of the owner and without permission. Counsel asserted the transfer of ownership did not stop time from running for purposes of adverse possession and to buttress her position counsel relied on the Court of Appeal decision of *Mwangi Gitbu v Livingstone Ndeete* [1980] eKLR which held: -



‘The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters... Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire’s Modern Law of Real Property, 11th edition at p 894.’

24. Counsel asserted for purposes of computation of time, time started to run from 1952 when the 1st plaintiff entered the suit property and that Kisumu HC Succession Cause No. 148 of 1999 and this suit were distinct with separate causes of action.

1st defendant’s submissions

25. Mr. Anyul, counsel for the 1st defendant, filed his written submissions dated 25/02/2022. Counsel rehearsed the 1st defendant’s testimony and contended the plaintiffs’ occupation of the suit property was without permission.
26. Counsel contended that the plaintiffs’ peaceful occupation terminated in 1999 and litigation came to end on 28/04/2017 when the plaintiffs were awarded one acre in Kisumu HC Succession Cause No. 148 of 1999 and the instant suit was intended to overturn that decision. Counsel similarly relied on *Mwangi Githu v Livingstone Ndeete* (Supra).

2nd defendant’s submissions

27. Mr. Ouma, counsel for the 2nd defendant, filed his written submissions dated 22/03/2022. Counsel identified 1 issue for determination; whether the plaintiffs had met the threshold of adverse possession.
28. Counsel argued the plaintiffs claim was unmeritorious because they entered the suit property in 1999 and the decision of Maseno PMCC no. 290 of 2010 remained unchallenged. Further, counsel contended the 12-year period against the 2nd defendant had not lapsed because the 2nd defendant obtained title in 2012 and some of the plaintiff’s objections in Kisumu HC Succession Cause No. 148 of 1999 were upheld in 2016. Counsel asserted in this decision, the High Court upheld the 1st defendant’s title document.
29. Additionally, counsel submitted Maseno PMCC no. 290 of 2010 and Kisumu HC Succession Cause No. 148 of 1999 demonstrated the plaintiffs’ occupation was disturbed, interrupted and not peaceful. Further, the order issued on 26/04/2017 in Kisumu HC Succession Cause No. 148 of 1999 restricted the plaintiffs’ activities to one acre of the suit property. Counsel argued the plaintiffs’ recourse lay with challenging these decisions and not attempting to obtain the suit property by adverse possession.
30. Counsel submitted the plaintiffs could pursue the 1st defendant for an account of proceeds of sale.

Analysis and determination

31. I have considered parties’ pleadings, evidence including produced documents as well as submissions by counsels. The provisions of law and judicial precedents have been well articulated in counsels’ submissions and I will be guided by them.
32. In my view, the issues falling for determination are; (a) import of Maseno PMCC no. 290 of 2010, Kisumu HC Succession Cause No. 198 of 1999 and Kisumu HC Succession Cause No. 148 of 1999 on the plaintiffs’ claim (b)whether the plaintiffs proved their claim of adverse possession (c)what appropriate orders should be granted? and (d)who should bear the costs of this suit?



33. Before I address the issues for determination, I must deal with joinder of the 1st and 3rd defendants in these proceedings. A claim of adverse possession falls against a registered proprietor and not otherwise. The claim is non-suited against the 1st and 3rd defendants and I hereby strike it out against them with no orders as to costs as they are close family relations with the plaintiffs. See the Court of Appeal decision of *Chevron (K) Ltd v Harrison Charo Wa Shutu* (2016).

a) Import of Maseno PMCC no. 290 of 2010, Kisumu HC Succession Cause No. 198 of 1999 and Kisumu HC Succession Cause No. 148 of 1999 on the plaintiffs' claim

34. Documents in respect of these three proceedings were tendered before this court. This court is uncertain if there was a typographical error on the succession cause numbers. Be that as it may, the order that allegedly emanated from Kisumu HC Succession Cause No. 148 of 1999 has no consequence to this suit. It references Gem/Ramula/205 which is an entirely distinct parcel of land to the suit property.

35. When this court had initially reserved this suit for judgement on 19/5/2022, it noticed discrepancies between the ruling rendered by Majanja J in Kisumu HC Succession Cause No. 198 of 1999 on 7/11/2016 and the order dated 26/04/2017. This court called for the file from Kisumu High Court. On 17/01/2023, the Deputy Registrar notified this court she was unable to trace the court file.

36. Notwithstanding this order has no substance to the suit property, it raises several questions. Why is the name of the Deputy Registrar who allegedly issued it not disclosed? What was coming up before the Honourable Judge that was allegedly the subject of the order? What date did it come up before the Honourable Judge? Why was the citation and order not in the archetypal format? Was the ruling rendered on 7/11/2016 set aside to pave way for this order? I will leave it to rest.

37. In the ruling of 7/11/2016, Majanja J held as follows on the 2nd defendant and Onyango's ownership: -
'On this basis, I am satisfied that Habakuk and his son were bona fide purchasers of the land. Under section 93 of the *Law of Succession Act*, such a title is indefeasible and cannot be set aside.'

The Honourable Judge made his findings as follows on Maseno PMCC no. 290 of 2010 by the 1st defendant against the 1st plaintiff thus: -

'In my view, Pamela's action of filing suit was intended to consummate her act of non-disclosure and it cannot stand in the way of my finding that she failed to disclose material facts.'

38. The decision of Kisumu HC Succession Cause No. 198 of 1999 on the 2nd defendant and Onyango's ownership was in line with Section 25 of the *Land Registration Act* which states that a title document shall not be defeated except on several grounds including overriding interests which are set out in Section 28 of the same Act.

39. Could the finding of Kisumu HC Succession Cause No. 198 of 1999 interfere with the plaintiffs claim of adverse possession? The answer to this is in the negative. I agree with M/s Atieno that Kisumu HC Succession Cause No. 198 of 1999 did not determine the plaintiffs claim of adverse possession. Section 28 (h) of the *Land Registration Act* recognises adverse possession as an overriding interest over land. Being an encumbrance to land, the plaintiffs claim to the suit property ran against the current title holders and all their predecessors in title.

40. The revocation of the 1st defendant's grant on the estate of the deceased interfered with orders that ensued from Maseno PMCC no. 290 of 2010. The only persons who were protected from her unlawful actions were the 2nd defendant and Onyango who were purchasers. However as earlier stated, these rights could be defeated by overriding rights. See Section 93 of the *Law of Succession Act* and the Court



Appeal decision of *Musa Nyaribari Gekone & 2 others v Peter Miyienda & another* [2015] eKLR. Kisumu HC Succession Cause No. 198 of 1999 appreciated this position of law.

41. The plaintiffs are allegedly in occupation and their occupancy is inconsistent with enjoyment of the soil by the registered owners. I find this suit is competently before me.

b) Whether the plaintiffs proved their claim of adverse possession

42. 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.'
43. At the expiration of the twelve-year period, the proprietor's title was extinguished by operation of law and Section 38 of the same Act permitted an adverse possessor to apply to ELC for an order that she be registered as the proprietor of a particular parcel land. The doctrine of adverse possession is well settled. See *Mtana Lewa v Kahindi Ngala* (Supra).
44. The undisputed facts of the case are that; the plaintiffs are currently in occupation of the suit property, temporary injunctive orders were issued by this court, the deceased was registered owner as a 1st owner on 25/11/1976, he died on 31/12/1978, he had 3 children-the 1st defendant, Percival who is deceased and John Okore, armed with a confirmation of grant, the 1st defendant transferred the suit property to herself on 11/6/1999, she sold it to the 2nd defendant and Onyango who were issued with a title deed on 19/3/2012 and grant issued to the 1st defendant on the deceased's estate was revoked on 7/11/2016.
45. The primary function of a court is to draw legal inferences from proved facts which inferences are matters of law. The questions that suffice are when did the plaintiffs enter possession? What was the nature of their possession? Was their possession known to the 2nd defendant and Onyango? Was their possession open and undisturbed for the requisite 12 years? Were the 2nd defendant and Onyango dispossessed or discontinued possession?
46. The 1st plaintiff testified she entered the suit property in 1965 by marriage to Percival and they resided there together with their children. Her testimony was consistent.
47. On the other hand, the 1st defendant was uncertain when the plaintiff and her children entered the suit property. In her witness statement she testified she (1st defendant) stayed on the suit property with her brothers including Percival but contradicted herself and testified the plaintiffs invaded the suit property in 2009.
48. In her oral testimony, she testified Percival and the plaintiffs resided in East Gem Ramula 143 but constructed a house on the suit property upon Percival's demise. The 1st plaintiff's testimony that Percival died on 29/10/2003 was not controverted. The 2nd defendant testified Percival had constructed a structure on the suit property before relocating to East Gem Ramula 143.
49. At the time of sale, the 1st defendant alleged the suit property was vacant. If that were so, what was the purpose of Maseno PMCC no. 290 of 2010? The 1st defendant's evidence that the plaintiffs at one time lived on East Gem Ramula 143 was unsubstantiated. I find the 1st defendant's testimony was inconsistent and untruthful. I find PW 1 entered the suit property in 1965 upon her marriage to Percival.
50. When did time start running for purposes of computation? By virtue of her marriage, it is obvious she and her family resided with permission of the deceased. However, when the deceased died on



31/12/1978, permission ceased. See *Ogak v Auma & another* (Environment & Land Case 11 of 2021) [2023] KEELC 65 (KLR) (19 January 2023) (Judgment).

51. I respectfully disagree with the 1st and 2nd defendants' counsels' submissions that probate proceedings stopped time from running. In accordance with the provisions of Section 7 of the *Limitation of Actions Act*, the plaintiffs' rights as adverse possessors accrued from 31/12/1990. This was 12 years after the deceased had died. As at the time the 2nd defendant and Onyango were acquiring rights over the suit property, the plaintiffs' rights were overriding interests by virtue of Section 28 (h) of the *Land Registration Act*.
52. There was no evidence to show that from 31/12/1990 to the time of filing suit, their occupation was with force, secrecy and permission. From the court record, the 2nd defendant attempted to evict them after the suit had been filed but this court issued two injunctive orders against him.
53. Since a claim of adverse possession is sustainable against the registered owner, any person who was registered as proprietor subsequent to 31/12/1990 held it in trust for the plaintiffs. See *Mtana Lewa v Kahindi Ngala* (Supra).
54. The 1st defendant was the perpetrator of the conundrum the parties have found themselves in. However, I am yet to grapple why the 2nd defendant and Onyango purchased the suit property yet by the 2nd defendant's admission, he knew the suit property's history, lived in its neighbourhood, established the 1st plaintiff's residence was on the suit property prior to purchasing it and yet, he still went ahead and bought the suit property.
55. For the reasons stated above, it is my ultimate finding the plaintiffs proved their claim of adverse possession to the required standards. It is trite law costs follow the event and in the absence of special circumstances, I award costs to the plaintiffs which shall be borne by the 2nd defendant. In the end, I make the following disposal orders;
 - a) A declaration that the title in the names of Jacob Thomas Mboya Onyango and Habakuk Onyango Abogno in respect of East GEM/ Ramula 206 has been extinguished by the plaintiffs' adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act*.
 - b) That the plaintiffs have become entitled by adverse possession to East GEM/ Ramula 206 that is registered in the names of Jacob Thomas Mboya Onyango and Habakuk Onyango Abogno.
 - c) An order that the Land Registrar Siaya register the plaintiffs as absolute proprietors of land parcel Number East GEM/ Ramula206 in place of Jacob Thomas Mboya Onyango and Habakuk Onyango Abogno.
 - d) That the Land Registrar Siaya be directed that the order herein shall be an instrument of transfer of ownership of the whole of land parcel Number East GEM/ Ramula 206 from the names of Jacob Thomas Mboya Onyango and Habakuk Onyango Abogno to the plaintiffs.
 - e) The costs of the suit to the plaintiffs shall be borne by 2nd defendant.

DELIVERED AND DATED AT SIAYA THIS 2TH DAY OF APRIL 2023.

HON. A. Y. KOROSS

JUDGE

20/04/2023



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

In the Presence of

M/s Atieno for the plaintiff

N/A for the 1st defendant

Mr. Ouma for the 2nd defendant

Court assistant: Ishmael Orwa

