



**Nyanjom (Suing as the Administrator of the Estate of Dan Jacob Nyanjom)
& another v Oduor & 2 others (Environment & Land Miscellaneous
Case 6 of 2021) [2023] KEELC 17533 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE 6 OF 2021
AY KOROSS, J
MAY 25, 2023
ORIGINALLY KISUMU ELC MISC.CASE NO. 7 OF 2019**

BETWEEN

**WILLIS OCHOLA NYANJOM (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF DAN JACOB NYANJOM) 1ST PLAINTIFF**

ALICE NYANJOM 2ND PLAINTIFF

AND

SOLOMON ODUOR 1ST DEFENDANT

NAHASHON OUMA HAWUORI 2ND DEFENDANT

WILLIS ODERO 3RD DEFENDANT

JUDGMENT

Background

1. The 1st and 2nd plaintiffs instituted suit against the 1st and 2nd defendants vide an originating summons dated March 14, 2023.
2. The 1st plaintiff- Dan Jacob Nyanjom died in the course of these proceedings and he was substituted by Willis Ochola Nyanjom ('Ochola'). The 2nd defendant also died in the course of these proceedings and from the record, the suit against him was marked as abated. The 3rd defendant was joined in the course of these proceedings.
3. In their originating summons, the plaintiffs claimed they had acquired 1.5 ha of land parcel no. East Gem/Uranga/4 ('suit property') by adverse possession having purchased it from the 1st and 2nd



- defendants in 1970. Their originating summons was supported by the 2nd plaintiff's affidavit which was deposed on March 26, 2013.
4. In opposition, the 1st defendant filed his replying affidavit which he deposed on June 17, 2013. He averred it was not tenable for a sale to have taken place in 1970 since he was born in 1977. The 1st plaintiff was at one point a mere lessee for 2 years. Later on, a building that was on it was utilized as a police post for 3 years. The building had over the years been intermittently utilized by various persons including the defendants before it was eventually abandoned.
 5. In their pleadings, the plaintiffs identified the following issues for determination.
 - a. Whether the plaintiffs as adverse possessors bought a portion of the suit property from the 1st and 2nd defendants who were the original owners.
 - b. Whether pursuant to Sections 28 (c), (e) and (j) of the [Land Registration Act](#), the plaintiffs had an overriding interest over the suit property.
 - c. Whether the suit property should be vested upon the plaintiffs.
 - d. Whether the Siaya district land registrar should be directed to register the plaintiffs' rights and interests over the suit property.
 - e. Whether the plaintiffs were entitled to costs.

Plaintiffs' evidence

6. Ochola testified as PW1. His evidence was contained in his witness statement filed on February 26, 2023, oral testimony and produced documents.
7. It was his testimony he took control of the suit property in 2001 when Atieno Oluoch (PW2) who managed the suit property retired. In 2014, the 3rd defendant encroached on the suit property. The 1st plaintiff purchased a portion of the suit property and built a house before handing it over to the police. His family had been in possession for 40 years without being evicted and without permission.
8. On cross examination, it was his testimony he had correspondence to affirm the 1st plaintiff purchased a portion of the suit property. The plaintiffs were only claiming a quarter portion of the suit property. The 2nd defendant was buried on the suit property. His (2nd defendant's) wife and a son lived on it. He lived in Chemelil. The 2nd defendant never built houses on it or purchased it.
9. PW2's evidence was contained in his witness statement filed on February 28, 2014 and oral testimony. It was his testimony he was at one time the 1st plaintiff's manager. He went to work for him on the suit property in 1970. On it, he found the 1st plaintiff's parents' residence; 1st plaintiff's father was buried on it but his mother was then living on it. He constructed a house for him (1st plaintiff).
10. At one point, he left the suit property for 2 years before once again embarking on additional constructions which included 4 rooms for workers and toilets. These buildings were made of blocks. The property was handed over to the police before he again constructed two more semi-permanent houses. On the police's exit, the houses were utilized by the 1st defendant for chicken farming- this was later abandoned. The 1st plaintiff had carried out farming activity on the suit property.
11. On cross examination, it was his testimony that though he constructed 4 houses for the 1st plaintiff on the suit property and even lived there with other workers, he did not know the particulars of the land.



Defendants' evidence

12. The 1st defendant testified as DW1. His evidence was contained in his replying affidavit and oral testimony. The averments therein were summarized earlier in this judgment and I need not reiterate them. It was his oral testimony his mother and brothers were in occupation of the suit property and the plaintiffs did not purchase the suit property.
13. On cross examination, it was his testimony he was born in 1977. The photographs of the houses that were produced by Willis were on the suit property and belonged to the 1st defendant. Willis was a neighbour. He had planted trees on the suit property.
14. Yegon Kipngetich, a land registrar, testified as DW2. He testified the suit property had paths that separated it into lower and upper sections. The lower part had a path that traversed it thus, it was further subdivided into two portions. He produced his report.
15. On cross examination, he asserted his report was derived from DW3's report.
16. Harison Adenyo Odongo, a government land surveyor, testified as DW3. It was his testimony that pursuant to a court order and in the company of DW2, they visited the suit property. A portion which he described as part 'C' had a structure with an occupier and a watering point. In addition, it appeared abandoned. He produced a sketch map.
17. On cross examination, he testified he did not access the lower part of the suit property since it was bushy and he relied on information given to him. The court order restricted their mandate to establishing the occupancy of the suit property.
18. On re-examination, he testified he established from the respective parties that the person who constructed the structure were the plaintiffs but was uncertain of the current occupier of this portion or structure.

Plaintiffs' submissions.

19. Their counsel, Miss Mwangi, filed her written submissions dated February 17, 2023. Counsel identified a singular issue for determination; whether the plaintiffs had acquired registrable interests over the suit property.
20. She submitted that from DW2 and DW3's evidence, the plaintiffs occupied three quarters of the suit property; they were laying claim on this portion that had been marked as 'B' and 'C' in DW3's report. The plaintiffs had been in uninterrupted and open possession since purchase and time started to run since then.
21. Counsel placed reliance on Sections 7, 13, 16, 17 and 38 of the *Limitation of Actions Act*, Section 28 (h) of the *Land Registration Act* and Section 7 of the *Land Act* and the authority of *Kasuve vs Mwaani Investments Limited & 4 others 1 KLR 184* which stated: -

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

Defendants' submissions

22. Their counsel, Mr Ogonda, filed their written submissions dated March 23, 2023. He identified two issues for determination; (a) whether the suit property was registered in the defendants' names and,



- (b) whether the plaintiffs had proved their claim. Counsel abandoned the 1st issue and only addressed the 2nd issue.
23. Counsel submitted that from the evidence adduced, the plaintiffs had not proved their case that they had been in active occupation of the suit property. In a similar fashion as the plaintiffs' counsel, counsel relied on Sections 7 and 13 of the *Limitation of Actions Act*. To buttress his position, counsel cited the Court of Appeal decision of *Kweyu vs Omutut [1990] KLR 709* where Gicheru JA opined as follows: -
- 'By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but in reality is) A mere adverse claim to the land for the period required to form the bar is not sufficient. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously.'

Analysis and determination

24. I have considered the originating summons, responses thereto, evidence presented to this court and parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the key issue falling for determination which is whether the plaintiffs had satisfied the criteria upon which title to the suit property was acquired under the doctrine of adverse possession as against the 1st and 3rd defendants.
25. The law on adverse possession is now settled and I shall be guided by the provisions of law and decisions cited by counsels. However, I am reluctant to rely on the excerpts of *Wambugu vs Njuguna [1983] KLR 173* and *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui [2017] eKLR* that were relied upon by counsel to bolster his arguments.
26. For the benefit of doubt, there was nothing wrong with these decisions. The sole reason I am not relying on them is because the excerpts were lifted from other unrelated decisions and not from the ones he relied upon. I urge counsel to be meticulous lest he misleads the court.
27. 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.'
28. 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 possessors to apply to the courts handling ELC cases to seek an order that they be registered as the proprietors of the particular parcel land. Section 28 (h) of the *Land Registration Act* recognises adverse possession as an overriding interest over land.
29. To establish whether the ingredients of adverse possession have been met or not, this court is called to examine; when was the property registered? what date did the plaintiffs enter the suit property? what was the circumstances of their entry? what was the nature of their possession? Was it open, peaceful, continuous, without force, without secrecy, and without license or permission for a period of more than 12 years? Was it on an identifiable portion? and was there dispossession or discontinuance of possession?
30. The green card of the suit property was not produced before this court. The plaintiffs' pleadings alluded the 1st and 2nd defendants were the original owners. In other words, the property had not



changed hands. The certificate of official search shows the 1st and 2nd defendant's became registered owners on August 27, 2008.

31. Time for purposes of adverse possession could only accrue from the date of issuance of a title document to the 1st and 2nd defendants and not from 1970 which was the alleged date the plaintiffs entered the suit property.
32. This suit could only be filed for purposes of adverse possession on August 28, 2020 and not earlier. This suit was filed barely 5 years after issuance of a title document to the 1st and 2nd defendants. The plaintiffs fail on this principle. I rely on the Court of Appeal decision of *Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016] eKLR* where the court stated: -

'It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. The relevant period would therefore be between 1994, the date of registration of the Appellant as the proprietor and 2008 when the suit was filed which is the period the respondent can legitimately base his claim.'
33. Ochola and PW2 testified the 1st plaintiff entered the suit property in 1970 but they differed on the circumstances of entry. Ochola testified that a portion was purchased by the 1st plaintiff from the 1st and 2nd defendants. In contradiction, PW2 testified he already found the 1st plaintiff's father already buried on it and his parents homestead already stood on it.
34. PW1 did not disclose whether the agreement was in writing or oral, whether consideration was paid and its mode payment. DW 1's evidence that he was born in 1977 was not controverted. I agree with the 1st defendant it was possible for a non-born person to enter into an agreement for sale. I find PW1 and PW2's evidence inconsistent, full of half-truths and unsubstantiated.
35. It was common ground the defendants occupied the suit property. PW1 and PW2 testified PW2 constructed houses on the suit property at the behest of the 1st plaintiff. DW1 was adamant it was constructed by the 2nd defendant. DW3 testified when he conducted a site visit, both parties agreed it was constructed by the 1st plaintiff. Even though this court is unsure the circumstances of the 1st plaintiff's entry to the suit property, it is satisfied the 1st plaintiff put up a structure on it.
36. It was common ground the police occupied the structures at one point. The photographs that were produced by Ochola were unclear. Be that as it may, Ochola testified he moved to the suit property in 2001 after PW2 retired from the 1st plaintiff's employ. Ochola never led evidence as to whether he carried out any activity on the suit property. By his own admission, he carried out farming in Migori and Chemelil.
37. DW3 testified the portion allegedly occupied by the plaintiffs which he described as part 'C' appeared abandoned, was bushy and there was one structure which was occupied by an unknown person. I am not satisfied that the plaintiffs held to the whole world that they held some colour of title over a portion of the suit property in a manner that was open, notorious or continuous. The mere construction of structures could not on its own suffice to deem the plaintiffs as adverse possessors.
38. The plaintiffs shifted goal posts on the portion they were claiming. In their pleadings, they claimed 1.5 ha. In his cross examination, Ocholla testified he was claiming a quarter of the suit property. In other words, they were claiming 0.65 ha. It was obvious, the plaintiffs were unsure of the size of the portion they were entitled to. I rely on the Court of Appeal decision of *Gerishon Muindi Baruthi vs Willays Gatinku Mukobwa & another CA No 98 of 1998* which was cited with approval in the case of *Charles Mwangi Kiiru & 2 others vs Boniface Maina Gichomo & another; [2021] eKLR*. In Gerishon's case, the court held thus;



‘Exclusive possession of a portion of parcel of land which is definite would entitle the appellant to establish his claim on ground of adverse possession provided the period of 12 years has run’

39. The plaintiffs evidence ran afoul with settled principles of adverse possession. For the reasons stated above, it is my ultimate finding the plaintiffs did not prove on a balance of probabilities their claim of adverse possession. I hereby dismiss the plaintiffs’ case. In the absence of special circumstances and being guided by Section 27 (1) of the *Civil Procedure Act*, I award costs to the 1st and 3rd defendants.

DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF MAY 2023.

HON. A. Y. KOROSS

JUDGE

25/05/2023

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

M/s Omondi for the plaintiffs

Mr. Ogonda for the defendants

Court assistant: Ishmael Orwa

