



**Olayo v Adero (Sued as the legal administrator of the Estate of Adero Odiero - Deceased)  
(Environment & Land Case 30 of 2019) [2023] KEELC 17740 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17740 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 30 OF 2019**

**E ASATI, J**

**MAY 25, 2023**

**BETWEEN**

**MONICA AKOMO OLAYO ..... PLAINTIFF**

**AND**

**EZEKIEL ODIERO ADERO (SUED AS THE LEGAL ADMINISTRATOR OF THE  
ESTATE OF ADERO ODIERO - DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. Monica Akomo Olayo, the plaintiff herein filed the originating summons dated September 3, 2019 brought pursuant to the provisions of Order 37 Rule 7(1) *Civil Procedure Rules* against Ezekiel Odiero Adero in his capacity as the Legal Administrator of the of the Estate of Adero Odiero, deceased. Her claim is that she is entitled to registration as proprietor of all that part and/or portion of parcel of land No. Kisumu/Karateng<sup>2</sup>/884 measuring 0.10Ha by adverse possession in place of the deceased who is the current registered proprietor. The plaintiff sought for the following orders: -
  - a. She has acquired and is entitled by adverse possession to the said portion measuring 0.10Ha.
  - b. The Applicant be registered as the proprietor of the whole of and/or part of the said parcel of land known as Kisumu/Karateng<sup>2</sup>/884 measuring 0.10Ha in place of the deceased.
  - c. That the Respondent do sign and execute transfer forms and the relevant transfer documents for the suit land parcel No. Kisumu/Karateng<sup>2</sup>/884 into the name of the applicant failure of which the Deputy Registrar to do so.
  - d. A permanent injunction do issue restraining the respondent, his servants, agents, heirs, assigns and/or any other person acting on his behalf from interfering with the applicants enjoyment of the said portion.
  - e. Cost of the Originating Summons be borne by the defendant



- f. Such further and other orders that the court may deem fit and expedient to grant in the circumstances of the case.
2. The Originating Summons was supported by content of the supporting affidavit sworn by the applicant on September 3, 2019 and the annexures thereto and the Further Affidavit sworn on May 25, 2021.
3. In response to the Originating Summons, the defendant filed a statement of defence dated May 6, 2020 and a replying affidavit sworn on April 26, 2021.
4. Directions pursuant to O.37 Rule 19 of the Civil Procedure Rules were taken on July 15, 2021, inter alia, that the matter be disposed of by way of viva voce evidence.

## Evidence

5. The evidence of the plaintiff comprised of her own testimony and the documents she produced as exhibits and the testimony of two witnesses. The plaintiff adopted the contents of her Supporting Affidavit sworn on September 3, 2019 and Further Affidavit sworn on May 25, 2021 as her evidence in chief. She stated that land parcel No. Kisumu/Karateng<sup>7</sup>/884 measuring 0.10Ha. (the suit land herein) was registered in the name of Adero Odiero who is deceased. That she has been occupying and cultivating the suit land since the year 1976. That the defendant who is the son of the deceased has undertaken succession to the estate of the deceased and is desirous of recovering the land from the plaintiff after a period of over 40 years since she (plaintiff) took possession. That the defendant's right to recover the land expired by effluxion of time as the plaintiff has been in physical possession of the land since the year 1976 which is a period of over 12 years set out in the Limitation of Actions Act. That the defendant was well aware of the plaintiff's occupation of the suit land. That if the orders sought are granted, they will not prejudice the defendant in any way as he (defendant) has not been depending on the suit land.
6. She testified further that she had built a house and lived on the suit land before she moved to another land where she currently resides. That while living on the suit land her child by the name Nereah Olayo died and was buried thereon, that although she lives on the other land, she is the one utilizing the suit land till now.
7. She produced exhibits namely Judgement dated July 12, 2021, Chief's letter dated July 30, 2019, Chief letter dated May 11, 2021, Minutes dated November 18, 2018, Minutes dated March 12, 2017, Chief letter dated February 27, 2017, letter dated November 15, 2018, Certificate of Official Search dated July 16, 2019, Green card for Kisumu/Karateng<sup>7</sup>/884, Survey report for Kisumu/Karateng<sup>7</sup>/884 and Certificate of Confirmation of grant.
8. On cross-examination, she stated that she started living on the suit land in the year 1976 and later moved to parcel No. Kisumu/Karateng<sup>7</sup>/1611 where her home is currently.
9. PW2 testified that he worked as Senior Assistant Chief of West Karateng<sup>7</sup> sub-location where the parties in the suit hail from. That the plaintiff has been cultivating the suit land since 1970s to date. That the plaintiff at one time lived on the suit land before she moved to Kisumu/Karateng<sup>7</sup>/1611 and continued to cultivate the suit land to date. That the deceased came from a place called Nyamboyo – East Karateng<sup>7</sup> Location and settled on land parcel No. Kisumu/Karateng<sup>7</sup>/888 after exchange it with the plaintiff's husband with land parcel No. Kisumu/Karateng<sup>7</sup>/884 (the suit land).

That the dispute herein had been discussed before the elders and resolution reached.



10. PW3 relied on his witness statement as his evidence. He stated that he has known the plaintiff since the year 1974 when she got married to Joshua Olayo. That his (PW3's) home is on land parcel No. Kisumu/Karateng'/795 which is adjacent to parcel No. Kisumu/Karateng'/884 where the plaintiff lived. That in the year 1977 the plaintiff lost a child by the name Nereah Olayo. That the child was buried on the suit land. That the plaintiff later moved to parcel No. Kisumu/Karateng'/1611 which is adjacent to the suit land but continued to cultivate the suit land. That the plaintiff has been working on the suit land since the year 1976. In cross-examination, he stated that there was house on the suit land currently. That the plaintiff has planted some trees on the land including avocado trees.
11. The evidence for the defence comprised of the testimony of the defendant and the exhibits he produced. The defendant who testified as DW1 adopted the contents of his Replying Affidavit as his evidence. He deponed in the Replying Affidavit that he was the Administrator of the estate of Adero Odiero, the registered owner of the suit land. That he knows that the plaintiff has never occupied, used or peacefully or openly been in possession of the suit land. That the plaintiff has not occupied or cultivated the suit land since 1976 or at all. That the suit land has been in his use and occupation. That it was only in the year 2020 when he ploughed the land that the plaintiff without any reason entered the land and planted where the defendant had ploughed. That he plaintiff has no home on the suit land.
12. He stated further that the plaintiff has not explained in her evidence how and under what circumstances she allegedly came to cultivate and occupy the suit land. That the plaintiff whose land borders the suit land started using the suit land in the year 2018 after the death of the defendant's parents and hence the claim based on adverse possession is premature, illegal, unlawful and without any justification. That the plaintiff is only attempting to inherit the defendant's father's land since her objection proceedings in Maseno Succession Cause No.11 of 2017 was dismissed.

That one Stephen Olang'o Ongoya alleges to have bought the suit land from the plaintiff. He produced Chief's letter dated February 27, 2017, Chief's letter dated July 30, 2019 and chief's letter dated October 17, 2019 as exhibits. On cross-examination, he stated that he has never filed any suit to stop the plaintiff from using the land. That the farming activities on the land currently are being undertaken by plaintiff.

### Submissions

13. At the close of the case, Counsel for the parties filed written submissions on the case.
14. Written submissions dated February 22, 2023 were filed by the firm of P.D. Onyango & Co. Advocates on behalf of the plaintiff. Counsel submitted that the plaintiff's claim is purely based on adverse possession and that the evidence adduced supports the same. Relying on the case of *Kasuve v Mwaani Investments Limited and 4 others* [KLR 184, Counsel submitted that a plaintiff in a claim of adverse possession has to prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.
15. He submitted that the evidence shows that the land was exchanged with another land and that is how the plaintiff and her husband entered the land. Replying on the case of *Alex Njonjo Karu & 3 other v John Kamau Gitungo* [2014] eKLR Counsel submitted that an exchange of land with no transfer done amounts to adverse possession after 12 years. That there is evidence that there was exchange of two land parcels and the plaintiff has been in active use and occupation of the suit land since 1976 when the exchange was done and that this is more than 12 years.

That the occupation has been open peaceful, continues, active as required by the law so as to establish a claim for adverse possession. Counsel relied further on the case of *Kimagut Arap Mogeso v Simeon Kipkemoi Maru* [2015] eKLR where in handling a case where the plaintiff came into possession of the



suit land on the basis of exchange of land, the court allowed the plaintiff's claim after establishing that all the ingredients of adverse possession had been demonstrated.

16. That although the defendant claimed that the plaintiff only entered the suit land in the year 2018 and that it is his wife who had otherwise been tilling the land as he was away working as a policeman, he never called the wife to court as a witness.

Referring to exhibit P-1, Counsel further submitted that the Judge in that judgement (exhibit P-1) had noted that at the time when Fredrick and Joshua exchanged the 2 parcels of land, the defendant was a minor and that the defendant has not responded to that assertion.

That the green card and certificate of official search produced as exhibits P-8 and 9 show that the suit land is in the name of the deceased, who was the father of the defendant.

Counsel further relied on the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR and *Joseph Gacheri Kiritu v Lawrence Munyambu Kabura* CA No.20 of 1993 and prayed that the claim be allowed. He submitted that by the time the defendant was pursuing succession in the year 2017, the deceased's title had been extinguished in favour of the plaintiff and the deceased held title in trust for the plaintiff.

17. Written submissions dated March 25, 2023 were filed by the firm of Juliet Dima & Associates Advocates for the defendant. Counsel submitted that the sole issue for determination was whether the plaintiff has earned the prescriptive right of adverse possession over land parcel No. Kisumu/Karateng<sup>7</sup>/884. That the prescriptive right of adverse possession is given to the applicant claiming such right by time and not by court. That such an applicant only needs to confirm that he or she has been in continuous and uninterrupted occupation of the subject land for at least 12 years and that his or her entry was non-permissive by the land owner. That there ought to be no vagueness on timelines when proving adverse possession. Counsel relied on the case of *James Maina Kinya v Gerald Kwendaka* [2018]eKLR to submit that for a claim based on adverse possession to succeed, it is not enough to state that some acts of adverse possession had been committed but also to prove that the possession claimed was adequate in continuity, in publicity and in extent and that it was adverse to the registered owner.
18. That the plaintiff did not state the exact date when she took possession of the suit land so as to start counting the 12 years. That it remained an unresolved issue as to when exactly the plaintiff took possession of the suit land. That there was no evidence to support the plaintiff's claim that there was an agreement in the year 1976 vide which the plaintiff's husband exchanged the suit land with the defendant's father. That even if such agreement indeed existed, the same would only amount to permission, which defeats a claim of adverse possession. Counsel submitted further that the minutes produced by the plaintiff as exhibits are neither documents recognized under the *Land Registration Act* nor the regulations thereto. That they are hearsay evidence. That no photographs were produced to show the condition of the land and for the court to see any crops grown on it or remains of a house.  
Counsel submitted that the plaintiff has not proved the claim for adverse possession and prayed that the suit be dismissed with costs.

### **Issues for determination**

19. As submitted on behalf of the defendant, the sole issue for determination herein is whether or not the plaintiff has acquired title to the suit land by operation of the doctrine of adverse possession.



## Determination

20. For a claim premised on adverse possession to succeed, the claimant must prove on a balance of probability, actual, open peaceful and continuous possession of the subject land for a period of at least 12 years. It is expressed in the latin maxim of *nec vi, nec clam nec precario* meaning without force without secrecy without permission. That the possession must be accompanied by the necessary *animus possidendi* or the intention to acquire and keep the land for himself or herself as his/her own land. The 2 key ingredients that the claimant has to prove is that the entry onto and possession of the land was without the permission of the registered owner and that the possession has been actual, exclusive, open, peaceful and uninterrupted for a continuous period of at least 12 years as provided for in sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:

“An action may not be brought by any person 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.”

21. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

22. In the present case, the plaintiff's evidence is that she entered the suit land in the year 1976 and has had actual open exclusive and peaceful and uninterrupted possession to date. PW3 explained that the defendant's father exchanged the plaintiff's husband with land parcel No. Kisumu/Karateng'/888 with the suit land. That the defendant's father settled on parcel No Kisumu/Karateng'/888 while the plaintiff's husband took the suit land. One of the exhibits produced by the plaintiff was the judgement in Kisumu H. C. Succ. Cause No. 3 OF 2019. It was a judgement in respect of an appeal arising from a ruling dated October 6, 2019 in Maseno Succession Cause No 11 of 2017 in respect of the estate of the defendant's father. The appellate court did find that the evidence that the suit land had been exchanged with the plaintiff's husband's land parcel No. Kisumu/Karateng'/888 had not been controverted and proceeded to allow the appeal in favour of the plaintiff herein. I am satisfied that there is sufficient explanation on record as to how the plaintiff took possession of the suit land. The plaintiff explained that when she got married she first lived with her husband on the suit land before relocating her home to parcel No 1611 but continued to till the suit land. PW3 testified that among the developments the plaintiff has done on the land is planting of trees including Avocado trees. Her evidence on the date of entry onto the suit land and her developments thereon was consistent. That she entered onto the land in the year 1976.
23. The defendant disputed that the plaintiff has had possession since the year 1976. His evidence however was not only unsupported but also contradictory. While at in paragraph 3 of his statement of defence dated May 6, 2020 he stated that the plaintiff entered the land in the year 2018 after his (defendant's) parents died, in paragraph 7 of his Replying Affidavit he stated that the plaintiff entered onto the suit land in the year 2020 after the defendant had ploughed and the plaintiff entered thereon without any



reasons and planted on the place ploughed by the defendant. That the claim for adverse possession is premature.

24. It was submitted on behalf of the defendant that if the plaintiff's entry onto the suit land was on the basis of a land exchange agreement, then the entry was not adverse as it was with the permission of the registered owner and hence cannot be the basis for adverse possession. I have considered this submission against the submission on behalf of the plaintiff that exchange of land without transfer done amounts to adverse possession after 12 years. Counsel for the plaintiff referred the court to the decision in *Alex Njonjo Karu & 3 others v John Kamau Gitungo* [2014]eKLR where the Court of Appeal held that

“we are satisfied that the learned Judge was right in finding, as we do, that a land exchange arrangement had in fact been made between Gitungo and Gathii.....Turning to the question whether the claim for adverse possession was established and the effect of absence of consent to the land exchange agreement, this court expressed itself on the law on adverse possession in *Wambugu v Njuguna* [2013]KLR 173 in the following terms: “in order to acquire by Statute of Limitation title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are inconsistent with his enjoyment of the soil for the purpose of which he he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuation of possession.”

25. From the evidence adduced, I find that the plaintiff has demonstrated that she has had possession of the suit land for more than 12 years. That the possession has been adverse to the interests of the registered owner where possession of the suit land was discontinued upon exchange of the parcels of land before the year 1976. And that by reason thereof, the deceased's title to the suit land has been extinguished.
26. I find that the plaintiff has proved her claim on a balance of probabilities. I enter judgement in favour of the plaintiff for: -
- i. A declaration that the plaintiff has acquired title to the suit land parcel No. Kisumu/Karateng<sup>7</sup>/884 by adverse possession.
  - ii. A declaration that the deceased's title to the suit land parcel no. Kisumu/Karateng<sup>7</sup>/884 has become extinguished by effluxion of time.
  - iii. An order that the defendant as the personal representative of the deceased do transfer the suit land parcel No. Kisumu/Karateng<sup>7</sup>/884 in favour of the plaintiff forthwith. In default, the Deputy Registrar of the court to sign all documents necessary for the transfer of the suit land in favour of the plaintiff.
  - iv. Costs to the plaintiff.

Orders accordingly.

**JUDGEMENT READ AND DATED AT KISUMU, DELIVERED VIRTUALLY THROUGH TEAMS VIDEO CONFERENCING PLATFORM THIS 25TH DAY OF MAY 2023.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

**Maureen —Court Assistant**

**Bagada h/b for P. D. Onyango --for the plaintiff**



**Ohayo h/b for Juliet Dima --for the defendants.**

