



**Awuonda v Bonyo (Environment & Land Case E006 of 2021)
[2023] KEELC 18249 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E006 OF 2021
SO OKONG'O, J
JUNE 15, 2023**

BETWEEN

FREDRICK OCHIENG AWUONDA PLAINTIFF

AND

DR. BEATRICE AKINYI BONYO DEFENDANT

JUDGMENT

- 1 The plaintiff brought this suit by way of an originating summons dated December 20, 2010 which was filed in the High Court on January 17, 2011. The suit was subsequently transferred to this court and given its current case number. In the Originating Summons, the Plaintiff sought the following orders;
 - a. A declaration that the plaintiff is entitled by adverse possession to all that parcel of land measuring 0.22 of a hectare or thereabouts registered as Title No. Kisumu/ Konya/ 4131 (hereinafter referred to as “the suit property”) and is entitled to be registered as the proprietor thereof.
 - b. The costs of the suit.

The Plaintiff’s case.

- 2 The Originating Summons was supported by the affidavit of the plaintiff sworn on December 20, 2010 in which he deposed as follows: He was the son of one, Janes Owuonda Owiti, deceased (hereinafter referred to only as “the deceased”). The deceased died intestate on 31st June 2002. During the deceased’s lifetime, the deceased and members of his family including the plaintiff were in actual, open and continuous occupation of the suit property. In 1996, the Defendant fraudulently caused the suit property to be registered in her name but did not take possession thereof. The plaintiff continued to occupy the suit property despite the defendant’s fraudulent acquisition of the same. The Plaintiff’s open, actual, unauthorised, continuous occupation and use of the suit property entitled him to acquire the suit property by adverse possession since the defendant’s title to the property had been



extinguished. Sometime in the month of May 2010, the defendant purported to serve the plaintiff with a notice to vacate the suit property through the area Chief. The plaintiff annexed to his affidavit in support of the application, a copy of the deceased's Certificate of Death. According to the Certificate of Death, the deceased died aged 40.

- 3 At the trial, the plaintiff told the court that he sued the defendant because she wanted to evict him from the suit property that he had occupied since 1995. He stated that the suit property belonged to his father, Janes Owuonda Owiti, deceased (the deceased). He stated that he heard from the defendant for the first time in 2010. He stated that the defendant who claimed to be the owner of the suit property demanded that he vacates the suit property. He stated that the suit property was the only land that he had and that if he was evicted from the property, he would have nowhere to go.
- 4 On cross-examination, the plaintiff stated that he entered the suit property in 1995 and put up a house thereon. He stated that he was born in 1983 and as such he was 12 years old in 1995. He stated that according to his Identity Card, his year of birth is given as 1986. He stated that 1986 was not his correct year of birth. He stated that if he was born in 1986, he would have been 9 years in 1995. He stated that the house that he put up on the suit property in 1995 was a small house. He stated that the deceased died in 2002 and that he heard later from the defendant that the deceased had sold the suit property to the defendant. He stated that his mother died in 2004 and that both his mother and father were buried on a different parcel of land. He denied that he entered the suit property in 2010.
- 5 On examination by the court, he stated that when he moved to the suit property, his parents who were still alive were not occupying the suit property. He stated that when he put up his homestead on the suit property, he had no wife. He stated that he got married in 2006.

The Defendant's case.

- 6 The defendant opposed the Originating Summons through a replying affidavit sworn on September 11, 2012 and a further affidavit sworn on December 13, 2022. The defendant stated that she purchased the suit property from the plaintiff's father Janes Owuonda Owiti, deceased on November 27, 1996. She stated that his brother David Muga cultivated the suit property from the time she purchased the same until the time of his death. The defendant stated that the plaintiff entered the suit property in 1999 and put up temporary structures thereon. She stated that she reported the plaintiff's act of trespass to the area Chief who asked the plaintiff to vacate the suit property but he refused to do so. She stated that she thereafter instructed her advocates on record to send a demand letter to the Plaintiff to vacate the suit property which they did but once again, the plaintiff failed to comply with the demand. The defendant stated that she thereafter filed a suit in the lower court in 2011 for the eviction of the plaintiff from the suit property. She stated that it was after he was sued that the defendant filed the present suit for adverse possession. The defendant annexed to her affidavits among others her title deed for the suit property and the agreement for sale that she entered into with the plaintiff's deceased father.
- 7 In her evidence, the defendant adopted her witness statement and further affidavit in response to the plaintiff's originating summons as part of her evidence in chief. She produced the documents attached to her list and bundle of documents as exhibits. She told the court that she acquired the suit property from Janes Owuonda, deceased who was the registered owner thereof. She stated that the agreement for sale was prepared by Miruka Owuor Advocate and the same was signed by the deceased and witnessed by the deceased's brother and wife, Mary Auma. She stated that they obtained consent of the land Control Board after which the suit property was transferred to her name. She stated that the suit property was vacant when she purchased the same and that it was her friend who introduced her to the deceased who saw some activities on the suit property in 2009 and informed her of the same. She stated that she did not go to the property immediately as she was sick. She stated that in early 2010, the same



friend told her that the person who had entered the suit property was putting up a second house on the property. She stated that she went to the suit property and found the plaintiff who claimed to be the owner of the property. She stated that when the plaintiff refused to vacate the suit property, she filed a suit against him at the Chief Magistrates Court at Kisumu namely, Kisumu CMCC No. 376 of 2011 which was defended by the plaintiff. She stated that after filing his defence, the plaintiff abandoned the suit and filed the present suit. She denied that the Plaintiff entered the suit property in 1995. She stated that her deceased brother used to take care of the suit property. She urged the court to make an order for the eviction of the plaintiff from the suit property.

- 8 On cross-examination, the defendant stated that she purchased the suit property in 1996 when it was vacant. He stated that the defendant entered the suit property in 2009 and that until then, the property was vacant. On re-examination, she stated that her deceased brother cultivated the land from 1996 to 1999 and that from 1999 to 2009, the property was vacant. She stated that she took action immediately after she learnt of the plaintiff's trespass.

The submissions by the parties:

- 9 After the close of evidence, the parties made closing submissions in writing. Both parties filed their submissions on February 24, 2023.

The Plaintiff's submissions:

- 10 The plaintiff submitted that he was born and brought up on the suit property. The Plaintiff submitted that having been in occupation of the suit property for 13 years with his family, any interest that the defendant had in the suit property was extinguished. The plaintiff submitted that the defendant had no right to evict him from the suit property. The plaintiff submitted that his occupation of the suit property was without the permission of the defendant and that it was in excess of 12 years. The plaintiff submitted that his occupation and use of the suit property was adverse to the interest of the defendant in the property. The plaintiff submitted that he had made out a case for the cancellation of the title held by the defendant and registration of the property in his own name. The plaintiff cited several cases in support of his submissions.

The Defendant's submissions:

- 11 The defendant submitted that the plaintiff had not been in possession of the suit property for a period of 12 years without interruption since the defendant had filed a suit against him for possession. The defendant submitted that the plaintiff had not proved his case and urged the court to dismiss the suit with costs.

Analysis and determination:

- 12 From the pleadings, the following in my view are the issues that arise for determination in this suit;
1. Whether the plaintiff has proved his adverse possession claim in respect of the suit property.
 2. Whether the plaintiff is entitled to the reliefs sought in the originating summons.
 3. Who is liable for the costs of the suit?

Whether the Plaintiff has proved his adverse possession claim in respect of the suit property.

- 13 I have considered the originating summons together with the evidence that was tendered by the Plaintiff in support thereof. I have also considered the evidence that was tendered by the defendant in



opposition to the application. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;

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, *nec vi, nec clam, nec precario* (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 *Gitbu 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 adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into 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.”

17 It is on the foregoing principles that the plaintiff’s claim falls for consideration. The burden was on the plaintiff to establish the elements of adverse possession set out in the above cases. The plaintiff told the court that he was born in 1983. This allegation was made by the plaintiff despite the fact that the plaintiff’s National Identity Card by his own admission indicated that he was born in 1986. Even if I was to give the plaintiff the benefit of doubt in his claim that he applied for Identity Card when he was overage and as such he falsified his age so as to lower it to 18 at the time he was applying for the Identity Card, the plaintiff having been born in 1983 would have been a minor until 2001. The plaintiff could not, therefore, acquire any land by adverse possession until 2001. When the plaintiff alleged to have entered the suit property in 1995, he was only 12 years. For the purposes of limitation of Actions, time could not run in favour of the plaintiff. Time could only start running in his favour in 2001 when he attained the age of majority. The suit herein was filed in 2011; that is 10 years from the time the plaintiff attained the age of majority which falls short of the 12 years required for an adverse possession claim.

18 I am also not persuaded that the plaintiff entered the suit property in 1995. As I have already observed, the plaintiff was only 12 years old in 1995. He was a young boy of school-going age and was not married. The plaintiff’s father and mother were still alive and they were not occupying the suit property. The court is not convinced that a boy of 12 years would leave his parents’ homestead and would go and put up his own homestead elsewhere save in exceptional circumstances. The plaintiff did not give the court any convincing reason why he would have taken such a step. I am also unable to see why the defendant could have purchased the suit property in 1996 with the plaintiff in possession and why the plaintiff’s father would have sold to the defendant land that was occupied by the plaintiff. The plaintiff also gave a conflicting account of his entry into the suit property. He claimed on one hand that he occupied the suit property with his parents from the time he was born in 1983. On the other hand, he claimed that he entered the suit property alone in 1995.

19 In my view, the evidence before the court is consistent with the plaintiff’s entry into the suit property in 2009 as claimed by the defendant. The defendant placed evidence before the court showing that as soon as she learnt of the plaintiff’s trespass in 2009 he lodged a complaint against him with the area District Officer and Chief and when the plaintiff failed to vacate the suit property, she filed a suit against him for eviction. There was no evidence showing that the defendant was aware of the plaintiff’s alleged occupation of the suit property prior to 2009. It follows therefore that even if it is assumed that the



defendant occupied the suit property in 1995 and he was a person in whose favour time could run, he could still not sustain an action for adverse possession in the absence of evidence that the plaintiff was aware of his occupation of the property.

- 20 For the foregoing reasons, it is my finding that the plaintiff has failed to prove his adverse possession claim against the defendant.

Whether the Plaintiff is entitled to the reliefs sought.

- 21 From my findings above, this issue is answered in the negative.

Who is liable for the costs of the suit?

- 22 Under section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. The plaintiff has failed in his claim against the defendant. The plaintiff has not given any reason why the defendant should be denied her costs for defending this suit. For the foregoing reasons, I will award the defendant the costs of the suit.

Conclusion.

- 23 In conclusion, I find the plaintiff's suit not proved. the same is dismissed with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

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

Ms. Okaka h/b for Mr. Ojuro for the Plaintiff

Mr. Mwamu for the Defendant

Ms. J. Omondi-Court Assistant

