



REPUBLIC OF KENYA



KENYA LAW

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**Rombo v Ouko & another (Environment & Land Case E003 of 2022)
[2023] KEELC 18870 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E003 OF 2022**

E ASATI, J

JULY 19, 2023

**IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF
TITLE BY ADVERSE POSSESSION OF THE PARCEL OF LAND
DESCRIBED AS KISUMU/NYAHERA/1694 AND IN THE MATTER
OF LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

BETWEEN

JOSEPH OTIENO ROMBO PLAINTIFF

AND

NORA ADHIAMBO OUKO 1ST RESPONDENT

EMMA ANYANGO OUKO 2ND RESPONDENT

JUDGMENT

1. The Applicant approached the court vide the Originating Summons dated 2nd February, 2022 brought pursuant to the provisions of Section 38(1) of the *Limitation of Actions Act* Cap. 22 Laws of Kenya and Order 37 Rule 7 of the *Civil Procedure Rules*, 2010.

The Applicant claimed to have acquired title through adverse possession to the whole of land parcel known as kisumu/nyahera/ 1694 (the suit land herein). he therefore sought for orders that:

- a. the applicant has acquired the title to 0.26 ha comprised in land parcel no. kisumu/nyahera/ 1694 by adverse possession.
- b. an order directing rectification of the register by deleting the names of nora adhiambo ouko and emma anyango ouko and substituting the name of joseph otieno rombo as the proprietor of the parcel of land known as kisumu/nyahera/ 1694 measuring 0.26 ha and the applicant be issued with the title deed in respect of the said parcel of land.



- c. an order vesting title of all that parcel of land known as kisumu/nyahera/ 1694 measuring 0.26 ha in the names of Joseph Otieno Rombo as the absolute proprietor and that all necessary forms be signed by the deputy registrar of the environment and land court at Kisumu as the situation may require.
 - d. Costs of the suit be allowed to the applicant.
2. The Applicant's case was that he has been in continuous and exclusive occupation, use and possession of the parcel of land described as kisumu/nyahera/ 1694 for a period of over 12 years.

that the subject parcel of land was cultivated by his mother one Jennifer Awuor Rombo (now deceased) from before 1960s until the year 1986 when the applicant inherited the land from his mother and continued to cultivate it. That in the year 1999 the Applicant stopped cultivation on the land and built his house thereon and has been living therein without any interruptions, adverse claim or protest from any one and in particular the Respondents. That the Applicant has therefore had exclusive occupation, use and possession of the parcel of land from the year 1988 to date, a period of 36 years and as such, has acquired the said parcel of land by adverse possession by operation of law. That the Respondents were registered as proprietors of the said land in the year 1994 as shown from the green card which shows that the suit land was transmitted from John Ouko Kasuku to the Respondents. That neither John Ouko Kasuku nor the Respondents ever occupied the said parcel of land. That it is in the interest of justice that the application be allowed and the suit property be registered in the name of the applicant.
 3. The Originating Summons was supported by the averment in the Supporting Affidavit sworn by the Applicant Otieno Rombo on 2nd February, 2022 and the annexures thereto.
 4. The Originating Summons was urged by way of Affidavit evidence and submissions. The Affidavit evidence was contained in the Supporting Affidavit.
 5. The Respondent did not reply to the Originating Summons. Affidavit of service sworn by Cecil Kouko Advocate on 1st December, 2022 shows that the Respondents were served with the Originating Summons by substituted service by way of advertisement in the newspaper. The applicants by a Notice of Motion Application dated 11th May 2022 sought leave of the court to serve the Respondents by substituted service. The Applicant contended that his efforts to serve the Respondents personally at their last known address were not fruitful as the Respondents could not be traced. The court vide its order dated 3/11/2022 granted the leave. To the affidavit of Service dated 1st December 2022 was annexed certificate of postage from postal Corporation of Kenya, Copy of forwarding letter dated 10th November 2022 and newspaper cutting of the Star Newspaper for 11th to 13th November 2022 containing notice of filing of the Originating Summons. The matter therefore proceeded in the absence of the Respondents who having been served in the above described way, never responded in any way.
 6. Written submissions dated 27th March, 2023 were filed on behalf of the Applicant by the firm of Cecil Kouko & Company Advocates. Counsel submitted that a copy of register attached to the Originating Summons shows that the Respondents are the title holders of the suitland. A valuation report also attached to the Originating Summons shows that the Applicant has had exclusive use of the land and even built a permanent home on the land. That the requirements of adverse possession as laid down in the case of *David Kipkosgei Kimeli –vs- Titus Baramasai* [2019] eKLR are; exclusive use and possession of the suit property open and notorious use of the property and non-possessive, hostile or adverse use of property. Counsel relied on the case of *Kasuve –vs- Mawani Investments Limited and 4 Others* eKLR 184 and Nairobi Civil No.283 of 1990 *Gabriel Mbui –vs- Mukindia Maranya* [1993] eKLR to support his submissions.



7. I have considered the pleadings in the Originating Summons, the evidence in the Supporting Affidavit and annexures and the submissions made and authorities relied upon. I have taken into account that the suit was undefended hence the evidence of the Plaintiff was uncontroverted.
8. However, though the Respondent failed to file defence or reply to the Originating Summons, adduce evidence and to attend court to prosecute the case, the Plaintiff still has to prove his case to the standard of proof set by law in order for his claim to succeed.

Section 107(1), 108 and 109 of the *Evidence Act* places the burden of proof on the Plaintiff. He has the burden to prove the existence of adverse possession which is the basis of his claim. In the case of *Charter House Bank Limited (Under Statutory management –vs- Frank N. Kamau* [2016] e KLR the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“ we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

9. Section 38(1) and (2) states;

- “(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

10. Section 28(h) of the *Land Registration Act*, 2012 also recognizes overriding interests on land.

11. The Ingredients of adverse possession were also discussed by the Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR where the court stated:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”



12. Further in the case of *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR the court held that;

“It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

This being a claim for Adverse Possession, the applicants must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.”

13. I have considered the evidence on record, namely; – the copy of register in respect of the suit land which shows that the suit land has since 7th of July 1994 been registered in the names of the Respondents as the proprietors thereof. The valuation report by ADD Property Consultants on the suit land shows the developments carried out by the applicant on the suit land inclusive of a homestead which comprises a three bedroom bungalow/main house, newly built garage for two small cars, an old semi-permanent house, a permanent three-door pit latrine and sheets clad poultry pen, a fence and a gate, a septic tank, main electricity and piped water. I have also considered the averments in the Supporting Affidavit. I find that the Plaintiff has proved that he has had continuous, peaceful, exclusive and open occupation, use and possession of the suit land for an uninterrupted period of more than 12 years. That his activities on the land were in all aspects adverse to the interests and title of the registered owners and that for the entire period the said registered owners have been dispossessed of the land. I find that the Respondents’ title has been extinguished by effluxion of time under section 7 of the *Limitation of actions Act*.
14. In conclusion, I find that the applicant has proved his claim on a balance of probabilities and enter judgement in his favour for;
- A declaration that the Applicant has acquired title to the suit land by adverse possession;
 - A declaration that the Respondents’ title to the suit land has been extinguished by effluxion of time.
 - An order for transfer of the suit land by the Respondents in favour of the Applicant forthwith and in default of which the Deputy Registrar to sign all requisite documents to effect the transfer.
 - Each party to bear own costs.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 19TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

No appearance for the Plaintiff/Applicant.

No appearance for the Respondents.

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