



**Athieno v Magundho & another (Enviromental and Land Originating Summons
2 of 2021) [2023] KEELC 20171 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 2 OF 2021
AY KOROSS, J
SEPTEMBER 28, 2023
[ORIGINALLY KISUMU ELC 007 OF 2021 (O.S.)**

BETWEEN

AGNES ATHIENO PLAINTIFF

AND

PAULO ADONGO MAGUNDHO 1ST DEFENDANT

**JENNIFFER ODUNGA (SUED AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF THE LATE CAMLUS ODUNGA AKEYE) 2ND DEFENDANT**

JUDGMENT

1. This suit was instituted by way of an originating summons dated 1/03/2021 brought pursuant to the provisions of Section 38 of the [Limitation of Actions Act](#) and Order 37 Rule 7 of the [Civil Procedure Rules](#).
2. In her claim for adverse possession against the defendants, the plaintiff asserted that she had acquired a portion measuring 0.25 acres of land parcel no. East Gem/Uranga/1104 registered in the name of the 1st defendant and 1 acre of land parcel no. East Gem/Uranga/678 registered in the name of the deceased, Camlus Odunga Akeye (hereinafter referred to as ‘the deceased’).
3. The 2nd defendant is allegedly sued in her capacity as an administrator of the estate of the deceased. These two disputed portions of land shall hereafter be referred to as “the disputed portions”.
4. The plaintiff raised the following issues for this court’s determination;
 - a. Whether she has been in actual, open, hostile, continuous and uninterrupted possession of the disputed portions and cultivated it to date for a period of 47 years.



- b. Whether under those circumstances, the defendants' title to the disputed portions was extinguished after 12 years of such possession or occupation.
 - c. Whether she should be registered as the proprietor of the disputed portions.
5. The plaintiff's originating summons was supported by her affidavit deposed on 1/03/2021 which had several annexures attached to it.
 6. The 1st defendant who was represented by the firm of M/s Oguso Okungu Advocates did not file any documents in opposition. In a similar fashion, the 2nd defendant who partially participated in the proceedings, did not file any documents in opposition to the originating summons. The plaintiff's claim was undefended.

Plaintiff's evidence

7. The 1st plaintiff testified as PW1. Her evidence was composed of her oral testimony, affidavit, witness statement and documents she produced in support of her case. Her evidence was led by her sons Willis Ochola Nyanjom and Abel Ben Nyanjom who respectively testified as PW2 and PW3. Their evidence was composed of oral and written evidence.
8. It was her case, in 1973, her deceased husband Dan Jacob Nyanjom (Dan) and herself bought the disputed portions from the deceased's and 1st defendant's grandfather one Lawrence Akeye (Lawrence). At that time, the disputed portion lay in East Gem/Uranga/82. They paid the full purchase price.
9. Upon Lawrence's demise, his sons Magundho Akeye and Odunga Akeye subdivided it into East Gem/Uranga/666 and 667 with Odunga Akeye being registered in the former and Magundho Akeye the latter. On following up with them, these two agreed to hive off the disputed portions but they died before registering it in Dan's name.
10. The 1st defendant inherited Magundho Akeye's East Gem/Uranga/667, subdivided it and created several portions including East Gem/Uranga/1104 which was where part of the disputed portions lay. Meanwhile, the deceased inherited East Gem/Uranga/666, subdivided it and created several portions including East Gem/Uranga/678 which was where the other part of the disputed portions lay.
11. Since Dan's demise in 2016, she had continued to plough the disputed portions to the exclusion of the defendants. She had since traced the disputed portions and knew where they lay. Neighbours and the former provincial administration knew it was her land.
12. She had been in possession for 43 years and the defendants had been employed as her farmhands and had cultivated the disputed portions as her employees. Since 2016, the defendants had taken over the disputed portions and attempts by the chief to resolve the dispute had not borne fruit.
13. On cross examination by the 1st defendant, it was her case she had the agreement for sale before court and it was Dan who bought the disputed portions.
14. PW2 testified he had known about the disputed portions since 1994 or 2002. The defendants were his relatives. The 1st defendant was at one time employed by him (PW2) as a watchman. In 2016, the 1st defendant sold the disputed portions to a 3rd party who had even constructed on it.
15. PW3 testified his parents occupied the disputed portions since 1973 without disruptions. In 2016, the defendants lay claim over it and feigned ignorance of the plaintiff's occupation and agreement for sale.



16. He had known about the disputed portion since 1979 as his sister had cultivated napier grass and beans on it. However, they ceased possession in 2016. The 1st defendant had sold part of the disputed portions.
17. On cross examination by the 1st defendant, he testified the mere farming by his sister affirmed his ownership and he did not have any documentation concerning the transaction between Dan and Lawrence.

Parties' submissions

18. The plaintiff's counsel, M/s Akinyi, filed her written submissions dated 25/05/2023. Counsel identified two issues for determination;
 - (a) whether the plaintiff was entitled to the disputed portions by virtue of adverse possession and
 - (b) who should bear costs of the suit.
19. On the 1st and 2nd issues, counsel submitted the plaintiff had proved her claim of adverse possession and she relied on the Court of Appeal decision 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 or 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.”

20. Further, by the plaintiff taking possession of the disputed portion in 1973 after Dan had purchased it and paid the full purchase price, time started to accrue and to this end, she relied on the Court of Appeal decision of *Public Trustee v Wanduru Ndegwa* [1984] eKLR. In the decision, the court held that adverse possession commences in favour of a purchaser from the date he completes payment of the purchase price. On the 2nd issue, counsel sought for costs. The defendants did not file submissions.

Analysis and determination

21. I have carefully examined the plaintiff's pleadings, evidence and submissions and in my view the issues falling for determination are:
 - I. Whether the plaintiff's suit is competent against the 2nd defendant.
 - II. Whether the plaintiff proved her claim of adverse possession against the 1st defendant.
 - III. What appropriate orders should be granted.

I. Whether the plaintiff's suit is competent against the 2nd defendant

22. Section 82 (a) of the *Law of Succession Act* provides as follows:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;”



23. Section 2 of the *Civil Procedure Act* has defined a ‘legal representative’ as: -
- ‘a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.’
24. It is settled law a claim of adverse possession is only maintainable against the registered proprietor of a suit property or the administrators of his estate. See the Court of Appeal decision of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR.
25. The 2nd defendant is neither the registered owner of the suit property nor does she have locus standi to be sued since there is no evidence that she is the administrator deceased’s estate.
26. In a more recent decision by a court of concurrent jurisdiction in *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR, the court stated: -
- ‘The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.’
27. The issue of locus standi is a cardinal principle in law. If one lacked locus standi in a civil suit, then a suit could not be instituted or maintained against her. In the absence of locus standi, this court cannot exercise jurisdiction. For the reason the 2nd defendant is neither the registered owner nor does she have locus standi, I find the suit against her incompetent and a nullity. Consequently, I hereby strike out the suit against her.

II. Whether the plaintiff proved her claim of adverse possession against the 1st defendant.

28. The doctrine of adverse possession is well settled and is one of the ways of land acquisition in Kenya. It is underpinned within the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*.
29. Even if the plaintiff’s claim was not defended, she had the onus of proving the 1st defendant or his predecessors in title had either been dispossessed or had discontinued their possession and she had been put in possession and continued possession for a period of over 12 years in a manner that was hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous and without permission of the owner. See *Mtana Lewa v Kabindi Ngala (Supra)*, *Mbira vs. Gichubi* [2002] IEALR 137, *Jandu v Kirplal & another* [1975] EA 225, *Kimamo v Kimamo* [2004] eKLR and *Kasuve vs. Mwaani Investments Limited & 4 others* 1 KLR 184.
30. As rightfully submitted by M/s Akinyi, in instances of purchase where a purchaser contends that the vendor or his administrator held the suit property in trust for them, time starts to run from the date of final payment. In *Public Trustee v Wanduru Ndegwa (Supra)* the court held:-
- ‘The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it.’
31. In contending her claim of adverse possession, PW1’s testimony and those of her witnesses were full contradictions. In her originating summons, the plaintiff contended she had been in occupation for



- 47 years to the time of filing suit while in her witness statement, she testified she had been in possession for 43 years.
32. In her affidavit, it was her averment she personally tilled the disputed portions after Dan died in 2016 while in witness statement, it was her testimony the defendants forcefully took the disputed portions from her in 2016. This court is uncertain of when she entered the disputed portions or who occupied it from 2016. In fact, PW2 and PW3 were emphatic they had never been in occupation since 2016.
 33. Even if one was to interrogate the purported agreement for sale that allegedly took place in 1973 for purposes of computation of time, it is questionable if such an agreement ever took place. In her testimony, PW1 was categorical she had tendered it to court; which was not so.
 34. From the evidence, she contradicted herself. In certain instances, it was her testimony it was her and Dan who entered into the agreement for sale while in others, it was only Dan who entered into the agreement.
 35. She did not disclose the consideration paid, prove money changed hands, produce the agreement or even call witnesses who attested to the agreement to substantiate her claim that indeed such an agreement took place. This court has not satisfied itself that such an agreement for sale ever took place.
 36. It was strange she purported the defendants were her employees and cultivated it on her behalf yet the 1st defendant and deceased were the registered owners. It was not proved they had ever parted with the disputed portions. Despite her two sons testifying, it was odd her undisclosed daughter who allegedly at one time tilled the disputed portions was not called to testify.
 37. Although it was PW1's case the disputed portions had changed hands 3 times with the 2nd generation owners being Magundho Akeye and Odunga Akeye and 3rd generation owners being the 1st defendant and the deceased, documentary evidence shows otherwise.
 38. The 1st defendant and deceased were 2nd generation owners having had their portions transferred to them by transmission on 12/04/1995. It was only the deceased who changed his name in East Gem/Uranga 667 on 25/6/1996 from "Odunga Akeye" to "Camlus Odunga Akeye"; it was a change of name and not a transfer.
 39. Her evidence on Lawrence's sons or that she purportedly followed up with them, was nothing but made up and a figment of her imagination. I find the plaintiff and her witnesses were nothing but untruthful and their testimonies were full of falsehoods.
 40. Having evaluated the adduced evidence and also considered the applicable law, I find that the plaintiff did not prove her case on a balance of probabilities.
 41. For the foregoing reasons and findings, I dismiss the plaintiffs' claim of adverse possession and because it is trite law that costs follow the event, I hereby award costs to the 1st defendant. Ultimately, I hereby issue the following disposal orders;
 - a. The plaintiff's suit against the 1st defendant is hereby dismissed.
 - b. The plaintiff's suit against the 2nd defendant is hereby struck out with no orders as to costs.
 - c. The plaintiff shall bear the 1st defendant's costs of this suit.
 42. It so ordered.

DELIVERED AND DATED AT SIAYA THIS 28TH DAY OF SEPTEMBER 2023.

HON. A. Y. KOROSS



JUDGE

28/09/2023

JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO

Conferencing Platform in the Presence of:

Miss Khisa for the plaintiff

1st defendant present

N/A for 2nd defendant

Court assistant: Mr. Ishmael Orwa.

