



**Ogweno v Plough & another (Environment & Land Case E089 of 2022)
[2023] KEELC 20111 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E089 OF 2022
NA MATHEKA, J
SEPTEMBER 27, 2023**

BETWEEN

AYUB OTIENO JUNIOR OGWENO PLAINTIFF

AND

HENRY CONWAY PLOUGH 1ST DEFENDANT

ANN PLOUGH 2ND DEFENDANT

JUDGMENT

1. This suit is brought under Sections, 17, 37 and 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya and Order 37 Rule 7(1)(2)(3) of the *Civil Procedure Rules*, 2010 seeking the following orders:
 1. A declaration that the Defendants' title to Land Title No. Mombasa/Block X/82 (situate at Tudor within Mombasa County) has been extinguished in favour of the Plaintiff by virtue of Adverse Possession pursuant to Sections 17, 37 and 38 of *Limitation of Actions Act* Cap 22 Laws of Kenya having occupied the said Land for more than 12 years preceding the filing of this suit.
 2. That the Plaintiff is entitled to be registered forthwith as the owner of all that piece of land known as Land Title No. Mombasa/Block X/82 (situate at Tudor within Mombasa County) which land the Plaintiff has held on Adverse Possession since 2003 to date for a period of more than 12 years immediately preceding the filing of this suit, the same being land which the Plaintiff has occupied openly, exclusively, notoriously and continuously as of right and without any interruption from the Defendants or its predecessor in title.
 3. That the Land Registrar at Mombasa Land Office to delete the names of Henry Conway Plough and Yalarie Ann Plough, the Defendants herein and register the name of Ayub Otieno Junior Ogweno, the Plaintiff herein in place thereof absolutely.



4. That the costs of this Application be provided for.
2. It is based on the grounds that the Plaintiff has since the year 2003 been in peaceful, uninterrupted and open occupation of Land Title No. Mombasa/Block X/82 for a period which is exceeding 12 years preceding the taking out of this summons. That the Plaintiff having lived on the property since 2003 therefore acquired prescriptive rights over it. That the Defendants have never upset the status of the Plaintiff by way of interruption thereof. That it is in the interest of justice that this summon be allowed.
3. This court has considered the evidence and the submissions therein. The Plaintiff herein seeks to be registered as the proprietor of Land Parcel Mombasa/Block X/82 measuring 0.692 acres by virtue of adverse possession. He has produced a certificate of title deed issued to the Defendants as joint tenants on 18th October 2004. The Plaintiff claimed to have lived on the suit property openly, peacefully and uninterrupted since 2003 and has since acquired prescriptive rights over the suit property. Further he contended that the proprietary rights of the Defendants have been extinguished under Section 38 of the *Limitation of Actions Act*. The Defendants did not participate in this case, they were served vide substituted service on 27th November 2022 and filed an affidavit of service on 20th December 2022. Nevertheless, the court will examine the evidence presented before it to determine whether the Plaintiff has met the requirements laid down for a claim of adverse possession, as was stated in *Joseph Macharia Kairu v Kenneth Kimani Muiruri* (2021) eKLR, where the court held that:

This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the applicant is entitled to the prayers sought. This court has pronounced itself on uncontroverted evidence in Murang'a ELCA No. 16 of 2017:- *Gichinga Kibutha v Caroline Nduku* [2018] eKLR to the strength that It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

4. In order for the Plaintiff to be entitled to the suit property by way of adverse possession, he must prove that he has been in exclusive possession of the suit property openly and without any color of right for a period of 12 years. The said possession must be as a result of the Plaintiff dispossessing the Defendants of the suit property or by a discontinuation of possession by the Defendants of their own volition. The Plaintiff must demonstrate to the satisfaction of the court the point that the Defendants were dispossessed of the suit property or they discontinued possessing it. The Plaintiff ought to establish that he physically and exclusively possessed the suit land at the exclusion of the Defendants. The Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR held that:

person who claims adverse possession must inter alia show:

- a. on what date he came into possession.
 - b. what was the nature of his possession?
 - c. whether the fact of his possession was known to the other party.
 - d. or how long his possession has continued and
 - e. that the possession was open and undisturbed for the requisite 12 years".
5. Possession is a question of fact and the Plaintiff herein has not led any evidence as to the nature of his occupation. He has not established how or when he gained access to the suit property. The Plaintiff simply stated that he has been in open, continuous and uninterrupted occupation for over 12 years.



The Plaintiff has not adduced any evidence as to the current state of the land for court to determine whether he is in occupation or not. The mere averments cannot sustain a claim for adverse possession.

6. The non-use of the suit property by the Defendants for a long period of time will not affect his title, the Plaintiff ought to prove by evidence that he took possession of the suit property and asserted rights over it as a true owner would. The mere fact that the Defendants did not use the suit property, or could not be traced to be served with the pleadings herein to defend the suit against adverse possession; by itself does not prove adverse possession. The abandonment of possession of the Defendants must be coupled with the Plaintiff prove of possessing the suit property with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the Defendants' as the true owner. In the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, the court held that;

Acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it. Accordingly, where a true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves in unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year after year for 12 years or more.”

7. As I have stated, there is no evidence that has been tabled before this court that proves the Plaintiff entered the suit property with the intention of dispossessing the Defendants as the registered proprietors of the suit land. The fact that the Plaintiff claims to have occupied the suit land for more than 12 years does not per se prove adverse possession. The court finds that the Plaintiff has not discharged his burden of proving this case on a balance of probabilities. Consequently, the Court finds and hold that the Plaintiff's claim contained in the originating summons dated 17th August 2022 is not merited and proceeds to dismiss it with no order as to costs, since the Defendants neither entered appearance nor defended this claim.

8. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

