



Owiti v Otieno (Sued as the Legal Administrator of the Estate of the Late Joseph Otieno Ooro) (Environment & Land Case E013 of 2022) [2023] KEELC 21243 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E013 OF 2022
AY KOROSS, J
OCTOBER 19, 2023**

BETWEEN

JOHN ARIANDA OWITI PLAINTIFF

AND

JOHN WILLIAM OTIENO (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH OTIENO OORO) DEFENDANT

JUDGMENT

Background

1. The plaintiff filed his originating summons ('OS') dated 18/07/2022 against Joseph Otieno Ooro (Joseph) who died on 31/12/2022 which was in the course of these proceedings. Joseph's son, John William Otieno (defendant), substituted him.
2. The plaintiff's claim was in respect of land parcel no. South Sakwa/Barkowino/1073 ('suit property') that is registered in Joseph's name.
3. The plaintiff pleaded he had been in occupation of the suit property for a period of over 12 years without secrecy or interruption and in a manner that was open. He pleaded he was entitled to the suit property by way of adverse possession. He sought for the following orders: -
 - a. The plaintiff be declared to have acquired prescriptive rights over suit property by way of adverse possession.
 - b. The defendant do sign transfer documents and consent in favour of the plaintiff, failing which the registrar be mandated to sign the documents.
 - c. Costs be borne by the defendant.



4. The originating summons was premised on the supporting affidavit of the plaintiff John Arianda Owiti dated 18/07/2022.
5. In reply to the OS, Joseph filed a replying affidavit deposed on 02/09/2022. This affidavit was not considered since the defendant swore a replying affidavit dated 23/03/2023. The earlier replying affidavit sworn by Joseph is hereby expunged from the record.
6. Under the province of Order 37 Rule 19 of the Civil Procedure Rules, the court deemed the OS a plaint and replying affidavit a defence. It directed the suit to proceed by viva voce evidence.

Plaintiff's evidence.

7. The plaintiff testified as PW1. He relied on his supporting affidavit and oral testimony. He produced an application for caution over the suit property that had been lodged by his brother Mathews Arianda Owiti (Mathews).
8. The plaintiff stated he had resided on the suit property for over 12 years. When he conducted an official search, he realized the suit property was registered in Joseph's name. The suit property was his ancestral home which he had inherited from his late father and he had lived there since he was born. He started constructing on the suit property in 2010.
9. On cross examination, it was his testimony the 1st registered owner was Anton Okome Arianda (Anton) who was his uncle but he did not know the circumstances of Anton's registration. The suit property was not family land. Anton owned land in Barkowino while his father owned land in Ugenya. Onyango Abala who was not related to him also occupied the suit property but Mathews had never been in occupation of the suit property.
10. He was not privy his father and Mathews had barred Joseph from entering the suit property. He neither had photographs of his developments on the suit property or witnesses to corroborate his averments.
11. On re-examination, he testified Joseph had never been in occupation. However, he (plaintiff) had built a structure on the suit property, kept cattle on it and had installed water tanks within it.

Defendant's evidence

12. The defendant testified as DW1. He relied on his replying affidavit, oral testimony and produced documents which included the green card and certificate of title over the suit property.
13. He stated Joseph bought the suit property from Anton 1993. Attempts by Joseph to enter the suit property were repulsed at different intervals by Barnabas Owiti Arianda who was the plaintiff's father and also by Mathews. The repulsion by Mathews took place in early 2022 and that was when they discovered strangers had encroached on the suit property without consent.
14. He further stated the plaintiff was not in occupation since Mathews had earlier on alleged he was the one in occupation. The plaintiff had not proved the suit property belonged to his father. The plaintiff had not met the ingredients of adverse possession since when he visited the suit property in 2015, he found it vacant.
15. DW1's evidence was corroborated by the testimony of his brother Jared Opiyo Otieno who testified as DW2. His evidence was composed of his witness statement dated 23/03/2023 which he adopted as his evidence in chief.
16. On cross examination, he testified a house existed on the suit property which occupied close to a quarter of an acre but no other activity was carried out therein. Joseph did not file suit against the trespassers



since he was a man of straw. When Joseph bought the suit property in 1993, it was vacant. His advocate had informed him a counterclaim was not feasible in the circumstances of this case.

Plaintiff's submissions

17. The plaintiff's counsel, M/s. N.E. Mogusu & Associates, filed its written submissions dated 14/06/2023. It was submitted the legal provisions of the doctrine of adverse possession were provided for in Sections 7 and 17 of the *Limitation of Actions Act*.
18. Further, it was submitted that Joseph lost title to the suit property 12 years of his registration as proprietor. Counsel computed time for purposes of adverse possession from 2005 and contended the plaintiff had met the ingredients of adverse possession.

Defendant's submissions.

19. The firm of Ooro Awana & Co. Advocates, who represented the defendant, filed written submissions dated 20/06/2023. Counsel, Mr. Ooro F., identified 2 issues that he considered fell for determination (a) whether the plaintiff had demonstrated sufficient grounds to warrant orders of adverse possession over the suit property and, (b) whether the suit was competent.
20. On the 1st issue, counsel submitted the doctrine of adverse possession were spelt out in the persuasive and well cited decision of the Supreme Court of India of *Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779* which stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

21. In applying these principles, counsel submitted it was not in dispute the plaintiff or Mathews was in occupation. The date of commencement of occupation was not disclosed and was disputed. Counsel submitted that there had been interruption and the plaintiff had not proved his occupation was adverse to the owner. Additionally, counsel submitted a claim of customary trust could not suffice. Counsel placed reliance on several authorities including *Gabriel Mbui v Mukindia Maranya [1993] eKLR* and *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR*.

Analysis and determination

22. The court has carefully read and considered the pleadings by parties herein, evidence adduced, rival submissions, provisions of law and authorities cited and establishes the issues for determination are;
 - a. Whether the plaintiff has met the ingredients of adverse possession.
 - b. Who should bear the costs of the suit?



a. Whether the plaintiff has met the ingredients of adverse possession.

23. The doctrine of adverse possession is statutorily underpinned in the *Limitation of Actions Act*. The relevant provisions are found in Sections 7, 13 and 38 thereof. These provisions provide as follows: -

Section 7

“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.”

Section 13

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Section 38 (1)

“(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.”

24. The Court of Appeal in the decision of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR cited with approval the decision of *Littledale v Liverpool College* [1900] 1 Ch 19, 21 where Lindley MR expressed himself as follows: -

“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 of the requisite number of years.”

25. On assertion of rights by the registered owner, the court in *Githu v. Ndeete* (1984) KLR 776 stated: -

“Time ceases to run under the Limitations of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. 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.”

26. The plaintiff who had asserted the claim of adverse possession had the onus of proving he was an intruder, he had been in unlawful occupation for a period of over 12 years to the time of filing suit, the claim was against the registered owner, show clear and unequivocal evidence he had dispossessed the owner or the owner has discontinued possession in a manner that was without permission and his occupation was open, with the knowledge of the true owner, without secrecy, without evasion and in continuous occupation of a determinable portion of the suit property.
27. It was undisputed the plaintiff was in occupation of the suit property. However, occupation alone did not deem him an adverse possessor. He needed to prove all the ingredients of adverse possession. In my considered view, the alleged acts of the plaintiff’s father or Mathews’s in repulsing the defendant or Joseph could not amount to interference. See *Githu v. Ndeete*. (Supra)
28. On the 1st principle of time or date of occupancy for purposes of calculation of time, the plaintiff contended he had resided on the suit property since he was born. No doubt, he was an adult, however, he did not disclose his date of birth.
29. In his evidence in chief, he testified he constructed on the suit property in 2010, however, in an affidavit deposed by Mathews on 18/04/2022, Mathews asserted he and the plaintiff had been farming on the suit property before they both built houses and had been “staying there for more than 10 years”. The suit was filed barely 2 months after Mathews’s depositions. In his supporting affidavit, the plaintiff asserted he had been in possession “for more than 12 years”. The date of commencement of occupation was vague.
30. When did time start accruing? The plaintiff’s date of birth was not disclosed and neither was the date he started farming or residing on the suit property divulged. Since the suit was filed on 19/07/2022, a disclosure of the date and month of construction in the year 2010 was so crucial for purposes of computing time. However, this was not done.
31. When the defendant testified that he found the suit property vacant in 2015, the evidential burden shifted to the plaintiff to prove his exact date of occupancy but he failed to lead sufficient evidence to rebut the defendant’s evidence. The plaintiff did not satisfactorily demonstrate the date he took possession of the suit property. He failed on this limb.
32. On the 2nd principle of occupation of a defined portion, notwithstanding it was not disputed the plaintiff was in occupation, in his OS he sought that he be declared to have acquired the entire suit property by adverse possession. However, it emerged he was not in exclusive possession but in possession together with one Onyango Abala who was a stranger. The plaintiff fails on this limb. On this, I place reliance on the case of *Gatimu Kinguru vs Muya Gathangi* [1976] KLR 253 where the court observed that:

“ the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”
33. The 3rd principle was that the title holder had been dispossessed or had discontinued his possession. The plaintiff testified that since the suit property was ancestral land, he occupied it as of right and he had inherited it from his father. In other words, it was a gift and he had permission of his father to occupy the suit property. No evidence was led of when his father died to establish if such permission ceased. From the green card of the suit property, his father was never the registered owner.



34. It was evident he was not even privy of Joseph's registration when he averred in paragraph 3 of his affidavit 'I have just realized that the suit parcel was registered in the name of the respondent'. He never led evidence to prove he entered the suit property with aim of dispossessing Joseph. The plaintiff did not prove this limb. I adopt the recent Court of Appeal decision of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR which had similar facts as this case and held: -

“Comparatively, the Supreme Court of India in Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639 ... Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant's claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant ...”

35. In this decision, the court went further and stated;

“We further note that the appellant's entry into the suit property was by permission from a person who had no proprietary interest in the parcel. ...Having entered the suit property on permission, the appellant cannot be allowed to turn around and state that that entry was by way of adverse possession...”

36. This court took note the plaintiff's testimony was contradictory and not credible. The plaintiff on cross examination denounced that the suit property was his family land yet in his evidence in chief, it was his case it was ancestral land.

37. In addition, Mathews's affidavit which he produced as his evidence deponed he and Mathews were both in occupation of the suit property whilst in cross examination, he admitted Mathews had never constructed on it. The logical conclusion that one can arrive at is that his testimony was full of half-truths.

38. To this end, this court finds the plaintiff did not discharge his burden of proving his claim to the required standard. Utmost, the court finds and holds the plaintiff's claim as contained in the originating summons dated 18/07/2023 is not merited and the same is hereby dismissed in entirety. It is trite law costs follow the event and I award costs to the defendant.

39. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

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

N/A for the plaintiff

Mr. Ooro F for the defendant

