



**Acheri v Oduogi (Environment & Land Case 58 of 2019)
[2023] KEELC 21827 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 58 OF 2019
MN KULLOW, J
NOVEMBER 29, 2023**

BETWEEN

SUSAN WANCHARA ACHERI PLAINTIFF

AND

MAURICE ADEK ODUOGI DEFENDANT

JUDGMENT

1. Susan Wanchara Acheri ("The Plaintiff") commenced this suit by way of an Originating Summons dated 13.05.2019; sued the Defendant and sought for the following ORDERS: -
 - i. That this Honourable Court do declare the Applicant and any other person claiming under her, has by way of adverse possession acquired title to part of L.R. No. Suna West/ Wiga/1298 measuring approximately 50ft by 100ft registered in the Plaintiff's name Maurice Adek Oduogi.
 - ii. That, this Honourable Court be pleased to further order for excision of the portion of the land pleaded to from L.R. No. Suna West/ Wiga/1298 measuring approximately 50ft by 100ft and the same be transferred to the Applicant.
 - iii. That, this court do make an Order as to interest on costs.
 - iv. That, this Court do order that the Respondent pays costs of this Application.
2. It is the Plaintiff's contention that she has been in a long, uninterrupted occupation of a portion of L.R. No. Suna West/ Wiga/1298 measuring approximately 50ft by 100ft since 2000 having entered the same on the permission of the Defendant and vide a verbal sale agreement.
3. That pursuant to the said verbal sale agreement in January 2000 between herself and the Defendant (who is her brother in-law); she paid a consideration price of Kshs 20,000/= as the purchase price of



- the portion of the suit property measuring 5ft by 100ft as agreed. The Defendant then planted beacons on the portion sold and she took immediate vacant possession of the said portion.
4. Further, she claims that she has enjoyed quiet and peaceful possession of the suit property since 2000 and even established a posho mill the same year which is still operational to date which she uses as her source of livelihood.
 5. It is her contention that sometimes on 14th January, 2013; the Defendant in total disregard of her rights and interest over the portion of the suit property, the Defendant invaded the said portion sold to her and hurriedly put up a structure and installed his posho mill thereon with the intention to defeat the interests and rights of the plaintiff.
 6. That despite having paid the purchase price in full, the Defendant has refused, ignored and neglected to have the land transferred to her name. The Plaintiff now claims adverse possession over the portion of the suit property which she has occupied since 2000.
 7. The Defendant entered Appearance through the firm of M/s Odondi Awino & Co. Advocates on 17th November, 2021 after the close of the Plaintiff's case.

TRIAL

8. The matter came up for hearing of the main suit on 29.09.2021 and proceeded ex-parte. However, the Defendant filed an Application dated 12/01/2022, seeking to set aside the ex-parte proceedings. The Application was allowed vide a Ruling rendered on the 21.07.2022. Consequently, the ex-parte proceedings was set aside and the matter proceeded for fresh hearing on the 6/6/2023.
9. The Plaintiff testified as PW1; she adopted her witness statement dated 13.05.2019 as her testimony. She further stated that her claim against the Defendant is for a portion of land L.R. No. Suna West/Wiga/ 1298 measuring 500 * 100ft, that he purchased in the year 2000 and she paid Kshs. 20,000/= as the purchase price in full.
10. That pursuant to the said sale, she took immediate possession of the said portion and constructed a posho-mill, which she operated until the year 2013 when the Defendant entered the land and built another posho-mill behind hers. That the posho-mill is still on the suit land to date even though she is not operating it.
11. She further stated that the said transaction was not reduced into writing but the same was a verbal contract. Despite getting into the agreement for the sale of the said portion, the Defendant has refused to give her a title document in respect of the said portion.
12. She produced the following documents as exhibits in support of her case; copy of the Green Card as Pexh. 1 and bundle of photographs as Pexh. 2.
13. On cross-examination; she reiterated that they did not sign an agreement but there was a verbal agreement, which was witnessed by her husband. She also maintained that she is still in occupation of the said portion since her posho-mill is still on the land
14. The matter proceeded for the defence hearing on the same day, the Defendant testified as DW1. He adopted his witness statement dated 14/11/2022 as his testimony in chief. He further stated that he never sold any land to the plaintiff neither did he receive any money from as payment for the same. That he only gave the plaintiff the land so that she can establish a posho mill on her request. He maintained that he never relinquished the land to her and that she is currently not in occupation of the same land; she left the land in the year 2013 and that only the foundation of the posho-mill is left on the land.



15. On cross- examination; he conceded that he gave the plaintiff the suit land long ago and that he cannot recall the date.
16. Upon close of the Defence Case, I issued directions on the filing of the final written submissions. Both parties filed their rival submissions together with authorities which I have read and considered.

Analysis and Determination

17. I have carefully considered the Originating Summons and the various documents filed by the Plaintiff herein. On that account, it is this court's considered view that the following issues arise for determination: -
 - a. Whether the claim of Adverse Possession has been proved by the Plaintiff.
 - b. Whether the Plaintiff is entitled to the reliefs sought.

I. Whether the Claim of Adverse Possession has been proved by the Plaintiff.

18. Sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#) provides the statutory framework for the doctrine of adverse possession.
19. The law and requirements for adverse possession were reiterated in the case of Mbira –v- Gachuhi (2002) IEALR 137 where it was held that:

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
20. The Plaintiff herein has stated both in her pleadings and in her testimony in court; that there was a verbal sale agreement between her and the Defendant sometimes in January, 2000, and she paid Kshs.20,000/= as consideration, that the sale was witnessed by her husband. Pursuant to the said sale, the Plaintiff took immediate vacant possession of the land and installed a posho mill for business purposes. She indeed confirmed that at the time of the said sale, the Defendant was the registered owner of the land but has refused to transfer the title to the sold portion to her name to date. It is on the basis of her continued use and occupation of the said portion since the year 2000 that she now claims title and right over the portion of the land by virtue adverse possession.
21. It is her claim that she has been in occupation of the said portion of land to date and the posho mill remained operational since the year 2000 until the year 2013; when the Defendant in total disregard of her rights and interest over the portion of the suit property, invaded the said portion, put up a structure and also installed his posho mill behind hers. Despite the efforts by the Defendant to evict her from the said land, she has remained in occupation to date. That even though she is not operating the said posho-mill from the year 2013, the same still lies on the suit land to date.
22. At paragraph 1 of the grounds of the Originating Summons; the plaintiff states that she entered the suit land on the permission of the Defendant. Similarly, during the hearing of the case; she reiterated that she bought the suit land from the Defendant vide a verbal agreement and she paid Kshs.20,000/= as consideration thereof. The Defendant on the other hand confirmed that he gave the Plaintiff the portion of land on her request to enable her construct a posho-mill. It is therefore clear that the Plaintiff's entry into the suit land was with the permission of the defendant and was thus consensual, contrary to the requirement of adverse possession.



23. Adverse possession is a hostile possession by clearly asserting a wrongful disposition in denial of the title of the rightful owner. It must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period of 12 years. This is not the case in the present proceedings; the plaintiff has indeed acknowledged that her initial entry into the suit property and occupation/possession was by virtue of a verbal sale agreement for the portion of the suit land measuring 50ft by 100ft;
24. However, despite the entry into the suit land being permissive and consensual, as I have always held and which position has been reiterated in several cases; the subsequent occupation and use of the land in dispute can still become adverse depending on the circumstances of the case. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land.
25. In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal cited with approval the case of Jandu vs Kirpal [1975] EA and held as follows: -
- “...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.
26. Further, the court has also held that time for adverse possession will start running notwithstanding that the initial entry was permissive, upon payment of the final instalment of the purchase price. In the case of Public Trustee vs. Wanduru, Madan J A stated as follows; -
- “.... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.
27. In light of the above, it is my considered opinion that even though the Plaintiff's initial entry was consensual, time for adverse possession started to run upon the expiry of the said consent period.
28. Having held that the subsequent occupation and use of the suit land became adverse even though the initial entry was permissive, the question that follows is whether the continued lying of the posho mill on the suit land from the year 2013 to date gave rise to prescriptive rights capable of registration in favour of the Plaintiff by virtue of adverse possession.

Possession and Occupation

29. Possession and occupation are some of the key elements that must be established in a claim for adverse possession. Possession must be open, continuous, uninterrupted for a period of 12 years and demonstrate the intention to dispossess the actual owner of the suit land. An Applicant must also establish when the possession became adverse in the circumstance.
30. In this case, the Plaintiff has not demonstrated when her possession became adverse as alleged, it is not enough for an Applicant to merely state that there was uninterrupted possession and occupation since the year 2000. Long possession is not necessarily adverse possession and the rules of evidence equally applies in this case, “he who alleges must prove”.



31. It is also important to consider whether the said possession was uninterrupted for the statutory period. A continued occupation and use can be interrupted where the actual owner of the suit land evicts the trespasser/ adverse possessor and/or makes a formal entry into the land parcel. Once it is established that there was interruption of the occupation and possession, the time for adverse possession stops running.
32. The court in *Githu v Ndeete* [1984] KLR 776 it was held that: -
- “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*”.
33. It is the Plaintiff’s own admission that the Defendant without any colour of right and in total disregard of her rights entered into the suit property sometimes in January 2013 and put up a posho mill behind hers. She further confirmed that since the year 2013 she has not been operating the said posho mill although the same still lies on the suit land to date. This fact was also confirmed by the Defendant in his testimony that the Plaintiff left the suit land in the year 2013 and only the foundation of the posho-mill is left on the land.
34. Adverse Possession was further discussed in the case of *Omukaisi Abulitsa v Albert Abulitsa Shitseswa* [2005], where the Learned Judge opined thus:
- “Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own.
35. It is well settled that in a claim of adverse possession; the possession must be actual possession, which is hostile to the current owner and must be unequivocally exclusive and with unmistakable animus possidendi, that is, occupation with clear intention of excluding the owner as well as other people. Has this been clearly demonstrated by the Plaintiff?
36. In the instant case, it is not in contention that the defendant, who is the actual owner, made a formal entry into the land and built a posho mill behind the Plaintiff’s posho mill in assertion of his rights. It has been held that exclusive possession means that the land must not be shared with the actual owner. The Plaintiff must be in possession solely to the exclusion of others. It is not in dispute that the Defendant put up a posho-mill on the suit land, it is also not in dispute that the Plaintiff has not been running her posho-mill since the year 2013 after the Defendant made a formal entry into the land.
37. Justice Kuloba J, (as he then was,) in *Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the Court held:
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”



38. Kuloba J. in Gabriel Mbui case above (supra) went on to state that:-

“.....(2) The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power. If he has no semblance or shadow of right to be on the land, he cannot rely on adverse possession (see the cases cited in (1) above, especially the authority quoted by Gicheru, JA, in Ernest Wesonga Kweyu v Kweyu Omuto CA Civ Appeal No 8 of 1990)”

II. Whether the Plaintiff is entitled to the reliefs sought

39. It is clear that for one to be deemed to have acquired the title to a land adversely; he must meet the threshold set on a balance of probabilities.

40. In view of the foregone analysis, I find and hold that the Plaintiff has not satisfactorily demonstrated to this court that her occupation and possession of the suit property warrants the reliefs under Adverse Possession as claimed; to the required threshold. Consequently, I find that she is not entitled to the reliefs sought in the Originating Summons.

Conclusion

41. The upshot of the above is that the Plaintiff has not proved her claim for adverse possession on a balance of probabilities and I accordingly dismiss the Originating Summons dated 13th May, 2019 with costs to the Defendant. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF NOVEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

..... Plaintiff

.....Defendant

Court Assistant - Tom Maurice/ Victor

