



REPUBLIC OF KENYA



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**Ngoje v Nyanjwa & 2 others (Environment & Land Case E022 of 2020)
[2023] KEELC 22037 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22037 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E022 OF 2020
MN KULLOW, J
NOVEMBER 29, 2023**

BETWEEN

WILIKISTA ADHIAMBO NGOJE PLAINTIFF

AND

RISPER ATIENO NYANJWA 1ST DEFENDANT

COUNTY LAND REGISTRAR, MIGORI 2ND DEFENDANT

HON. ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons, erroneously dated 17th December, 2017 instead of 17/12/2020, against the Defendants seeking the following ORDERS: -
 - i. That declaration that the 1st Defendant's right to recover a portion of L.R. No. Kamagambo/ Koluoch/1064 measuring approx. 0.55Ha is overtaken by events or time barred under the Limitation of Actions Act, Cap 22 Law of Kenya and her rights thereto is extinguished on the grounds that the Plaintiff herein has been peacefully and continuously been in active use and possession of the aforesaid land parcel well over 40 years, without any interference at all.
 - ii. That there be an Order that the Plaintiff Wilikista Adhiambo Ngoje, be registered as the proprietor of L.R. No. Kamagambo/ Koluoch/1064 measuring approx. 0.55Ha, currently registered in the names of Abayo Atito Omwanga – Deceased.
 - iii. That there be an Order directing the 2nd Defendant to register L.R. No. Kamagambo/ Koluoch/1064 measuring approx. 0.55Ha, into the names of Wilikista Adhiambo Ngoje.
 - iv. That there be an Order restraining the 1st Defendant by herself, her agents, servants and/or employees from interfering, encroaching or dealing with the Plaintiff's suit land L.R. No.



Kamagambo/ Koluoch/1064in any manner whatsoever and/or howsoever that is inconsistent with the Plaintiff's rights thereon.

- v. That the costs of this Originating Summons be borne by the Defendants.
2. The Originating Summons is premised on 6 grounds on its face and on the Plaintiff's Supporting Affidavit sworn on even date. She avers that the suit land was their ancestral land, which was apportioned to his late husband Henry Ngoje Okach. It is her claim that she has been actively using and occupying the suit land for over forty years; during the lifetime and after the death of her husband until 20/09/2020, when she was issued with Summons from the County Land Surveyor for Boundary Confirmation between land parcels No. Kamagambo/ Koluoch/1064, 1126, 1073 and 324.
 3. It is her contention that her late husband died in the year 2012 and had never informed/ disclosed to her that the suit land had been sold to anybody else neither did he witness any sale agreement thereof.
 4. The 1st Defendant entered Appearance through the firm of Oluoch - Awino & Co. Advocates and filed a Replying Affidavit sworn on 21st March, 2022. She deponed that the suit land is registered in the name of Obayo Atito Omwanga, who is since deceased and that she has been occupying and using the suit land in her capacity as a daughter in-law even during the lifetime of the deceased.
 5. It is her claim that the deceased acquired the suit property legally through sale from Henry Ngoje Okach and the same was duly transferred to the deceased name; which circumstances has always been within the Plaintiff's knowledge and further that the failure on the part of Henry Ngoje Okach does not change and/or affect the validity of the said transfer.
 6. She maintained that she has been in active and open possession and occupation of the suit property and the Plaintiff has never possessed or occupied the suit land since the transfer of the land to the deceased.
 7. Further, she challenged her capacity to be sued and that of the Plaintiff and stated that she is not the registered owner of the suit land and thus the Applicant ought to have cited her before filing the suit. In addition, it was her claim that the Plaintiff lacked the requisite capacity to sue on her part for failure to take out letters of Administration Ad- Litem on behalf of the estate of her late husband. In conclusion, she urged the court to dismiss the suit with costs.

Trial

8. The Plaintiff's case proceeded for hearing on 11.7.2023, the Plaintiff testified as PW1 and thereafter closed her case. It was her testimony that she has lived on the suit land since 1977 and has been planting crops on the land without any interference from any party.
9. She produced the documents on her List of Documents dated 17.12.2018 as Plaintiff Exhibits 1 -3 as follows; copy of the Title Deed in respect to the suit land as Pexh. 1, Letter from the County Surveyor dated 20/09/2020 as Pexh. 2 and Copy of the Green Card as Pexh. 3 in further support of her case and urged the court to grant the orders sought.
10. On cross- examination, she conceded that the title deed in respect to the suit land is registered in the name of Obayo Atito Omwango (since deceased) and that she had not filed the suit against his estate. She further confirmed that the 1st Defendant was not the registered owner of the suit land.
11. She further stated that her claim was for the declaration as the owner of the suit land since she had lived in it for a long time of about 40 years. She denied knowledge of any sale of the suit land between her late husband and Obayo Atito in the year 1988 for about Kshs. 7000/= and further that she did not sign any spousal consent.



12. She maintained that she produced photographs which showed that she has been farming the suit land to date. She also stated that she is claiming the suit land on her own behalf and on behalf of her children.
13. It was also her testimony that she obtained orders restraining the 1st Defendant from cultivating the suit land and maintained on the other hand that the 1st Respondent together with Obayo Atito has never used the land and reiterated that her late husband who died in the year 1979 never informed her that she had sold the suit land
14. The Defence case proceeded for hearing on the same date, the 1st Defendant testified as DW1. She relied on her Replying Affidavit as her evidence in chief. It was also her testimony that the suit land No. 1064 is registered in the name of Obayo Atito Omwango, who is since deceased and was her father in-law. She further stated that her late father in-law purchased the suit property from one Henry Okach and they had been cultivating the said portion pursuant to the sale in 1988 together with her father in-law. After his death, she continued cultivating it together with her husband upto the year 2020 when she was threatened by the Plaintiff.
15. She denied the claims by the Plaintiff of using the suit land and stated that the Plaintiff only started using the land after the court had issued restraining orders. She thus urged the court to dismiss the Plaintiff's suit with costs.
16. She also produced the documents annexed to her Affidavit as defence exhibits 1 – 5 as follows; Certificate of Official Search dated 05/10/2021 as Dexh. 1, copy of the title deed in respect to the suit land as Dexh. 2 and Copy of Mutation Form dated 05/09/1988 as Dexh. 3. On a perusal of the 1st Defendant's Replying Affidavit, I have noted that only 3 documents were annexed and not 5 as alleged. The Defence Exhibits are therefore Dexh. 1 – 3.
17. On cross-examination; she stated that she had not filed any succession proceedings in respect to the estate of his late father in-law. She reiterated that she had been cultivating the suit land since the year 1989 and that the survey officers visited the land when she wanted to fence the land.
18. It was also her testimony that she was not present when her late father in-law and the Plaintiff's husband were signing the agreement for sale. The 1st Defence thereafter closed her case.
19. The 2nd and 3rd Defendants did not enter appearance nor filed response. Upon close of the Defence case, I issued directions on the filing on final written submissions. On a perusal of the court record, I note that only the Plaintiff filed her submissions and authorities, which I have read and considered. Despite being granted leave to file their submissions within 3 days from the 18/9/2023, the 1st Defendant did not file the same. Be that as it may, I will proceed to render my decision as hereunder;

Analysis and Determination

20. I have reviewed the pleadings herein, the respective testimonies and exhibits and Plaintiff's submissions in totality and it is my considered opinion that the issues which arise for determination are as follows: -
 - a. Whether the Plaintiff has sufficiently proved her claim on Adverse Possession.
 - b. Whether the Plaintiff is entitled to the reliefs sought.

I. Whether the Plaintiff has sufficiently proved her claim on Adverse Possession.

21. 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.



22. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -

“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, it 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 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*.....”

23. The requirements for a claim of adverse possession are now well settled; The land in question must be registered in the name of a person other than the Applicant, the Applicant must demonstrate that he took possession of the parcel of land, asserted his rights over it in an adverse manner to the title of the actual land owner and the said title holder did not take any precipitate action against the said Applicant for a period of 12 years. Lastly, he must then demonstrate that his possession and occupation of the said land was not by force or under the licence of the land owner and that the said possession was open, in continuity for an uninterrupted period of over 12 years.
24. An Applicant seeking the registration of a title in his favour by virtue of adverse possession must also establish the date he took possession, the nature of his possession, the duration of his possession and whether the same was open and uninterrupted for the 12 years’ statutory period and with the intention to dispossess the actual owner. Long possession is not necessarily adverse possession. See Court of Appeal decision in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR)
25. With these principles and/or prerequisites in a claim of adverse possession in mind; it is important to determine whether the Plaintiff has met these principles to warrant the grant of the orders sought.
26. The first ground that must be proved is that the suit land must be registered in the name of a person other than the Applicants and such registration must not be in dispute. It is not in dispute that the suit parcel is registered in the name of the one Obayo Atito Omwanga, who is since deceased. The Plaintiff produced a copy of the title deed as Pexh. 1 while the 1st Defendant produced a copy of the said title as Dexh. 2.
27. What however appears to be in dispute is the acknowledgement of such title and ownership of the estate of the said Obayo Atito as the actual owner of the suit land therein. The Plaintiff in her pleadings and evidence has maintained that the land is an ancestral land and lawfully belongs to her late husband. She further stated that her late husband, Henry Okach never at any time informed her any sale of the suit land to the said Obayo Atito or anyone else and she was therefore not aware that the land had been sold. It was also her claim that she never signed any spousal consent to the transfer or witnessed the agreement for sale and thus dismissed the registration of the suit land in the name of Obayo Atito.
28. The 1st Defendant on the other hand maintained that the suit land was legally bought by her late father in-law from the late Henry Okach sometimes in the year 1988. She produced the Certificate of Search and Mutation of the original parcel in support of her averments on the validity of the transfer in the name of her late father in-law. That pursuant to the said sale, she has been cultivating the suit land until the year 2020 when the Plaintiff threatened her and an Order of Temporary Injunction was issued against her.



29. Acknowledgment of the ownership of the actual registered owner is critical in a claim of adverse possession. It is the rights and interests of the registered owner that one seeks to dispossess by virtue of continued occupation on a suit land, which possession ideally starts as a trespasser; without stealth, consent, permission or license.
30. The plaintiff in this case has maintained that the land is an ancestral land that the same belongs to her and her children. It cannot therefore be said that her occupation and use was adverse with the intention to dispossess since it is her case that the land belongs to her. You cannot acquire adversely that which belongs to you.
31. On possession and occupation of the suit land, the Plaintiff is duty bound to demonstrate the duration and nature of her possession, when the same became adverse and whether the same gave rise to any prescriptive and overriding rights over the suit parcel, capable of registration.
32. It is the Plaintiff's claim that she has been using the suit land for over 40 years; during the lifetime of her late husband Henry Okach and even after his death. That the land in question being an ancestral land, she is entitled to the same together with her children.
33. Her testimony in court with regards to the occupation was contradictory. On the one hand it was her testimony that she had been using the land continuously and without any interruption for a period of over 40 years and that neither the 1st Defendant nor her late father in-law had ever used the land in dispute. On the other hand, it was her testimony that she had to obtain injunction orders from the court to stop and/or restrain the 1st Defendant from using the suit land.
34. It is important to point out that the Plaintiff did not produce any bundle of photographs to support her occupation and use claims. Further, she did not call any witness to corroborate her averments. This court is therefore unable to ascertain the said averments and find in her favour without any proof. He who alleges must prove and the burden of proof lies on Plaintiff who alleges the occurrence of an event.
35. The 1st Defendant on the other hand maintained that she had been using the suit land together with her father in-law during his lifetime and upon his death; she continued cultivating the suit land together with her husband until sometimes in the year 2020 when the court issued a restraining order stopping her use thereon.
36. Further, as pointed out earlier in the judgment, long possession is not necessarily adverse possession. The onus is on the Plaintiff to demonstrate when her possession and use of the suit land became adverse and whether the same was with the intention to dispossess the actual owner thereof and/or his estate like in the instant case. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR)
37. I wish to reiterate that the Plaintiff has not provided any proof in support of her possession, occupation and use claims; either in the form of photographs or the testimony of a witness. Further, her testimony of the said issue is contradictory.
38. The totality of the foregoing is that the Plaintiff has failed to sufficiently demonstrate her claim on adverse possession to the required threshold.

II. Whether the Applicants are entitled to the reliefs sought

39. In view of the above, having held that the Plaintiff has not proved her claim on adverse possession against the Defendants to the required standard, I find that she is not entitled to the reliefs sought.



Conclusion

40. The upshot of the above is that the Plaintiff has failed to prove her case against the Defendants to the required standard and consequently, I dismiss the Originating Summons erroneously dated 17th December, 2017 (instead of 17/12/2020) with costs to the 1st Defendants. It is so ordered!

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

MOHAMED N. KULLOW

JUDGE

