



Ogola & another v Ndede & another (Environmental and Land Originating Summons 66 of 2019) [2023] KEELC 22519 (KLR) (29 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 66 OF 2019
MN KULLOW, J
DECEMBER 29, 2023**

BETWEEN

CHARLES OGOLA 1ST PLAINTIFF

FREDRICK OCHIENG OGOLA 2ND PLAINTIFF

AND

JOHN OBUANGA NDEDE 1ST DEFENDANT

JASON OTUNGA FESTO (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF FESTO MIDEGA, DECEASED) 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein commenced this suit vide an Originating Summons dated 21st August, 2019 against the Defendants seeking the following ORDERS: -
 - i. Declaration that the Defendants right to recover the whole of L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424 is barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya and their titles thereto extinguished on the grounds that the Plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcels of land for a period exceeding 40 years.
 - ii. There be an Order that the Plaintiffs be registered as the proprietors of the whole of L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424, in place of the Defendants herein who currently holds title to the suit properties.
 - iii. There be an order restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the Plaintiffs' peaceful possession and occupation of the suit properties, that is, L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424, in any manner whatsoever and/or howsoever.



- iv. The Deputy Registrar and/or Executive Officer of the Honourable High Court be directed and/or ordered to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of the whole of L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424, in favor of the Plaintiffs, in the event of default by the defendants to execute the necessary Transfer Instruments.
 - v. Costs of this Originating Summons be borne by the Defendants.
 - vi. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.
2. The Originating Summons is premised on 29 grounds on its face and on the 2nd Plaintiff's Supporting Affidavit sworn on even date, on his own behalf and on behalf of the 1st Plaintiff who is his father. He averred that his father was allotted parcel No. 521 and ultimately became the registered owner thereof on 05/08/1972. That upon allocation, transfer and registration; the 1st Plaintiff took possession of the said parcel of land, established his homestead thereon and began cultivating sugarcane on a portion thereof.
 3. It is his contention that the said parcel of land No. 521 shared a common boundary with the suit parcels No's. 1153 and 1155. However, parcel No. 1153 has since been subdivided into parcel Nos. 1423 and 1424 and registered in the names of the defendants respectively. Thus, the suit properties Nos. 1155, 1423 and 1424 are all registered in the names of the defendants.
 4. He further contends that when the 1st Plaintiff entered into and took possession of his rightful parcel of land No. 521, he also took possession of the suit parcels Nos. 1155, 1423 & 1424, despite the same being registered in the name of the 2nd defendant's father. It is his claim that upon attaining the age of majority, the 1st plaintiff allowed him to take possession of parcel Nos. 1423 and 1424 and also started cultivating portions of parcel No. 1155.
 5. He deposed that sometimes on 6/12/2017; the 1st defendant moved the court vide Migori ELC Misc. Application No. 66 of 2017, seeking to have the Land Registrar and Surveyor, Migori County to visit the suit parcels to establish and ascertain the boundaries thereof. The same was done and a Survey Report dated 09/04/2019 filed to that effect. The findings of the said report confirmed that the defendants, who are the registered owners of the suit parcels had ceased to occupy the same a long time ago and the same is instead being used by the plaintiffs.
 6. It was further his claim that despite the subdivision of parcel No. 1153, the same did not interrupt/ interfere with their occupation, possession and use of the said parcels in any manner whatsoever. They have remained in open and continuous occupation and use of the suit parcels to date for a period of over 29 years.
 7. Further, it is their claim that the defendants have had knowledge of their said occupation and various activities being carried out on the suit parcels. They thus contend that the defendants' rights over the said suit parcels have extinguished on account of their possession, occupation and use of the said parcels, by effluxion of time. The defendants never took steps or precipitate actions to recover the said parcels save for the Misc. Application in the year 2017 which sought a determination of the common boundaries between the suit parcels.
 8. He thus maintained that they have acquired adverse rights and/or interests over the suit parcels to warrant the registration of the same in their names as the proprietors. He urged the court to allow the suit as prayed.



9. The Defendants entered Appearance through the firm of Odoni Awino & Co. Advocates and filed a Replying Affidavit sworn on 11th October, 2019 by the 1st Defendant on his own behalf and on behalf of the 2nd Defendant. He averred that he is the registered owner of suit parcel No. 1423, which borders the plaintiffs' parcel No. 521. It was however his contention that the said parcel No. 521 which had earlier been registered in the name of the Plaintiffs was sold by way of public auction and became registered in the name of Sakog Holdings Limited; as evidenced by the Survey Report dated 16/04/2019. He thus dismissed the claims by the Plaintiffs as desperate efforts seeking to find an alternative parcel after being rendered homeless following the public auction.
10. It was his claim that the Plaintiffs forcefully invaded/ entered into the suit parcels in the year 2017 and planted trees. He averred that their occupation has not been peaceful, continuous or uninterrupted as alleged; they have had both civil and criminal cases where the Plaintiffs were arrested and charged with the offence of arson for torching his house on the suit land.
11. He also made reference to an earlier civil case that was filed by the 1st plaintiff against the 2nd defendant and maintained that the two cases bear contradictory statements even though they both relate to the same subject matter. He therefore urged the court to dismiss the suit with costs.

Trial

12. The Plaintiffs' case proceeded for hearing on 04.07.2022; the 2nd Plaintiff testified as PW1; he adopted his witness statement dated 21/8/2019 as his evidence in chief. It was also his testimony that the suit parcels are currently in their possession and have been so for about 29 years.
13. He also produced the annexures to his Affidavit as Plaintiff Exhibits 1 – 16 as follows; copy of Green Card in respect of parcel No. 521 as Pexh. 1, copy of Certificate of Official Search in respect to parcel No. 521 as Pexh. 2, copy of Green Card in respect to parcel No. 1153 as Pexh. 3, copy of Certificate of Official Search in respect to parcel No. 1153 as Pexh. 4, copy of Green Card in respect of parcel No. 1423 as Pexh. 5, copy of Certificate of Official Search in respect to parcel No. 1423 as Pexh. 6, copy of Green Card in respect of parcel No. 1424 as Pexh. 7, copy of Certificate of Official Search in respect to parcel No. 1424 as Pexh. 8, copy of Green Card in respect of parcel No. 1155 as Pexh. 9, copy of Notice of Motion Application dated 6/12/2017 vide Migori ELC Misc. App. No. 66 of 2017 as Pexh. 10, copy of Court Order dated 29/01/2019 vide Migori ELC Misc. App. No. 66 of 2017 as Pexh. 11, copy of the letter by the County Surveyor, Migori County dated 14/01/2019 as Pexh. 12, copy of the letter by the County Surveyor, Migori County dated 25/03/2019 as Pexh. 13, copy of the Report by the County Surveyor, Migori County dated 09/04/2019 as Pexh. 14, copy of Registry Index Maps Sheets/ Diagrams Number 20, Area 'B' Kwa Registration Section as Pexh. 15 and bundle of photographs showing the farming and related activities undertaken on the suit properties by the Plaintiffs as Pexh. 16 in further support of their case.
14. On cross- examination, he stated that they live on all the suit parcels; Nos. 1155, 1423 and 1424 and the same are registered in the names of the 1st and 2nd defendants respectively. He denied being armed or burning the defendants' houses.
15. The 1st Plaintiff testified as PW2; he adopted his witness statement. On cross-examination, he denied taking any loan from Agricultural Finance Corporation (AFC). The Plaintiffs thereafter closed their case.
16. The Defence case proceeded for hearing on 22/5/2023, the 1st Defendant testified as DW1; he adopted his Replying Affidavit as his evidence in chief. It was also his testimony that he is the registered owner of suit parcels Nos. 1155 and 1423. He confirmed that parcel Nos. 1153 and 1423 are occupied by



the plaintiffs but added that their occupation thereof has not peaceful; the plaintiffs burnt his house and demolished the foundation of other houses and took away materials. The matter was reported to the police.

17. On cross-examination; he restated that he is the registered owner of parcel No. 1423. That the land was sold to him by the late Fredrick Ochieng Ojala while parcel No. 1153 was sold to him by Leah Musenya. It was his testimony that both parcels were occupied by Festo Otieno, who is since deceased. He further maintained that the land was vacant at the time of sale and there was nothing planted on the land. It was his claim that the plaintiffs only started using the land after he had taken possession which was about 20 years ago.
18. He conceded that he could not access the suit land at the moment since the plaintiff is very violent.
19. The 2nd Defendant testified as DW2; he adopted his witness statement dated 2/2/2020 as his evidence in chief. It was also his testimony that parcel No. 1424 belongs to him and was originally registered in the name of his late father.
20. He further stated that the Green Card in respect of parcel No. 1423 showed that the land was registered in the name of his father. He dismissed the claims by the Plaintiffs of occupying the suit land and added that the plaintiffs have been fighting people and burning houses.
21. On cross-examination; he conceded that the Plaintiffs are currently cultivating the suit parcel though he was not aware how they acquired the same. It was also his testimony that he was not aware whether the trees and crops were planted by the plaintiff in the year 2018.
22. He further stated that his late father did not live on the suit land and he died in the year 1998. It was his testimony that he was not around when the plaintiffs were allegedly invading the suit land. It was his assertion that he has lived on the suit land since he was born but conceded that there is no house constructed on the land though they were cultivating the land. The Defence thereafter closed their case.
23. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and considered.

Analysis And Determination

24. I have reviewed the pleadings herein, the respective exhibits, parties' rival submissions and the applicable law in totality, on that account; it is my considered opinion that the following issues arise for determination: -
 - a. Whether the Plaintiffs have sufficiently proved their claim on Adverse Possession.
 - b. Whether the Plaintiffs are entitled to the reliefs sought.

A. Whether the Plaintiffs have Sufficiently Proved their Claim on adverse possession claim of adverse possession

25. 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.
26. Makhandia, JA in [Mtana Lewa v Kabindi 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.....”

27. 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 Plaintiff, the Plaintiff 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 land owner and the said title holder/actual owner did not take any precipitate action against the said Applicant for a period of 12 years. Lastly, he must also 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.
28. With regards to the possession; the claimant 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. See Court of Appeal decision in Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR)
29. I will now proceed to analyse the rival position by the parties, the various exhibits adduced before the court vis a vis the necessary requirements to be proved in a claim of adverse possession. The first ground to be proved is that the suit land must be registered in the name of a person other than the Applicants. It is not in dispute that the suit parcels herein Nos. 1155, 1423 and 1424 are all registered in the names of the Defendants. The Plaintiffs produced copies of Green Cards and Certificate of Official Searches as Pexh. 4 – 9 as proof of the said ownership/ proprietorship claims.
30. Upon establishing the registration of the suit land, the issue that follows for determination is that of possession and occupation of the suit land. As earlier pointed out, the Plaintiffs are under a duty to demonstrate the duration and nature of their possession and whether the same gave rise to prescriptive and overriding rights over the suit land, capable of registration.
31. The Plaintiffs contend that they took possession of the suit land sometimes in the year 1972; that the 1st plaintiff was allotted parcel No. 521 on 5/8/1972 which borders the suit parcels Nos. 1153 and 1155. Upon allocation, transfer and registration, he took possession of his land parcel No. 521 and extended his cultivation and use to the neighbouring suit parcels. It was the Plaintiffs’ contention that the defendants have had knowledge of their activities and occupation of the suit parcels but they did not take any precipitate action or steps to recover their parcels.
32. Further, the subdivision of parcel No. 11553 into parcel Nos. 1423 and 1424 did not interfere or disrupt their occupation and they have remained in open, continuous occupation and use of the land to date. They produced bundle of photographs as Pexh. 16 as proof of their occupation and the various activities carried out on the suit parcels.
33. The Defendants in their statement of defence, denied the occupation and use claims by the Plaintiffs for a period of over 12 years. It was their claim that the Plaintiffs forcefully invaded the suit parcel sometimes in the year 2017, burnt down their houses and used violence to gain entry thereon. However, I do note that during cross-examination; DW1 confirmed that parcel Nos. 1153 and 1423 are occupied by the plaintiffs though their occupation has not been peaceful. He also conceded that the plaintiffs started using the land after he had taken possession about 20 years ago.



34. DW2 on the other hand testified that the plaintiffs are currently cultivating the suit parcels though he was not aware how they acquired the said parcels. He also conceded that the suit land No. 1424, which was originally registered in the name of his late father; his father did not live on the suit land.
35. It is therefore clear that from the Plaintiffs testimony, Pexh. 16 adduced and the testimony by both DW1 and DW2; the Plaintiffs have been in possession and use of the suit land for a period in excess of the 12 years statutory period. The time for adverse possession started running in the year 1972, when the 1st Plaintiff entered and took possession of the land. At the time of filing the suit herein, the Plaintiffs had occupied and used the suit land for a period of over 47 years which period is in excess of the 12 years' statutory period required in a claim of adverse possession.
36. Further, the Defendants did not adduce any evidence of the precipitate action taken against the Plaintiffs and their continued use of the suit land other than the Misc. Application No. 66 which primarily sought to determine and establish the common boundary between the suit parcels. In addition, despite the defendants' claims that plaintiffs forcefully invaded the suit land and have been using violence and burning houses, they did not adduce any evidence in support of the said averments and they thus remain unsubstantiated allegations.
37. Lastly, the Plaintiffs need to demonstrate whether the said possession and use of the suit land was adverse to the rights of the Defendants over the same land. 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)
38. The Plaintiffs produced Pexh. 16 as proof of their occupation and use of the suit land by cultivating the same. The Defendants did not challenge and/or controvert Pexh. 16 as produced by the Plaintiffs in support of the occupation claims or that the same were only cultivated in the year 2017 as alleged. In the absence of any contrary proof, I find that Pexh.16 is the actual reflection of the status of the suit land and the same confirms that the Plaintiffs are in actual possession of the suit land and the said use was/is with the intention to dispossess the actual owners of the suit parcels.
39. Adverse possession is a fact to be observed upon the land and not on the title. Thus, even though parcel No. 1153 has since been subdivided and registered in the name of the 1st Defendant; the said subdivision did not affect and/or interrupt the Plaintiffs' use and rights over the said land, they remained in occupation and use of the land despite the said sale, subdivision and transfer of a portion of the suit land. No contrary evidence was adduced by the defendants.
40. The totality of the foregoing is that the Plaintiffs have sufficiently demonstrated that they have acquired prescriptive rights over the portion of the suit parcels Nos. 1155, 1423 and 1424 by virtue of their possession and use of the suit land. Therefore, it is my finding that the Plaintiffs have proved their claim on a balance of probabilities and they are accordingly entitled to the reliefs sought in the Originating Summons.

Costs

41. Costs generally follow the event, in this case, having held in favor of the Plaintiffs against the Defendants, I find that they are entitled to costs of the suit.



Conclusion

42. The upshot of the above is that the Plaintiffs have proved their claim against the Defendants and I accordingly allow the Originating Summons dated 21st August, 2019 on the following terms;
- i. A Declaration be and is hereby made that the Defendants right to recover the whole of L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424 is barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and their titles thereto extinguished on the grounds that the Plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcels of land for a period exceeding 40 years.
 - ii. An Order be and is hereby issued that the Plaintiffs be registered as the proprietors of the whole of L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424, in place of the Defendants herein who currently holds title to the suit properties within a period of 60 days from the date of this Judgment.
 - iii. An Order of Permanent Injunction be and is hereby issued restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the Plaintiffs' peaceful possession and occupation of the suit properties, that is, L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424, in any manner whatsoever and/or howsoever.
 - iv. Further, the Defendants are hereby directed to execute the necessary Transfer Instruments in favor of the Plaintiffs to facilitate the transfer and registration of the suit parcels in their names within a period of 60 days from the date of this judgment. In default, The Deputy Registrar and/or Executive Officer of the Honourable High Court is hereby directed and/or ordered to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of the whole of L.R. NO'S Suna East/ Area 'B' Kwa/ 1155, 1423 & 1424, in favor of the Plaintiffs.
 - v. Costs of this Originating Summons be borne by the Defendants.

It is so Ordered!

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

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No attendance for the Plaintiffs

Ms. Agade for the Defendants

