



Obiero v Akinyi (Sued as representative/administrator of the Estate of Gilbert Ndege Okello and on her own behalf) (Environment & Land Case E001 of 2023) [2025] KEELC 297 (KLR) (28 January 2025) (Judgment)

Neutral citation: [2025] KEELC 297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E001 OF 2023
SO OKONG'O, J
JANUARY 28, 2025**

BETWEEN

JUDITH AKINYI OBIERO PLAINTIFF

AND

CLARICE AKINYI (SUED AS REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF GILBERT NDEGE OKELLO AND ON HER OWN BEHALF) DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit through Originating Summons dated 16th January 2023. On 24th July 2023, the court directed that the Originating Summons be treated as a plaint and the replying affidavit by the Defendant as a defence. The court further directed that the suit be heard through *viva voce* evidence. The Plaintiff who claimed to be in adverse possession of all those parcels of land known as Kisumu/ Songhor/ 220, Kisumu/ Songhor/927 and Kisumu/Songhor/928 (hereinafter referred to as “the suit properties”) sought for the determination of the following questions;
 1. Whether the Plaintiff was in possession of the suit properties;
 2. Whether Gilbert Ndege Okello, deceased whose estate the Defendant was the administrator jointly owned the suit properties with the Defendant and whether he died after the Plaintiff had lived and built his home on a portion of the suit properties;
 3. Whether the Defendants were the registered proprietors of the suit properties;
 4. Whether the Plaintiff had continuously, openly and without any interruption occupied and had been in possession of the portion of the suit properties for 34 years;



5. Whether the Plaintiff had acquired an overriding interest under section 28 (h) of the [Land Registration Act, 2012](#) on the suit properties;
 6. Whether the Plaintiff had acquired the suit properties by way of adverse possession;
 7. Whether the court should order the registration of the Plaintiff as the proprietor of the suit properties as occupied by the Plaintiff; and
 8. Whether the Plaintiff is entitled to the costs of this suit.
2. The Defendant filed grounds of opposition and a replying affidavit on 12th April 2023 in opposition to the Originating Summons. In her grounds of opposition, the Defendant contended that the Plaintiff's Originating Summons (application) was frivolous, scandalous and lacked merit. The Defendant contended that the application was incurably defective and amounted to an abuse of the court process. The Defendant averred that the application was res judicata and that the same was not supported by any affidavit as required under the Civil Procedure Rules. The Defendant averred further that the suit was time barred under the [Limitation of Actions Act](#).
 3. In her replying affidavit, the Defendant averred that in 2008 together with her deceased husband, Gilbert Ndege Okello, they purchased the suit properties from one, Dorina Ndege Onyuro, deceased. The Defendant averred that the suit properties were transferred to them and they were issued with title deeds in respect thereof. The Defendant averred that the suit properties were vacant when they purchased the same and were given vacant possession by the seller. The Defendant averred that the Plaintiff was not in occupation of the suit properties when they purchased the same and only showed up in 2009 when she sued them based on an award that had been made in her favour by the Land Disputes Tribunal whose proceedings were declared a nullity by the High Court of Kenya.
 4. The Defendant averred that the Plaintiff had earlier instituted a suit against her over the same subject matter at Nyando Law Court which suit involved the same parties. The Defendant averred that the Nyando Law Court suit was heard and determined and the Defendant appealed against the determination to the High Court in Kisumu which appeal was determined on 8th July 2011. The Defendant averred that the Plaintiff's suit was res judicata and should be struck out. The Defendant averred that the application was incurably defective for want of a supporting affidavit. The Defendant further averred that the application was time barred under the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya.
 5. The Defendant averred further that she had never been appointed as the administrator of the estate of Gilbert Ndege Okello (deceased) as alleged by the Plaintiff. The Defendant averred that since they acquired the suit properties, the Plaintiff had never occupied the suit properties openly, consistently and peacefully since they had been engaged in disputes with the Plaintiff. The Defendant prayed that the application be dismissed with costs.
 6. At the trial, the Plaintiff stated as follows in her evidence in chief: She was married in 1998 and settled on Kisumu/Songhor/220 (Plot No. 220). She had remained in occupation of the property from the time of his marriage to the time she was giving evidence. The Defendant subdivided Plot No. 220 into two portions, Kisumu/ Songhor/927 and 928 (Plot No. 927 and Plot No. 928). She remained in occupation of the suit properties even after the subdivision. She had a homestead on the suit properties. Her husband died in 2000. They had 4 children. She produced her bundle of documents dated 16th January 2023 as P.EXHS. 1 to 8. She had lived on the suit properties peacefully and nobody had tried to evict her therefrom.



7. The Plaintiff stated that the Defendants bought the suit properties from her mother in law, Dorine Ndege Onyuro who was holding the properties in trust for her children. She stated that her mother in law did not set apart for her the portion of the suit properties that was due to her deceased husband while selling the properties to the Defendant. She stated that she was the one in occupation of the suit properties. She stated that she had nowhere to go with her children.
8. On cross-examination, the Plaintiff stated that she had stayed on the suit properties since she was married in 1989 and that she had no land anywhere else. She stated that she was not aware that the family of her husband had land in a place called Masogo. She stated that her mother-in-law was not staying at Masogo. She stated that she knew nothing about Masogo because she had never lived there. She stated that when she was married, her husband was staying on Plot No. 220. She admitted that the suit properties were sold to the Defendant by her mother-in-law. The Plaintiff admitted that the dispute over the suit properties had been heard and determined by the Land Disputes Tribunal. She admitted that the dispute was also heard at Nyando Law courts whose decision was appealed to the High Court. The Plaintiff stated that she was occupying Plot No. 927 which measured 4.8 Ha. She stated that she was cultivating a portion of the land and residing on the remaining portion. The Plaintiff stated that her mother-in-law had given her land measuring 8 acres and again went ahead to sell all the land. The Plaintiff stated that when her mother-in-law was selling land to the Defendant, she told her and other people that she had reserved for her a portion of the land measuring 8 acres when she raised the issue of trust with her when she brought the purchasers.
9. On re-examination, the Plaintiff stated that she was claiming the suit properties by adverse possession on account of her long occupation of the properties. She stated that the dispute before the Land Disputes Tribunal was between her and her mother-in-law and the matter that was before the High Court was between her, her mother-in-law and the Defendants. She stated that the issues in those cases were different from the issues in this case.
10. On examination by the court, the Plaintiff stated that she was 53 years old and her children were adults. She stated that her mother-in-law sold the whole of Plot No. 220 including the 8 acres that she had given her. She stated that the land was sold after the death of her husband while she was in occupation. She stated that she was still occupying the whole land that was originally known as Plot No. 220. She stated that the Defendant had not taken possession of the suit properties. She stated that she was occupying the land, cultivating a portion and had leased the other portions. She stated that the Defendant had not come to the suit properties since 2008 when they purchased the same.
11. The Defendant Clarice Akinyi Okello gave evidence as DW1. She adopted her replying affidavit sworn on 12th April 2023 as her evidence in chief and produced the documents that were attached thereto as D.EXHS. 1,2,3 and 4 respectively. She stated further as follows in her evidence in chief: She knew the Plaintiff through her mother-in-law who sold the suit properties to her. She did not allow the Plaintiff to use the suit properties. The Plaintiff was cultivating the two parcels of land. They used the two parcels of land briefly after purchasing the same.
12. On cross-examination, the Defendant stated that she could not remember how long the Plaintiff had occupied the suit properties. She reiterated that she used the suit properties briefly. She stated that the Plaintiff had been using the suit properties for about 10 years. She stated that she bought the two parcels of land with her husband. She stated that when they bought the suit properties, the Plaintiff had her home on the same. She stated that at the time, the Plaintiff's husband had died. The Defendant stated that after purchasing the suit properties, she used the same for 2 years. The Defendant stated that after they purchased the land, her husband died. She stated that she was not worried about the



suit properties because she had the title deeds for the same. She stated that there was sugarcane on the suit properties.

13. On re-examination, she stated that the Plaintiff had leased out portions of the suit properties to third parties. She stated that the sugarcane on the suit properties belonged to the said third parties and not to the Plaintiff, and that the suit properties were transferred to them by the registered owner before her death. The Defendant stated that when they bought the suit properties, they did not use the same immediately. She stated that she cultivated the land for two years and after the said two years, she had several issues and could not use the land for some time.
14. On examination by the court, the Defendant stated that she could not remember when she used the suit properties for the last time. She stated that she used to visit the suit properties from time to time even when she was not using them. The Defendant stated that it was in 2022 that upon visiting the suit properties she found the same subdivided and leased out to third parties by the Plaintiff. She stated that the Plaintiff was residing on the parcel of land which she believed to be Plot No. 927. She stated that when they purchased the suit properties, the Plaintiff was staying on the same. She stated that the Plaintiff's mother-in-law had told them that the Plaintiff would move to their ancestral land in Ombeyi. She stated that the Plaintiff's mother-in-law moved to Ombeyi while the Plaintiff refused to move. She stated that she did not seek the Plaintiff's eviction because she (the Defendant) had other issues to deal with.
15. After the close of evidence, the parties made closing submissions.

The Plaintiff's submissions

16. The Plaintiff filed submissions dated 13th May 2024. The Plaintiff submitted that she had continuously, openly and without any interruption occupied the suit properties for a period of 34 years. The Plaintiff submitted that she had proved that she had acquired the suit properties by adverse possession.

The Defendant's submissions

17. The Defendant filed submissions dated 20th August 2024. The Defendant raised the following issues for determination;
 - a. Whether the Plaintiff's suit was competent;
 - b. Whether the Plaintiff had met all the pre-conditions for acquiring land by way of adverse possession;
 - c. Whether the Plaintiff had locus standi to file the present suit; and
 - d. Who should bear the costs of this suit?
18. The Defendant submitted that Order 37 Rule 7 of the Civil Procedure Rules provides that an application to acquire land by adverse possession pursuant to Section 38 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya must be brought by way of an Originating Summons supported by an affidavit. The Defendant submitted that an Originating Summons which is not supported by an affidavit is incurably defective. The Defendant submitted that since the Plaintiff's application violated the mandatory provisions of the Civil Procedure Rules, the application should be struck out with costs without it being considered on merit.
19. On the merit of the application, the Defendant submitted that for one to acquire land by adverse possession, he/she must demonstrate that he/she entered the land in question without permission and that the occupation has been open, continuous, uninterrupted and exclusive for 12 years. The



Defendant submitted that the duty was on the Plaintiff who sought to invoke the doctrine of adverse possession to discharge the burden of proof placed on her by the law. In support of this submission, the Defendant cited *Bwana v. Ibrahim* [1948] E.A.C.A 7. The Defendant submitted that by leasing out the suit properties, the Plaintiff could not claim to be in exclusive possession of the same.

20. The Defendant further submitted that exclusive possession must be without the permission of the owner of the suit land. The Defendant submitted that the Plaintiff's mother-in-law gave the Plaintiff the portion of the suit properties where the Plaintiff's deceased husband had put up a home for the Plaintiff with the consent and authority of the Defendant. The Defendant submitted that the Plaintiff was not a trespasser on the suit properties since she entered the properties with the permission of the owner thereof.
21. The Defendant further submitted that the Plaintiff had no locus standi to institute this suit as she had not taken out a grant of letters administration in respect of the estate of her deceased husband on whose behalf she purported to bring the suit. On the issue of costs, the Defendant submitted that she was entitled to the costs of the suit having established that the Plaintiff had failed to satisfy the conditions for an adverse possession claim and also lacked locus standi to institute the suit.

Analysis and determination

22. I have considered the Originating Summons, the grounds of opposition and replying affidavit filed by the Defendant, the evidence tendered and the submissions filed by the advocates for the parties. The issues that arise for determination in this suit in my view are the following;
 1. Whether the Plaintiff's suit is competent;
 2. Whether the Plaintiff has proved her adverse possession claim;
 3. Whether the Plaintiff is entitled to the reliefs sought in the Originating Summons; and
 4. Who is liable for the costs of the suit?Whether the Plaintiff's suit is competent
23. The Defendant has objected to the Plaintiff's suit for failure by the Plaintiff to support the Originating Summons with an affidavit as required under Order 37 Rule 7(2) of the Civil Procedure Rules. I agree with the Defendant that the Originating Summons herein offends the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules. Instead of filing an affidavit setting out the factual basis of her adverse possession claim, the Plaintiff filed a 4 paragraph verifying affidavit in which the Defendant stated that she affirmed the facts pleaded in the Originating Summons. This affirmation would be sufficient if the Defendant had set out in the body of the Originating Summons the facts giving rise to her claim. Unfortunately, the Originating Summons contained largely the questions that the Plaintiff wanted the court to determine. It follows that there were no "facts as pleaded in the O.S" which the Defendant affirmed in her verifying affidavit. I agree with the Defendant that an Originating Summons which is not supported by an affidavit is defective.
24. In my view, such defect can be cured by the court if moved to do so while giving directions under Order 37 Rule 18 of the Civil Procedure Rules. At that time, the Plaintiff can ask for leave to file an affidavit to support the Originating Summons. In the case before me, although the Defendant raised the issue of this defect in the Originating Summons earlier in the proceedings, the Plaintiff took no steps to remedy the situation.
25. Generally, I do not think that the defect under consideration can be cured under Order 37 Rule 19 of the Civil Procedure Rules. Under that rule, the court may at any stage of the proceedings in a suit



brought by Originating Summons order that such proceedings shall continue as if the suit had been brought by way of a plaint. While making such order, the court may also direct that any affidavits filed shall stand as pleadings. The rule presupposes that there are affidavits filed by the parties in support of and in opposition to the Originating Summons which are to be taken as their pleadings. In this case, the Plaintiff did not file an affidavit in support of her Originating Summons. She therefore had no affidavit that could be deemed as a pleading for the purposes of Order 37 Rule 19 of the Civil Procedure Rules.

26. That said, I have noted from the record that on 24th July 2023, the advocates for the parties appeared before Asati J. for directions on the hearing of the Originating Summons and on the proposal by the advocate for the Defendant which was not opposed by the advocate for the Plaintiff, an order was made on the following terms:

“The O.S be treated as plaint. The Reply thereto as defence. Matter to proceed by way of viva voce evidence. Hg on 8/11/2023.”

27. Now that the court had ordered that the Plaintiff’s Originating Summons be treated as a plaint and the Defendant’s replying affidavit as a defence, is there any further justification for the objection taken by the Defendant having regard to the fact that the suit has been heard fully and each party has had an opportunity to present its case? I do not think that the initial blunder by the Plaintiff’s advocates in the drafting of the Originating Summons should deny the Plaintiff her day in court.

28. In the circumstances of this case, I am of the view that to strike out the Plaintiff’s suit that has been fully heard on the ground that her Originating Summons was not supported by an affidavit would amount to sacrificing substantive justice at the altar of technicality. Article 159(2)(d) of *the Constitution* enjoins the court to administer justice without undue regard to procedural technicalities. I would adopt the reasoning of the court in *Macharia Mwangi Muna & 7 Others v. Davidson Mwangi Kagiri* [2014] eKLR where court stated as follows:

“Article 159(2) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities. This court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing and equity detests from unjust enrichment. This court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

29. For the foregoing reasons, the Defendant’s objection to the Plaintiff’s Originating Summons for want of a supporting affidavit is overruled. The Defendant had also contended that the Originating Summons was time-barred and also res judicata. The court was not told how an Originating Summons seeking title to land on account of adverse possession could be time-barred under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. I find no merit in this objection. On the issue of res judicata, there is no evidence that the Plaintiff had at any time brought an adverse possession claim against the Defendant before a court of competent jurisdiction and that the case was heard and determined. This objection also lacks merit and is overruled.

Whether the plaintiff has proved her adverse possession claim and is entitled to the reliefs sought;

30. In *Salim v. Boyd and Another* (1971) E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted



occupation of the land for a period of 12 years or more. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

31. It is common ground that the suit properties are registered in the name of the Defendant. It is also common ground that the Defendant acquired the suit properties from the Plaintiff's mother in law, Dorine Ndege Onyuro. It is also common ground that Plot No. 927 and Plot No. 928 which were subdivisions of Plot No. 220 were registered in the names of the Defendant and her deceased husband on 9th June 2008 and 14th May 2008 respectively. It is not disputed that when the Defendant and her deceased husband acquired the suit properties, the Plaintiff was in occupation of a portion of Plot No. 220 now forming part of Plot No. 927 after the subdivision. It is not disputed that even after the suit properties were sold and transferred to the Defendant and her deceased husband on 14th May 2008 and 9th June 2008 as aforesaid, the Plaintiff remained in occupation of Plot No. 927. The Defendant told the court that whereas the Plaintiff's mother-in-law moved out of the suit properties to a place known as Masogo/Ombeyi, the Plaintiff refused to move out and remained in occupation of Plot No. 927. It follows therefore that the Plaintiff occupied Plot No. 927 without the Defendant's permission. The Plaintiff told the court that her homestead was on Plot No. 927. She told the court that she was residing on part of this plot while she was using the other part for cultivation. The Defendant admitted that the Plaintiff was occupying Plot No. 927 and that she was in occupation of the same when they acquired the property in 2008.
32. It is not disputed that the Defendant and her deceased husband never filed a suit against the Plaintiff for her eviction from Plot No. 927. In *Githu v. Ndeete* [1984] KLR 776 it was held that:
 - a. “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*.
 - b. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”
33. The High Court found in the judgment delivered on 8th July 2011 in Kisumu High Court Civil Appeal No. 181 of 2011 that the proceedings that the Plaintiff had instituted against the Defendant and her deceased husband, and her mother in law at the Land Disputes Tribunal and Nyando Law Court were all nullities since the said tribunal and court had no jurisdiction to determine the dispute that the Plaintiff had with the said parties. Those proceedings could not therefore stop time from running for the purposes of Limitation of Actions. It follows from the forgoing that the Plaintiff had occupied and used Plot No. 927 openly, continuously and without the permission of the Defendant and her deceased husband from 2008 when the Defendant and her deceased husband acquired the properties up to 15th January 2023 when she filed this suit, a period of over 14 years.
34. Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides that an action to recover land cannot be brought after the end of 12 years from the date when the right of action accrued. Section 17 of the same Act provides that at the expiration of the said period of 12 years, the title of the person who was entitled to bring an action in respect of the land in question is extinguished. It is over 14



years since the Plaintiff took possession of Plot No. 927 without the permission of the Defendant. As mentioned earlier in the judgment, no action has been brought against her by the Defendant to recover the property. The title that was held by the Defendant and her deceased husband in Plot No. 927 has been extinguished by operation of law under Section 17 of the *Limitation of Actions Act*. It is my finding that Plaintiff has acquired the Plot No. 927 by adverse possession. Section 38 of the *Limitation of Actions Act* gives power to the court to order that the person who has acquired land by adverse possession be registered as the owner of the land in place of the person whose interest in the land has been extinguished.

35. With regard to Plot No. 928, I find no evidence of the Plaintiff's occupation. The Plaintiff told the court she had leased out Plot No. 928 to third parties. As correctly submitted by the Defendant no evidence was placed before the court of any lease entered into between the Plaintiff and the said third parties. The Plaintiff did not therefore prove continuous and uninterrupted occupation of Plot No. 928.

Conclusion

36. Due to the foregoing, the Plaintiff's Originating Summons succeeds in part. I therefore make the following orders in the matter;
1. I declare that the title that was held by the Defendant, in all that parcel of land known as Kisumu/Songhor/927 has been extinguished by operation of law.
 2. I declare that the Plaintiff has acquired all that parcel of land known as Kisumu/Songhor/927 by adverse possession.
 3. The Defendant shall transfer to the Plaintiff all that parcel of land known as Kisumu/Songhor/927 within thirty (30) days from the date hereof failure to which the Deputy Registrar of this court shall be at liberty to execute all documents necessary for the transfer of the said property to the Plaintiff.
 4. The Plaintiff shall meet all the expenses and costs associated with the transfer of all that parcel of land known as Kisumu/Songhor/927 into her name.
 5. The Plaintiff's claim over all that parcel of land known as Kisumu/Songhor/928 is dismissed.
 6. Each party shall bear its own costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 28TH DAY OF JANUARY 2025

S. OKONG'O

JUDGE

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

Ms. Mawinda for the Plaintiff

N/A for the Defendant

Ms. J. Omondi-Court Assistant

