



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okumu & 5 others v Andanje & another (Environment & Land Case  
134 of 2019) [2022] KEELC 15655 (KLR) (22 March 2022) (Judgment)**

Neutral citation: [2022] KEELC 15655 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 134 OF 2019  
DO OHUNGO, J  
MARCH 22, 2022**

**BETWEEN**

**SILVANUS OMONDI OKUMU ..... 1<sup>ST</sup> APPLICANT  
WERAMBO OKUMU ..... 2<sup>ND</sup> APPLICANT  
ONANI OKUMU ..... 3<sup>RD</sup> APPLICANT  
OKANGA OKUMU ..... 4<sup>TH</sup> APPLICANT  
OBIERO OKUMU ..... 5<sup>TH</sup> APPLICANT  
OPONDO OKUMU ..... 6<sup>TH</sup> APPLICANT**

**AND**

**SAMSON MWAIRUMBA ANDANJE ..... 1<sup>ST</sup> RESPONDENT  
CHRISOSTOM ONDUSYE MWAIRUMBA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By Originating Summons (OS) dated December 23, 2019, the applicants claimed that they are jointly entitled to the whole of the parcel of land known as LR No North Wanga/Indangalasia/452 (the suit property) having been in uninterrupted possession thereof for a period in excess of 12 years. They therefore sought determination of the following questions:
  1. If the Respondents are the joint registered proprietors of Plot 452;
  2. If the Applicants have been permanent residents upon Plot 452;
  3. If the residence, occupation and utilization by the Applicants over Plot 452 has been in excess of 12 years and in an open, peaceful and uninterrupted manner;



4. If the residence, occupation and utilization by the Applicants over Plot 452 has been adverse to the proprietary interests of the Respondents;
  5. When did time necessary to constitute adverse possession in favour of the Applicants begin to run;
  6. If having been in possession and use of Plot 452 in a peaceful and open manner for a period in excess of 12 years, whether the Applicants have acquired ownership of the same through prescription;
  7. If the proprietorship of the Respondents with respect to the parcel of land is subject to the prescriptive rights of the Applicants;
2. The OS was supported by an affidavit sworn by the first applicant. He deposed that the respondents are the joint registered proprietors of the suit property and that the applicants' late father, Paul Okumu Werambo, purchased the suit property from the late Jacob Ochola in the year 1972. That all the applicants have been raised on the suit property and have established their homesteads on it. That their occupation of the suit property has been open, peaceful, uninterrupted and continuous for a period in excess of 12 years and that they have as a result, acquired absolute ownership thereof through prescription.
  3. The respondents opposed the OS through a replying affidavit sworn by the first respondent. He deposed that together with his brother the second respondent, they purchased the suit property from Sorophina Makokha Othieno and Mary Mutenyo Makokha through a sale agreement dated June 12, 2014 and that a title was issued in their names. That prior to their acquisition, the suit property belonged to the late Osore Ochola in respect of whose estate letters of administration were issued to Sorophina Makokha Othieno in Kakamega High Court Succession Cause No 152 of 2011 who in turn sold it to the respondents. That the first applicant herein filed an application dated July 23, 2013 seeking revocation of the grant but did not prosecute the application and instead withdrew it in September 2020. That the respondents filed CMC ELC No 977 of 2018 in which they sought eviction of the applicants.
  4. At the hearing, the fourth applicant testified and adopted the affidavit in support of the OS as his evidence in chief. He added that the applicants reside on the suit property where they have two permanent houses and where they also cultivate. He confirmed that they applied for revocation of grant and later withdrew the application in the year 2020. The plaintiffs'/applicants' case was then closed.
  5. The first respondent testified next and adopted his aforesaid replying affidavit as his evidence in chief. He added that the applicants are using the land but have not constructed on it. The defence case was closed at that point.
  6. Parties filed and exchanged written submissions. The applicants argued that their allegation that they have been in occupation of the suit property for an uninterrupted period in excess of 12 years has not been rebutted and that their claim has therefore been established. On their part, the respondents argued that the applicants have not established the ingredients of adverse possession. They urged the court to dismiss the suit.
  7. I have considered the OS, the evidence and the submissions. The issues that arise for determination are whether the applicants have established the ingredients of adverse possession and whether the reliefs sought should issue.
  8. The law and principles relating to adverse possession are grounded on Sections 7, 13, 17 and 38 of Limitation of Actions Act. In the case of Wines & Spirits Kenya Limited & another v George Mwachiru



Mwango [2018] eKLR, the Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

... under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. ...

... it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See *Wanyoike Gathure v Berverly* (1965) EA 514, 519, per Miles J.)

(14) Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine.

...

9. Thus, any endeavours on the part of the registered proprietor to interrupt possession stops the running of time. Further, is settled law that the filing of a claim for recovery of possession interrupts the running of time. In *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR the Court of Appeal stated:

... If there was any time running in their favour towards adverse possession, it was interrupted when the suit was filed in March 2002. As this Court stated in *Joseph Gachumi Kiritu v Lawrence Munyambu Kabura* [1996] eKLR:

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.

...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

10. From the material on record, there is no dispute that the applicants are brothers and that the respondents are also brothers. It is also not in dispute that the respondents are the registered proprietors of the suit property. The respondents have availed evidence, which has not been rebutted, that they filed CMC ELC No 977 of 2018 against the first applicant herein. A perusal of the annexed copy of the plaint shows that the said case was filed at the Chief Magistrate's Court at Machakos. It is not clear why the case was filed in Machakos when it concerned a property located within Kakamega County. In the said plaint, the respondents averred that the first applicant trespassed on the suit property. They therefore sought judgment for an order restraining the first applicant and his agents from interfering with the suit property and an order compelling the first applicant to demolish and remove structures on the property.

11. In view of the relationship between them, I consider that the second to third applicants herein fall within the category of the first applicant's agents in the context of the prayers sought in the suit. It will be noted that CMC Elc No 977 of 2018 was filed before the filing of this suit. The suit constitutes assertion of proprietorship rights the respondents and therefore validly stopped the running of time.



It follows therefore that as at December 24, 2019 when the OS herein was filed, the applicants had not been in uninterrupted occupation of the suit property for 12 years. That being the case, the applicants have failed to establish the ingredients of adverse possession. In the circumstances, the reliefs sought cannot issue.

12. In the end, I find no merit in the OS and I therefore dismiss it. Each party to bear own costs.

**Dated, signed and delivered at Kakamega this 22<sup>nd</sup> day of March 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Okali holding brief for Ms Ikhumba for the plaintiffs/applicants

No appearance for the defendants/respondents

Court Assistant: E. Juma

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