



**Opot v Osoma & another (Environment & Land Case  
26 of 2021) [2022] KEELC 59 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 59 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 26 OF 2021**

**AY KOROSS, J**

**MAY 12, 2022**

**BETWEEN**

**GEORGE OHALA OPOT ..... PLAINTIFF**

**AND**

**JAMES AWIMBO OSOMA ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL OTIENO ATIENO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By way of Originating Summons dated 27/10/2018, the plaintiff instituted a suit against the Defendants. The bulwark of the dispute revolves around adverse possession. The Plaintiff's claim was of acquisition by adverse possession of a portion of land parcel North Gem/Malunga/658 measuring 1 acre and a portion of land parcel North Gem/Malunga/657 measuring 2.5 acres from the 1<sup>st</sup> Defendant, James Awimbo Osoma.
2. The firm of HMS Advocates filed a Notice of Appointment of Advocates on behalf of the Defendants, Notice of Preliminary Objection which was later dismissed by the court and a Replying Affidavit sworn by the 2<sup>nd</sup> defendant with the authority of the 1<sup>st</sup> defendant stating that the Plaintiff's claim was misplaced and that the 2<sup>nd</sup> Defendant was the bona fide purchaser of North Gem/Malunga/2235 and North Gem/Malunga/658 with the 1<sup>st</sup> Defendant holding North Gem/Malunga/2234. North Gem/Malunga/2234 and North Gem/Malunga/2235 were resultant subdivisions of North Gem/Malunga/657.

**The plaintiff's case and evidence**

3. The Plaintiff's case is contained in his Originating Summons, Supporting Affidavit, his Witness Statements and those of his witnesses Benson Nyaim and Mary Anyango Ochola, documents that were produced in court and oral testimonies. The case proceeded by viva voce evidence.



4. In summary, it was the Plaintiff's case that on 26/12/1993, he entered into a sale agreement with the 1<sup>st</sup> Defendant over the sale of portions of North Gem/Malunga/658 and North Gem/Malunga/657 for the purchase price of Ksh 140,000/-. The final instalment of Kshs.67, 000/= was fully paid for on 26/12/1993. The Plaintiff began occupying the purchased portions of the suit properties in 1993 and lived there in a manner that was open, without permission and uninterrupted and had continuously planted maize and trees thereupon until it came to his knowledge that the 1<sup>st</sup> defendant had sold the purchased portions to strangers.
5. It was his testimony that when the 1<sup>st</sup> Defendant sought to sell the purchased portions, he registered a caution over North Gem/Malunga/657. In light of this, the area chief summoned the parties and a meeting was held.
6. Later in 2016, the Plaintiff came to find out that North Gem/Malunga/657 had been subdivided into North Gem/Malunga/2234 which was held by the 1<sup>st</sup> Defendant and North Gem/Malunga/2235 which was sold to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is also the registered owner of North Gem/Malunga/658.
7. His witness Benson who was the plaintiff's neighbour and a relative of the 1<sup>st</sup> Defendant testified that he knew the 1<sup>st</sup> Defendant had sold to the Plaintiff portions of North Gem/ Malunga/658 and North Gem/Malunga/657. He stated that after purchase, the Plaintiff moved in immediately and started cultivating the purchased portions. His evidence was corroborated by Mary who testified that she witnessed the sale agreement between the plaintiff and 1<sup>st</sup> defendant. They both testified that the 2<sup>nd</sup> defendant was unknown to them.
8. In accordance with the provisions of Order 37 Rule 3 of the Civil Procedure Rules, the plaintiff raised several questions for determination. In summary, the main question was whether the Plaintiff was an adverse possessor of a portion measuring 1 acre of land parcel North Gem/Malunga/658 and a portion measuring 2.5 acres in land parcel numbers North Gem/Malunga/2234 and North Gem/Malunga/2235 which were subdivisions of North Gem/Malunga/657.

#### **The defendants' case and evidence**

9. The Defendants' case was contained in the 2<sup>nd</sup> defendant's Replying Affidavit dated 15/02/2019. In summary, the 2<sup>nd</sup> Defendant stated that he was the rightful owner and bona fide purchaser for value without notice of North Gem/Malunga/2234 and North Gem/Malunga/658 having conducted due diligence. He stated that he purchased North Gem/Malunga/2234 in 2015 from the 1<sup>st</sup> Defendant and North Gem/Malunga/658 from one Beatrice Adhiambo Mala in 2016. He stated that the Plaintiff's claim was fraudulent.
10. He purported that the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant was fraudulent and that it had been executed prior to the plaintiff being registered as the proprietor of the parcels of land and that the property known as North Gem/Malunga/658 had changed hands severally resting with the current registration in his name.
11. Despite service, the Defendants and their Advocate were absent from Court during the hearing and the matter proceeded ex parte.
12. The evidence of the Plaintiff was therefore uncontroverted by the Defendants. However, even if this is so, the plaintiff is called upon to discharge the burden of proof no matter how much the opponents have not made a presence in the contest.



### **The plaintiff's submissions**

13. In his submissions dated 25/02/2022 by his Counsel Bruce Odeny & Company Advocates, the Plaintiff identified three issues for determination: (i) whether the Plaintiff lawfully purchased the suit properties from the 1<sup>st</sup> Defendant, (ii) whether the Plaintiff had been in constant possession and use of the purchased portions of land without force, secrecy, permission and uninterrupted for a period of more than 12 years and, (iii) whether the Plaintiff was entitled to the orders sought. Some of the authorities cited by the plaintiff were not availed to this court and this court will not belabour in considering them.
14. On the 1<sup>st</sup> issue, he submitted that the written agreement for sale was prima facie evidence that there was a valid agreement between the plaintiff and the 1<sup>st</sup> defendant and this had been corroborated by his witnesses.
15. On the 2<sup>nd</sup> issue, he asserted that from 1993, he had been in possession of the purchased portions without secrecy or force and his occupation was uninterrupted and that his claim did not merely arise from the agreement of sale.
16. He relied on the Court of Appeal decision of *Public Trustee v Wanduru* (1984) KLR and several others. He contended that despite the 2<sup>nd</sup> defendant being privy to the caution lodged over one of the suit properties, he went ahead and purchased it. He asserted that the planting of trees was evidence of possession and on this, he relied on the case of *Manason Ogendo Afwanda v Alice Awiti Orende & Another* (2020) eKLR. He submitted that adverse possession affected not only the present holders in titles but its predecessors and on this he relied on the case of *Peter Thuo Kairu v Kuria Gacheru* (1988) KAR.
17. On the 3<sup>rd</sup> issue, he contended that he had proved his case and he prayed for judgment in his favour.

### **The defendants' submissions**

18. As evidenced from the court record, the defendants though served with a mention notice to put in written submissions, did not comply.

### **Analysis and determination**

19. Having considered the Plaintiff's and Defendants' pleadings, the Plaintiff's evidence, written submissions and authorities cited, this court is of the considered view that the single issue for determination is whether the plaintiff has met the legal threshold to be deemed an adverse possessor.

#### *I. Whether the plaintiff has met the legal threshold to be deemed an adverse possessor*

20. Section 7, Section 13 (1) and (2), 17 and Section 38 (1) and (2) of the *Limitation of Actions Act* are the statutory underpinnings of adverse possession. Section 7 provides that a person may not bring an action-

“....to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person  
“.

21. At the expiration of the twelve-year period, the proprietor's title is extinguished by operation of law and Section 38 of the Act permits the adverse possessor to apply to the courts handling ELC cases for an order that he be registered as the proprietor of the land.



22. Therefore the critical period for determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission and that the owner was dispossessed or discontinued his possession of the land. See the Court of Appeal decision of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR that quoted with approval the case of *Littledale v Liverpool College* (1900)1 Ch.19, 21.
23. Section 28 (h) of the *Land Registration Act* recognises adverse possession as an overriding interest over land. The case of *Daniel Kimani Ruchine & Others v Swift, Rutberford Co Ltd & another* [1977] eKLR stated that a party must prove that he had used the land which he claims as of right: *Nec vi, nec clam, nec precario* which means no force, no secrecy or evasion.
24. From the agreement for sale executed on 26/12/1993 between the plaintiff and 1<sup>st</sup> defendant, it is obvious that it emanated from an oral agreement that was entered into between the parties on 24/8/1993 with a 1<sup>st</sup> installment of Ksh. 3000/= being made. The oral agreement was reduced into writing on 26/12/1993 whereby the plaintiff paid the last installment of Kshs. 67,000/=. Save for the simple fact that the title deed was not registered in the name of 1<sup>st</sup> defendant, time would have started running on 26/12/1993. In the case of *Wanyoike v Kahiri* [1979] KLR, it was held thus:
 

“In a purchase scenario, the period of limitation starts to run on the date of payment of the last instalment of the purchase price”.
25. It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See *Sophie Wanjiku John v Jane Mwibaki Kimani* Nairobi ELC Civil Suit No. 490 of 2010.
26. In respect of North Gem/Malunga/657, the 1<sup>st</sup> defendant succeeded his father Osoma Odeyo in title on 2/11/2004 while in North Gem/Malunga/658, he succeeded his father on 20/2/2002. The suit was filed on 30/10/2018 and therefore his claim was ripe.
27. The 2<sup>nd</sup> defendant merely stated in his replying affidavit that the agreement was fraudulent. It is trite law that fraud must be strictly pleaded and proved beyond reasonable. In the absence of their testimony, I am not satisfied that the agreement was fraudulent. This agreement has met all the ingredients of a contract for sale of land in accordance with Section 3(3) of the *Law of Contract Act*.
28. From the testimony that was adduced, the plaintiff entered the suit properties on the basis of the agreement and had since then planted maize and trees thereupon and openly ploughed it. His testimony was corroborated by his witnesses who were his neighbours. One of them (PW 2) had witnessed the agreement between the plaintiff and the 1<sup>st</sup> defendant. A meeting presided over by the area chief on 31/10/2015 confirmed the existence of such an agreement.
29. By the time the 1<sup>st</sup> Defendant was selling North Gem/Malunga/658 to other people or subdividing and transferring North Gem/Malunga/657 the plaintiff was already in occupation.
30. In fact, when the plaintiff became alive of the subdivision, he lodged a caution on 30/6/2015 over North Gem/Malunga/657 which was removed by the land registrar. The 2<sup>nd</sup> defendant has admitted in his replying affidavit that he was aware of the caution, its subsequent removal and transfer of a portion of the subdivided portion to him. Despite this red flag, the 2<sup>nd</sup> defendant went ahead with the purchase.
31. As for, North Gem/Malunga/658, he averred that he bought it from Beatrice Adhiambo Mala. The register of this property confirms this position and this title can be traced back to the 1<sup>st</sup> defendant. Does this diminish the interests of the plaintiff over this property? My answer is in the negative. I am



bound by the Court of Appeal decision of Peter Thuo Kairu v Kuria Gacheru where the court stated thus;

“ That at that date, the 12 year period of Limitation had run out and the title of the appellant as well as that of his predecessor -in -title was extinguished”

32. The agreement merely stated that the plaintiff had purchased portions of the suit properties. The exact acreage was not disclosed. The Originating Summons, Supporting Affidavit and evidence adduced are consistent that the purchased portions were 1 acre that was to be excised out of North Gem/Malunga/658 and 2.5 acres that was to be excised out of North Gem/Malunga/657. As earlier demonstrated North Gem/Malunga/657 had been subdivided into North Gem/Malunga/2234 and 2235. It is unfortunate that the plaintiff did not address the court on what portion of his 2.5 acres lay in these subdivided portions.
33. In respect to the instant case the defendants did not attend court and tender any evidence to controvert the plaintiff's evidence. The evidence of the plaintiff was consistent that he purchased portions of the suit properties and took possession and his occupation had not been disturbed by the defendants or their predecessors in title by laying a claim in respect thereof and it is my finding that the plaintiff had been in continuous open and uninterrupted possession of portions of suit properties or the resultant subdivisions thereof for a period of over 12 years. It is my finding that the Plaintiff's claim for adverse possession succeeds. It is trite law that costs follow the event and I award the costs to this suit to the plaintiff.
34. Ultimately, I make the following disposal orders:
  - a. A declaration is hereby issued that the plaintiff has acquired 1 acre of land parcel North Gem/Malunga/658 and 2.5 acres of land parcel North Gem/Malunga/657;
  - b. Land parcel numbers North Gem/Malunga/2234 and North Gem/Malunga/2235 that were subdivisions of land parcel numbers North Gem/Malunga/657 and their subsequent transfers are hereby cancelled.
  - c. Land parcel number North Gem/Malunga/657 is hereby restored in the name of James Awimbo Osoma.
  - d. The County Land Registrar, Siaya and Land Surveyor, Siaya or such other officer delegated by them to subdivide North Gem/Malunga/658 and North Gem/Malunga/657 and issue the plaintiff with a title deed measuring 1 acre from Land Parcel Number North Gem/Malunga/658 and 2.5 acres from land parcel number North Gem/Malunga/657 upon payment of requisite fees by the plaintiff.
  - e. Costs of this suit to the plaintiff.

**JUDGMENT DELIVERED VIRTUALLY.**

**DATED, SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF MAY 2022**

**In the Presence of:**

M/s Imbaya for the plaintiff

N/A for defendant

Court assistant: Ishmael Orwa

**HON. A. Y. KOROSS**



**ELC JUDGE**

**12/5/2022**

