



REPUBLIC OF KENYA



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**Otwoma v Ombele (Environment & Land Case 13 of 2021)
[2022] KEELC 2522 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 13 OF 2021**

E ASATI, J

MAY 10, 2022

FORMERLY KAKAMEGA ELCC NO. 49 OF 2019 (O.S)

BETWEEN

MICAH NASITSI OTWOMA PLAINTIFF

AND

BENHARD ANEMBA OMBELE DEFENDANT

JUDGMENT

Introduction

1. This matter was commenced vide the Originating Summons dated 1/8/2013 wherein the Plaintiff raised the following questions for determination by the court:
 - i. Whether the suit land is registered in the name of the Defendant herein?
 - ii. Whether the Plaintiff is in possession of the said parcel of land or lived on the property since 1969 as an ancestral land?
 - iii. Whether at the time the Defendant became the registered proprietor of the said land the Plaintiff had been in adverse possession of the said parcel?
 - iv. Whether at the time of the alleged transfer of the said parcel of land to the Defendant then registered proprietor's title to the said parcel of land had been extinguished?
 - v. Whether the Defendant obtained a good title to the suit parcel of land?
 - vi. Whether the plaintiff has acquired title to the said parcel of land by adverse possession?
 - vii. Whether there should be a declaration that the Plaintiff be registered as the proprietor of the said parcel of land?



- viii. Whether the register should be rectified so that the Plaintiff be registered as the proprietor of the suit parcel of land in the place of the Defendant?
 - ix. Whether the Registrar of the High Court should execute transfer forms to effectuate such transfer on behalf of the Defendant?
 - x. Who should bear the cost of this suit?
2. The court record shows that the Originating Summons was first filed at the High Court Kisumu as Kisumu H.C Land Case No 311 of 2011(OS) and later *vide* court order dated 21/5/2018 transferred to the Principal Magistrate's Court at Vihiga as Vihiga Pmc Land Case No. 137 of 2018, it was further transferred *vide* court order dated 7/3/2019 to Kakamega Environment and Land Court as Kakamega ELC Case No 49 of 2019 and when the Environment and Land court was opened at Vihiga, the matter was transferred to Vihiga court as Vihiga ELCC NO 13 OF 2021, the suit herein.
 3. The Plaintiff's claim is that he has acquired, by operation of the doctrine of adverse possession, title to part of land parcel known as West Bunyore/Ebusikhale/1617(the suit land) currently registered in the name of Benhard Anemba Ombele, the Defendant herein.
 4. The Defendant *vide* his Replying Affidavit sworn on 24/1/2014 and denied the Plaintiff's claim and stated that he is the absolute owner of the suit land. That the plaintiff has never lived on the suit land nor had adverse possession thereof but owns land parcel No. West Bunyore/Ebusikhale/1657 (parcel No. 1657) which shares a common boundary with the suit land. That a boundary dispute exists between the suit land and parcel No. 1657 because the Plaintiff destroyed the common boundary.
 5. Directions on the Originating Summons pursuant to Order 37 Civil Procedure Rules were taken on 12/4/2014 *inter alia*, that the Originating Summons be converted to a Plaint and the Replying Affidavit into a Defence. That the matter becomes an ordinary suit to be heard in the usual manner.

The evidence

6. The Plaintiff testified as PW3. He relied on the contents of his witness statement dated October 14, 2013 as his evidence. He stated that at one time he had two parcels of land bordering each other in West Bunyore Ebusikhale area of which one was given to him by his father. That he was away when his nephew sold both pieces of land to the Defendant who brought a surveyor and without defining or ascertaining the boundaries of the pieces of land, fraudulently registered both parcels in his name as West Bunyore/Ebusikhale/1617. In addition to the contents of his witness statement, the Plaintiff testified that land Parcel known as West Bunyore/ Ebusikhale/1617 belonged to his late brother who died in 1986 and left 5 children. He produced exhibits namely certified copy of the original green card, copy of title deed and certificate of official search for the suit land, copy of minutes of clan meeting at the suit land on December 28, 2014 and copy of map. He testified further that the land is currently registered in the name of the Defendant having been transferred to him in the year 2009. That he (Plaintiff) begun using the suit land since 1968 when his brother passed on. That the clan meeting of the elders resolved that the suit land belonged to Joseph. That there was a case filed at Maseno court in which it was decided that the dispute be arbitrated at home.
7. On cross examination by Omoro, Advocate for the Defendant, he stated that he resides on a different parcel of land and that he uses the suit land only for grazing his animals. That he has been on the suit land since 1986. That he never challenged the succession proceedings. That nobody notified him that the land was changing hands and that he decided to sue when he saw the Defendant taking the land.



8. PW1, the Land Surveyor who visited the suit land and prepared a report pursuant to a court order dated 9/11/2016 and issued on 6/10/2016 in which the court had ordered the Vihiga County Land Registrar and Surveyor to visit the suit land and parcel No. 1657 and confirm the party in possession and occupation of each of the parcels. The Surveyor's findings were that the owner of the suit land was using only half of the suit land while the remainder was being used by the proprietor of a neighbouring land parcel No.1657. That there was no boundary between the suit land and parcel No.1657 on the ground. That what separates the two parcels of land on the ground is a river. On cross-examination by Omoro, Advocate for the Defendant, he stated that Micah does not live on the suit land but he does some farming on a portion thereof. That the problem was a boundary dispute whereby the owner of parcel No. 1657 was encroaching onto the suit land. The Surveyor's report dated April 22, 2021 and signed by one Dismas S. Mwisiahi was filed in court on December 1, 2021.
9. PW2, the Land Registrar Vihiga County. He testified that he visited the suit land together with the Surveyor pursuant to the court order. His findings were that the owner of parcel No. 1657 had encroached onto the suit land. The Land Registrar's report was dated December 1, 2021.
10. On cross examination he stated that the Plaintiff occupies part of parcel No. West Bunyore/Ebusikhale/1617 and the whole of parcel No. 1657. That parcel No. 1657 measures approximately 1.2 acres while No.1617 measures 0.88 hectares.
11. The Defendant on his part adopted the contents of his witness statement dated 24/1/2014 as his evidence. He stated that he is the registered owner of the suit land which he bought from one Elly J. Khabochi in the year 2009. That when the Plaintiff heard that he (the Defendant) had bought the suit land, the Plaintiff started interfering with the suit land. That the Plaintiff destroyed the boundary between the suit land and the Plaintiff land parcel No. 1657. He trespassed onto the suit land and started to cultivate. That because of the trespass, the Defendant filed a suit against the Plaintiff namely Maseno SRMCC NO. 102 OF 2010. In the suit the court found that the dispute was a boundary dispute and advised the parties to refer it to the relevant Land Disputes Tribunal. That the Plaintiff resides on a different parcel of land namely; West Bunyore/Ebusikhale/1486 which is far away from the suit land. That the Plaintiff has never lived on the suit land. In addition, he testified that he obtained title to the suit land in March 2009. He denied that the Plaintiff had occupied the suit land for 12 years. He stated that he utilizes the suit land by planting nappier grass and vegetables and has fish ponds thereon. He produced the plaint, Statement of Defence and Judgement in Maseno SRMCC NO 102 OF 2010, certificate of official search for parcel No. 1657 and a receipt as exhibits. He prayed that the suit be dismissed.

On Cross Examination he said that the plaintiff grazes his animals on his (defendant's) crops and that he has come to court because he did not want physical confrontation.

Submissions

12. At the close of the evidence parties elected to make written submissions in support of their respective cases.
13. Written submissions dated 8/4/2022 were filed on behalf of the Plaintiff by the law firm of Otieno C. O. Ayayo & Company Advocates. Counsel submitted that the Plaintiff has proved his case that he has been in occupation of the suit land for a very long period of time over 2 years holding it in trust for his grandchildren. That the Plaintiff has been cultivating and/or grazing cattle on the suit land peacefully without interruption from time immemorial. He prayed that the suit be allowed.



14. Written submissions dated 21/4/2022 were filed on behalf of the Defendant by the law firm of Mukabi & Company Advocates. Counsel submitted that the Plaintiff has not proved that he has been in exclusive possession of the suit land openly as of right without interruption for 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. Relying on the case of *Littledale vs Liverpool* (1900) 1 ch 1921 Counsel submitted that the Plaintiff should prove not only the period of 12 years but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
15. Counsel submitted further that the Plaintiff has also to prove that the Defendant had knowledge-actual or constructive of the Plaintiff's possession of the suit land. That such possession must be continuous and must not have been broken. Counsel relied on the case of *Francis Gicheru vs Peter Njoroge Mairu* [2005] eKLR. He submitted that the Plaintiff has not proved the distinct portion of land he is occupying or its acreage. That while the plaintiff claims the whole of the suit land, PW1 and PW2 who are experts told the court that the Plaintiff was using only a portion of the suit land. Counsel prayed that the suit be dismissed.

Issues for determination.

16. The issues for determination in this matter are the questions on the face of the Originating Summons and this court endeavours to determine each of the questions on the basis of the evidence adduced.
17. The first issue is whether the suit land is registered in the name of the Defendant. There is no contest on this. It is admitted in the pleadings and evidence of both parties that the suit land is registered in the name of the Defendant. A copy of register in respect of the suit land was not only annexed to the Supporting Affidavit to the Originating Summons but was also produced as exhibit. The copy of register shows that the register in respect of the suit land was opened on September 16, 1969 and on the same date one Joseph Omutsani was registered as the first registered owner. It further shows that on 26/4/1994 the land was transmitted in favour of one Samuel Amaume Muchile as Administrator. On 29.10.1998 the land was transmitted to Elly J. Khabochi upon succession, who, on 12/3/2009, transferred it in favour of the Defendant. In a claim based on adverse possession, it is one of the basic requirements that the suit land be registered in name of the defendant either as owner or administrator of estate of some owner against whose title time runs in favour of the adverse possessor. The law requires that a copy of the register in respect of the suit land be attached to the Affidavit in support of the Originating Summons as proof of this at the very onset of the suit.
18. The second issue is whether the Plaintiff is in possession of the suit land or lives on the suit land since the year 1969 as an ancestral land.

This issue seeks the court to determine the current status of the suit land in terms of occupation thereof by the parties. The plaintiff stated in his evidence that he does not live on the land but uses it only to graze his animals. While the Plaintiff's case is that he begun using the suit land in 1968 when his brother passed on, this position is however, not supported by the rest of his pleadings and evidence. In the Originating Summons he posed the question for the court's determination as to whether he had possessed or lived on the suit land since 1969. In his witness statement dated October 14, 2013 adopted as his evidence, the Plaintiff did not mention the date when he entered the suit land. Elsewhere in his testimony in court he stated that he had been on the suit land since the year 1986. And at other times in the same testimony that he had been using the suit land since the year 1968.



The Defendant's case is that the Plaintiff owns a parcel of land which shares a common boundary with the suit land namely West Bunyore/Ebusikhale/1657. That it was only in the year 2009 when the Plaintiff realized that the Defendant had bought the suit land that he started to destroy the common boundary and encroach onto the suit land. The report of PW1 and PW2 confirms the defendant's position that he owns land parcel No. 1657, that land parcel No.1657 shares a common boundary with the suit land and that the Plaintiff has encroached onto the suit land. The court finds that there is no evidence that the Plaintiff has been in possession of the suit land or lives thereon since 1969 or that the suit land is ancestral land to the Plaintiff.

19. The third issue is whether at the time the Defendant became registered owner of the suit land the Plaintiff had been in adverse possession of the said parcel of land.

Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period. The possession must be without the permission but with the knowledge of the registered owner. In Kenya, under the provisions of the *Limitation of Actions Act* Cap 22 Laws of Kenya, the prescribed period is 12 years. It is provided for in section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:

“An action may not be brought by any person 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.”

Section 13 of the *Limitation of Actions Act* provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of *this Act*, the land in reversion is taken to be adverse possession of the land.

Section 38 (1) provides;

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.



In the case of *Mtana Lewa –vs- Kabindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

20. As already found in issue no 2, there is no evidence that the plaintiff had been on the suit land since 1969. It is not clear whether it is the entire of the suit land or only part thereof that the plaintiff claims. And if it is only part thereof, the exact size is not specified. While in the Originating Summons the Plaintiff claims only part of the suit land, in the rest of the pleadings and evidence he claims the entire land. Secondly, the basis of the Plaintiff’s claim is not clear. While the Originating Summons is based on adverse possession, in his witness statement he alleges that the land belonged to him because it was given to him by his father but was registered in the name of the Defendant fraudulently and concludes that he had come to court to seek justice to restore his right or claim of ancestral land. In his testimony in court he claimed that the suit land belonged to his late brother and was pursuing it for himself and the children/grandchildren of the said deceased brother. He further claimed that he had been on the suit land since 1986 therefore had adverse possession thereof. The Defendant’s case is that the plaintiff only started interfering with the suit land in the year 2009. The burden was on the Plaintiff to proof that by the time the year 2009, he had occupied the land for 12 years as envisaged in the *Limitation of Actions Act*.

The court finds that there is no evidence that at the time the Defendant became registered owner of the suit land in the year 2009 the Plaintiff had had any adverse possession of the suit land.

21. The fourth issue is whether title of the then registered owner of the suit land had been extinguished. The registered owner who transferred the suit land to the Defendant was one Elly J. Khabochi who had held the title since 1998. There is no evidence that the Plaintiff was on the suit land when it was registered in the name of Elly J. Khabochi.

Under section 7 of the *limitation Act*, a title is extinguished by operation of the doctrine of adverse possession when the adverse possessor has had open, exclusive and continuous possession of the land without the permission but with the knowledge of the title holder for a period of 12 years. These elements have not been proved as against the previous title holder.

22. The fifth issue is whether the Defendant acquired a good title to the suit land. The Defendant’s evidence on how he obtained the title to the suit land is that in the year 2009 he purchased the land from Elly J. Khabochi who was the registered owner then. That he followed all laid down procedures to enable him be registered as absolute owner. There is no evidence to controvert the Defendant’s evidence. My finding is that the Defendant acquired good title to the suit land. The allegation that the land was registered in the name of the Defendant fraudulently was never pleaded or proved.

23. The sixth issue is whether the Plaintiff has acquired title to the suit parcel of land by adverse possession. There is no evidence that the Plaintiff has acquired ownership by operation of the doctrine of adverse possession. There is evidence that the Defendant has been asserting his rights over the suit land. He sued the Plaintiff in Maseno SRMCC No.102 Of 2010. The Defendant produced the Plaintiff, Statement of Defence and judgement in the case. I have read these exhibits carefully and find that the



Plaint shows that the suit land and the parties were the same as herein. That the cause of action was encroachment. The suit sought for a permanent injunction restraining the Defendant (the Plaintiff herein) from trespassing onto the suit land. The Statement of Defence filed by the Defendant shows that the Defendant (the Plaintiff herein) denied interfering in any way with the suit land. He stated in paragraphs 5 and 8 of the said Statement of Defence:

- “ 5) the Defendant denies that he has in any way interfered with the Plaintiff’s peaceful user and or occupation of the suit land hence he is taken aback why this suit has been brought up in the first place and shall put the Plaintiff to strict proof thereof
- 8) the Defendant denies that he has encroached and or trespassed the said premises as alluded in paragraph 5 of the Plaintiff or otherwise and the same is an imagination of the plaintiff and shall put the Plaintiff to strict proof thereof.”

The judgment in the suit shows that the Defendant therein (the Plaintiff herein) testified and denied that he ever encroached onto the suit land. He even called witnesses to support his case. The court stated in its judgement dated 25/8/2011

“the Defendant called 2 witnesses. The Defendant himself is DW1. He denied having trespassed on the suit land he had his own parcel of land which borders the Plaintiff’s. ... DW2 said the Defendant is a brother while the plaintiff is his nephew. He fully supported the evidence of the Defendant to the effect that he didn’t trespass upon the Plaintiff’s land.”

The Plaintiff admitted that there was the court case at Maseno court but the same was sent to arbitration. The plaintiff’s pleadings in the Maseno case are contrary to the pleadings herein for justice while in the Maseno case in the year 2010 he, in his Statement of defence and testimony under oath, vehemently denied trespassing or interfering with the suit land, in the present suit he claims to have had possession of the suit land since the year 1969 as ancestral land. This portrays the Plaintiff as a litigant who cannot be believed. In view of the pleadings and judgement and particularly the contents of the Plaintiff’s own Statement of Defence quoted herein above, the court believes the Defendant’s version that the plaintiff only entered the suit land in the year 2009 when he realized that the Defendant had bought it.

That being the case then, 12 years had not elapsed between 2009 and 2011 when the Originating Summons was filed.

The court finds that the Plaintiff has not proved that he has acquired title to the suit land by adverse possession.

24. The seventh issue is whether there should be a declaration that the Plaintiff be registered as the proprietor of the said parcel of land.

In view of the evidence and findings already arrived at herein, there is no basis for such declaration.

25. Issue eight is whether the register should be rectified so that the Plaintiff be registered as the proprietor of the suit parcel in the place of the Defendant. Rectification of register by order of court is provided for under section 80 of the [Land Registration Act](#). Rectification by order of court can only occur where registration is obtained by fraud, made or omitted by fraud to which the registered proprietor is a party. None of the grounds have been proved herein. There similarly is no basis for the Registrar of the High court to be ordered to sign transfer forms.



26. On who should bear the costs of the suit, the law as contained in section 27 of the *Civil Procedure Act* is that costs of any action, cause or other matter, or issue follow the event.

Conclusion

27. Having found that adverse possession has not been proved and that the Defendant holds a good title, this court finds that the Plaintiff has not proved his case on a balance of probabilities. The suit commenced by Originating Summons dated 1/8/2013 is dismissed. Costs to the Defendant.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 10TH DAY OF MAY 2022.

E. ASATI,

JUDGE.

In the presence of:

Lumalasi holding brief for Otieno for the Plaintiff

N/A for the Defendant

Court Assistant.....Ajevi.

E. ASATI,

JUDGE.

