



REPUBLIC OF KENYA



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**Ogeda v Esiba (Environment & Land Case 35 of 2015)
[2022] KEELC 3508 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 35 OF 2015**

**AA OMOLLO, J
JULY 28, 2022**

BETWEEN

HENERIA ADIPO OGEDA APPLICANT

AND

JOHN ANGHII ESIBA RESPONDENT

JUDGMENT

1. The Applicant commenced these proceedings vide an amended Originating Summons dated 12th October 2018 and filed in court on 16th October 2018 against the Respondent. The Applicant claims that she has acquired by way of adverse possession rights over land portion comprised in L.r No. South Teso/angoromo/1042 currently registered in the name of Anyi Emaillet Atanasi. The Applicant posed the following questions for determination:
 - a. Whether or not John Angii Esibahas obtained letters of grant in respect of the estate of Anyi Emaillet Atanasiwho died domiciled in Kenya on 14th August 2011?
 - b. Whether or not Herenia Adipo Ogedais the wife of Martin Ogeda Okelwho died in 1994?
 - c. Whether or not Anyi Emaillet Atanasi and martin ogeda okelentered into an agreement to purchase a portion of land parcel South Teso/angoromo/1042 measuring 2 acres in 1982?
 - d. Whether or not Herenia Adipo Ogedain 1985 to 1986 in furtherance of agreement paid Kshs. 18,000/= a final payment?
 - e. Whether or not Herenia Adipo Ogedahas been in quiet, peaceful, unlawful and uninterrupted occupation of 2 acres of land from 1986 to April 2015?
 - f. Whether or not Herenia Adipo Ogeda'soccupation and use has matured into adverse possession?



- g. Whether or not the respondent herein should be condemned to pay costs of the proceedings?
2. The Applicant seeks to be granted the following orders;
- a. Declaration that the applicant has acquired ownership of a portion of land parcel South Teso/angoromo/1042 measuring 2 acres by adverse possession and Land Registrar to make entries to that effect.
 - b. Costs of the application.
3. The Originating Summons was supported by the affidavit of Herenia Adipo Ogedain which she deposed that they purchased the suit land with her late husband from Anyi Emaillet Atanasi in 1986. She deposed that she peacefully used the land up to and even after the demise of the seller in 2011. That it is on 1.4 2015 when the Respondent forcefully entered the aforesaid portion and pulled down standing crops.
4. The Respondent entered appearance and filed a Replying Affidavit deposed on 5th May 2015. He deposed that his deceased father Anyi Emaillet Atanasi sold 5 ½ acres of land parcel South Teso/angoromo/1043 to Martin Ogeda Okal in 1976 and Mr. Ogeda was subsequently registered as the proprietor of the same. The Respondent denied that his deceased father approached the applicant to sell to them a further 2 acres in 1982 as she alleges and that the agreement dated 2nd June 1995 annexed by the Applicant is a forgery intended to mislead the court. He stated that he is the administrator of L.R. South Teso/angoromo/1042 which was going through succession in Busia HC Succession Cause no. 265 of 2014. He further deposed that the applicant has never cultivated L.R. South Teso/angoromo/1042 apart from her land L.R. 1043 which she has been using since 1976 when she bought the 5½ acres. The Respondent denied that he destroyed or pulled down standing crops planted by the applicant as alleged.
5. Viva voce evidence began on 28th June 2021 with the applicant calling two witnesses. Herenia Adipo Ogeda, the applicant testified as PW1 through adoption of her witness statement dated 29/2/2016. She testified that sometime in the year 1976, her husband, Martin Ogeda Okel – deceased, purchased five and half acres of land from Anyi Emaillet Atanasi originally South Teso/angoromo/573 which was sub-divided to create the portion of land South Teso/angoromo/1043. Sometime in the year 1982, her late husband further acquired 2 acres from Anyi Emaillet Atanasi from South Teso/Angoromo/1042 and when her husband passed on in 1984, she completed payment of the purchase price between 1995 to 1996. She continued that since 1982 to 1st April 2015, she had been in quiet, notorious and uninterrupted use of the 2 acres of the parcel of land without interference of anyone including Anyi Emaillet Atanasi.
6. PW1 stated that she was in possession until she preferred the case and the defendant sought to thwart justice by cutting her standing crops. She contends the community, leadership of Ochude area recognized her rights over the portion of land parcel South Teso/angoromo/1042. She produced the documents in her list dated 29/9/2016 as PEX 1-6 as follows;
- i. Copy of title for parcel 1043 – Pex 1,
 - ii. Agreement dated 2/6/1995 Pex 2,
 - iii. Agreement dated 5/7/1995 Pex 3,
 - iv. Agreement dated 30/4/1996 – Pex 4,
 - v. Search for 1042 –Pex 4,



- vi. Letter of grant – Pex 5,
- vii. Green Card for 1042 – Pex 6
7. When put to cross examination, PW1 said that her husband bought two parcels and the first land was L.R. 1043 which her husband has a title and which is where she lives on and even buried her husband on it. She told the court that she is using the 5½ acres which she has a title but she has not received title for the disputed 2 acres. PW1 had not taken out succession for the estate of her late husband. That she is claiming 2 acres from land of the defendant but she did not know the number. On re-examination, she said that she did not know the number which the defendants retained but her documents read L.R. 1042 as owned by the defendant.
8. Erneo Odola Ekeyawas the plaintiff's second witness who also adopted his witness statement dated 29/6/2016 as his evidence in chief. PW2 testified that he is a former administrator and he has lived all his life at Ochude Village. He said that he knows the family of Martin Ogeda Okel and Anyi Emaillet Atanasi both who have resided at Ochude. That sometime in late seventies and early eighties, Martin and Anyi entered into an agreement for purchase of 2 acres of land. Upon the demise of Martin Ogeda Okel, his wife and Anyi Emaillet Atanasi approached him that they wish to formalize the land payments at his offices on 2nd June 1995 and he was later informed all the money of the agreement were paid on 30th April 1996. He knew for a fact that the plaintiff and her family have been in occupation and use of the two acres of land purchased and sometime in April, the defendant forcefully prevented the plaintiff's family from using the land.
9. During cross-examination, PW2 stated that he knew Ogeda and Anyi Emaillet is his cousin and he witnessed their agreement as the area assistant chief. The agreement he witnessed was made on 2/6/1995 and the portion being sold was 2 acres from South Teso/Angoromo/1042 and the 2 acres was an addition to the previous land bought. He said that the applicant was stopped from using the land by the defendant after she brought the case to court and currently the defendant is in use of the land. On re-examination, PW2 averred that the family of Ogeda started using the land from 1995 but he could not remember the year the defendant made entry. It was possible the entry may have been in April 2016 as per his statement.
10. The defendant called the evidence of two witnesses with John Angii Esibatestifying as DW1. He adopted his witness statement dated 28/11/2016 and also relied on the Replying Affidavit dated 5/5/2015. He stated that he lives and cultivates on South Teso/angoromo/1042 which is their family land. He said that L.R. 1043 is owned by the plaintiff and denied his father never sold any other land. It is his evidence that he saw the sale agreement for 1042 by the plaintiff when he was served with the court documents. He denied signing the agreement of 5/7/1995 and stated that his name is John Angii Esiba. He denied that the plaintiff has ever used the 2 acres comprised in L.R 1042 asserting that the people in the village know the land L.R. 1042 belongs to their family. He denied ever destroying the plaintiff's crops on L.R. 1042.
11. Upon cross-examination by Mr. Jumba the counsel for plaintiff, he stated that his father passed on in August 2011 and if his father ever sold land, he would have told him. DW1 acknowledged Peter Opoloto is his elder brother and Dismas Esiba is his follower. He said the agreement was drawn by Chrispinus Opiyo is his cousin and he was sent to draw the sale agreement. He was not present when Kshs. 5,000 was paid and he reported the forgery to the assistant chief. Before their father died, he never heard that his father reported forgery of his signature. He reiterated that the plaintiff lives on 1043 since 1976. That the suit land was bushy and it was him who started cultivating the land in 2014. Their family used to cut grass from the disputed portion. On re-examination, DW1 confirmed seeing the agreements by the plaintiff when he was served with court process.



12. Dismas Esiba Ang'it testified as DW2 by adopting his witness statement. He said that DW1 is his brother while the plaintiff is their neighbour. He corroborated DW1's evidence that the plaintiff's husband purchased land from their father in 1976 and which they were given title L.R. 1043. He denied knowing of the sale of a portion of L.R. South Teso/angoromo/1042 or witnessing the agreement. DW2 disowned the signature included in the sale agreement stating that on the material day of the alleged sale, he was away at work in Funyula in Samia District. Before the demise of their father, they had never seen the family of the plaintiff coming to claim a part of L.R. 1042 and everyone in the village knows the land belongs to them.
13. In cross-examination, DW2 stated that he saw the agreement in 2013 when it was brought to them. Erneo belongs to the same clan as them. He denied having any disagreement with the chief. He knew the disputed portion is next to the boundary between their land and L.R. No. 1043 and denied there were no maize crops that were cut by the respondent. DW2 contended that the portion in dispute was given to Justus Omerkeke who is the one cultivating the portion. On re-examination, the witness affirmed that the plaintiff has never stopped Omerkeke from using the land.
14. By consent, the parties agreed that the statement of Agripina Nawiridated 28/11/2016 be adopted as evidence of DW3 without calling her. She averred that she is the wife of the late Anyi Emaillet Atanasi who in 1976, sold a portion of land measuring 5½ acres out of his L.R. No. South Teso/angoromo/573 to the applicant's late husband. Her late husband divided the land into two portions with L.R. No. 1043 being the applicant's share and he retained L.R. No. 1042. She denied that her husband sold to the applicant's late husband any more portion of land out of his portion Land L.R. South Teso/angoromo/1042. There was no agreement entered between her late husband and the applicant in respect to the purported land sale agreement. According to DW3, the purported sale agreement produced before this court was a forgery. At the time of the said purported sale agreement, her son Peter Opolot was still mentally ill and the other sons were not home hence they could not witness the agreement. She stated further that during the funeral and burial of her late husband, the applicant who is an immediate neighbour never made any claim as alleged and the applicant has never used, tilled or cultivated the said portion measuring two acres. DW3 said she has been using the said portion of land for cultivating and herding of cattle.
15. At the close of the defendant's case, the parties agreed to exchange written submissions. The applicant put in her written submissions on 21/2/2022 and submitted that the plaintiff and her witness confirmed that she has been in quiet and actual occupation of the portion being an extension of L.R. South Teso/angoromo/1043. The occupation satisfies all the requirements to find that the possession has matured into adverse possession.
16. The Respondent put in his submissions on 15/3/2022 and submitted that the applicant has failed to prove that the purported land sale agreements of 2/6/1995, 5/7/1995 and 30/4/1996 are genuine and valid for the court to rely on as evidence. He submitted that the applicant has failed to prove that she has been in actual visible, exclusive, open and notorious possession and as such the suit be dismissed with costs.
17. After analysis of the pleadings, the evidence and the submissions made by the parties, the only questions for determination of the dispute are:
 - a. Whether the applicant has proved her use and possession of the 2 acre portion in L.R No. 1042.
 - b. Who should bear the costs of the suit?
18. The essential requirements that one has to meet in order to succeed in a claim for adverse possession was set out in the Case of *Wambugu -v- Njuguna* (1983) KLR 173, where the Court of Appeal held



that adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

19. The applicant has stated that her late husband bought 2 acres of land comprised in L.R. South Teso/angoromo/1042 from the respondent's late father in 1982. She asserted that she completed the transaction between 1995 and 1996 and produced the sale agreements dated 5/7/1995 and 30/4/1996 as PEX 2 and 3. Time for purposes of adverse possession then started running in 1996 after the last payment was made. This was the position in the case of *Public Trustee vs. Wanduru*, where Madan J A stated as follows; -

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”. (Underline mine for emphasis)

20. On cross-examination, the applicant stated that she uses, lives on and even buried her husband on the 5½ acres comprised in title L.R. No. 1043. The occupation and use of the land title number 1043 is not in dispute. The applicant is however required to prove that she has been using the disputed 2 acres comprised in title number 1042 registered in the name of the Respondent. This court has taken the position in law that a sale agreement is only meant to demonstrate the mode of entry into a land that is being claimed for adverse possession as the production of the agreement perse does not constitute proof of possession. Although the Respondent termed the agreement dated 2nd June 1995 a forgery as the identification number of his father is wrong, and that the agreement dated 5/7/1995 was witnessed by his mentally ill brother, they never produced expert evidence to corroborate the allegation of forgery. Secondly, the letter produced to state the mental status of Peter Opolot does not disclose from what period the patient started being attended thus inconclusive as relates to the transactions of 1995.
21. Despite the observation made above, it is not lost to this court that adverse claim depends on proof of possession. The stand on the respondent's case is that their father never told them he had sold 2 acres of L.R. No. 1042 and that the applicant has never been in possession of the 2 acres of L.R. No. 1042. The Respondent has stated that he started using the disputed portion in 2014 and it was just an overgrown bush. DW2 has stated that disputed portion was given to Justus Omerkeke who was cultivating the portion. The applicant in her evidence claimed to have been using the 2-acre portion to cultivate maize and the respondent invaded it in 2015. Her evidence was corroborated with the evidence of Pw2 who stated that the Applicant is the one who had been using the disputed portion until 2015 when the Respondent uprooted her crops.
22. The Respondent admitted that the 2-acre portion in dispute is situated next to the common boundary where L.R 1043 and 1042. All the witnesses agree that before the demise of the Respondent's father, both families lived in peace. According to the Applicant, this peace was disrupted on 1st April 2015 when the Respondent pulled down her crops planted on the disputed two-acre portion. As already stated, her averment that she has been using the suited land was supported by the evidence of PW2 who also witnessed the payments for the said portion in his office in the year 1995.
23. In *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, Kuloba J quoted Gicheru, JA, in Kweyu's case, that in deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts, which inferences are matters of law. Accordingly, while possession is a



matter of fact, any proposition reached from that fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on the given facts. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.

24. From the facts of this case, I draw inferences that favour the Applicant for the following reasons. First, the Applicant has demonstrated that besides the 5½ acres of land they initially purchased in 1976, there was an additional purchase of two-acres in 1982 or 1995 when the agreement was formally drawn. The Respondent did not bring evidence to show that the thumbprint appearing on the agreement dated 2-6-1995 did not belong to their father. Both DW1 and DW2 also did not produce expert evidence that their signatures appearing on the impugned agreements were forged. Their signing the documents couldn't keep them from going to work in Eldoret or Funyula as he alleged. The fact of their disowning their signatures portray them as dishonest people and thus denying that the applicant was using the disputed portion would be much easier.
25. The second inference is drawn from the contradictions in the evidence of the Respondent and his witnesses. The Respondent stated the place was bushy and he is the one who cleared it and started cultivating it in 2014. DW2 stated that the portion in dispute was given to Justus Omerkeke. In re-exam, DW2 said Omerkeke has used the disputed portion for a while and the Plaintiff has never stopped him. According to DW3 whose statement was admitted without appearing in court, she stated that she is the one who has been using the said portion of land for cultivation and herding cattle. From their contradictions, there can only be one conclusion, that none of them including Justus Omerkeke has used the disputed portion. How can they not know what the portion is being used for when they live on the same land L.R No. 1042?
26. Guided by the foregoing observations, I can safely conclude that the Applicant has proved that she has been cultivating thus in possession of the two-acre portion comprised in land title South Teso/Angoromo/1042 registered in the Respondent's name as the personal representative of the estate of Anyi Emailit Atanasi. The said possession has been for a period in excess of twelve years and has by operation of law acquired rights over the two-acre portion.
27. Consequently, I find that the amended Originating Summons dated 12th October 2018 is merited and is hereby allowed on the following terms;
 - a. An order be and is hereby issued that the Applicant Herenia Adipo Ogeda has acquired by way of adverse possession two (2) acres of land comprised in L.R South Teso/angoromo/1042 registered in the name of the Respondent as administrator of the estate of Anyi Emailit Atanasi-deceased.
 - b. The Respondent is directed to execute transfer documents for the two-acre portion comprised in the suit title in L.R South Teso/angoromo/1042. In default, the Deputy Registrar of the Court to execute the said documents in the due performance of this decree.
 - c. Each party to bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF JULY 2022.

A. OMOLLO

JUDGE

