



**Opiyo v Nyadero (Environment & Land Case 15 of 2021)  
[2022] KEELC 3299 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3299 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 15 OF 2021  
AY KOROSS, J  
JULY 28, 2022  
( ORIGINALLY KISUMU ELC CASE NO. E025 OF 2021)**

**BETWEEN**

**BENSON OCHIENG OPIYO ..... PLAINTIFF**

**AND**

**JOHN OTIENO NYADERO ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By way of originating summons dated 29/06/2021, the plaintiff instituted suit against the defendant claiming that he was an adverse possessor of land parcel Central Alego/Nyalgunga/1715 measuring 0.32 Ha (hereinafter “the suit property”) which was registered in the name of the defendant and that it was held by him in trust for the plaintiff. The plaintiff prayed for several declaratory orders and that he be registered as the proprietor of the suit property.
2. The defendant neither entered appearance nor filed a defence however, he participated in the proceedings.

**The plaintiff’s case and evidence**

3. The plaintiff’s case was contained in his originating summons, affidavit in support dated 29/06/2021, his undated witness statement and documents that he produced in his testimony which were produced as PExh 1 to 5.
4. In summary, it was his case that the suit property was owned by his grandfather one Ogago Senior who bequeathed it to his father one Opiyo Oogago however, because his father was out of the country, his father’s younger brother Nyadero Ogago [the defendant’s father] fraudulently registered himself as



proprietor of the suit property without his father's knowledge. That the defendant's father surrendered the suit property to the plaintiff's father.

5. On the death of the Opiyo Oogago, the defendant conducted succession proceedings on Nyadero Oogago's estate and transferred the suit property to his name and that the defendant had threatened to evict the plaintiff's family from the suit property and demolish houses that were constructed thereupon.
6. According to the plaintiff, he had occupied the suit property from 1982 in a manner that was open, peaceful and without interruption. He asserted that the defendant's right to recover the suit property expired by effluxion of time.
7. On cross-examination by the defendant, he testified that the defendant had another parcel of land parcel and that Opiyo Oogago had constructed on the suit property in the year 1990 and he neither knew the circumstances under which Opiyo Oogago put up a structure on the suit property nor how he [plaintiff] came into occupation. He asserted that he and the defendants were "brothers" in the African context because their respective fathers were brothers.
8. On re-examination, he testified that he and his family started residing on the suit property in the year 1991 and that the defendant did not reside thereupon. He stated that in 2021, the defendant entreated him to vacate the suit property.
9. In accordance with the provisions of Order 37 Rule 3 of the Civil Procedure Rules, the plaintiff raised several questions for determination by this court. In summary, the questions were whether the plaintiff was entitled to the suit property by adverse possession and trust, whether he should be registered as the proprietor thereof and whether the subsisting registration should be cancelled and the suit property be registered in his name.

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

10. By his Counsel Sala & Mudany Advocates, the plaintiff filed written submissions dated 20/4/2022. Counsel submitted that adverse possession was premised on several principles. Firstly, Section 7 of the *Limitation of Actions ACT* prohibited a person from instituting a claim to recover land upon the lapse of 12 years, secondly, the claimant must prove that he had been in exclusive possession of the suit property in a manner that was open, as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. On this he relied on the following Court of Appeal decisions *Kasuve v Mwaani Investment & 4 Others* IKLR which was cited in the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR, *Mtana Lewa v Kabindi Ngala Mwangandi* [2015 eKLR] and *Wambugu v Njuguna* [1983] KLR 173. This last decision was not availed to this court.

#### **The defendants' submissions**

11. As has been observed by the court, the defendant never entered appearance or filed a defence but he participated in the proceedings and even filed written submissions. He urged the court to him allow him to enter appearance and file a defence. He contended that there had been previous proceedings between the parties in which he had been successful. He introduced issues of fact and urged the court to deem the submissions as a defence and for the suit to be dismissed with costs.

#### **Analysis and determination**

12. Having considered the plaintiff's pleadings and evidence, parties' written submissions and authorities cited and availed to this court, it is my considered view that the single issue for determination is



whether the plaintiff has proved that he is an adverse possessor of the suit property. Though the suit was unopposed, the plaintiff needed to prove his case on a balance of probabilities. I will address my mind on the legal and jurisprudential framework on the single issue. However, before I do that, it is paramount that I deal with certain issues that emerged from the defendant's submissions.

13. The submission that his submissions be deemed as a defence are rather strange in law. A defence can never take the place of pleadings. Order 2 Rule 3(1) of the Civil Procedure Rules provides that pleadings must contain facts and not evidence. The facts are proved by way of evidence. On the other hand, *Black's Law Dictionary*, 11<sup>th</sup> Edn, p. 1724 which quoted P.G. Pagone, "Written advocacy; Writing with Effect and Persuasion," in *Essays in Advocacy* 119,127 (Tom Gray et al.eds., 2012) described the intent of submissions as tools of mere persuasion. This position was succinctly captured by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where the court stated thus;

"Submissions cannot take the place of evidence... Such a course only militates against the law...Submissions are generally parties' "marketing language"

14. Further, the defendant participated in these proceedings and nothing could have been easier than for him to seek leave of this court to extend time for him to file pleadings; which he did not. Consequently, the outlandish prayers sought by the defendant in his submissions are unsustainable. I will now proceed with the main issue for determination.

15. Sections 7, 13 (1) and (2), 17 and 38 (1) and (2) of the *Limitation of Actions ACT* are the statutory underpinnings for 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  
"

16. 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 an adverse possessor to move the court in an appropriate manner for him or her to be registered as the proprietor of a particular parcel land.

17. Therefore, the critical period for determination whether possession was adverse is 12 years and the burden lies with 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.

18. Permission or rather lack of it is an important principle in proving or disproving adverse possession. The Court of Appeal in the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR stated thus;

"It is precisely because adverse possession does not arise where a person is on another's land with the latter's consent or permission..."

19. The authorities cited by the plaintiff in his decision indeed captures some of the settled principles of adverse possession. Even if the plaintiff's case was undefended, did he prove that he was an adverse possessor? That is the question that begs to be answered by this court.



20. The plaintiff and defendant are cousins and their respective deceased fathers were brothers. The plaintiff contended that his right to the suit property could be traced back to his grandfather who had bequeathed it to his father however, the defendant's father fraudulently registered it in his name. Contrary to the settled position of law, fraud was not specifically pleaded as required. See Order 2 Rule 4(1) (a) of the *Civil Procedure Rules*. Additionally, the plaintiff did not lead evidence that the suit property was customary land.
21. This court has had a chance to scrutinize the register of the suit property that was produced by the plaintiff and there is no trace of evidence that it was registered in the name of Ogago Senior. From the register, on 17/8/1978, the suit property was 1<sup>st</sup> registered in the name of Nyadero Ogago who was subsequently succeeded in title by the defendant.
22. The plaintiff's evidence was stained with inconsistencies and contradictions. In his evidence in chief, he testified that Nyadero Ogago surrendered the suit property to Opiyo Oogago. He did not disclose whether the surrender was forceful or voluntary. During cross examination, he however, stated that he did not know the circumstances under which he and his family started residing on the suit property.
23. Further, in his evidence in chief, he testified that he and his family had resided on the suit property from the year 1982. During cross examination, he averred that his father put up a structure thereupon in the year 1990. In his re-exam, he testified that and that he and his family started residing on the suit property in the year 1991 and that he constructed his own house on the suit property in the year 2010.
24. In his evidence in chief, he testified that the defendant took ownership of the suit property upon the demise of Opiyo Oogago. He averred that the defendant later on conducted succession proceedings on Nyadero Oogago's Estate. From the evidence produced, Opiyo Oogago died in the year 2012 and my understanding of the plaintiff's evidence is that the defendant took ownership of the suit property sometimes after the year 2012.
25. From the evidence tendered, it is not lost to this court that even if the plaintiff's case was undefended, his testimony leaves a lot to be desired. It was contradictory and maligned with half-truths and loopholes. When did time accrue? Was it from 1982, 1990, 1991 or after 2012? What were the circumstances that led to his family to reside on the suit property? Was it as a result of voluntary or forceful surrender or unknown circumstances. From the evidence produced, he has several surviving siblings, nonetheless, he did he not bother to call any of them to corroborate his testimony. Bearing in mind that he and the defendant are close family relations, why did he not bother to call any of their family members or even neighbours to corroborate the circumstances of his occupancy. Further, I find it curious that he did not produce any photographs to demonstrate his family's occupancy of the suit property.

PARA 26.

This court takes judicial notice that in African culture, it is not strange for a family relation to accommodate a kinsman in his homestead, make provisions for him including giving him land for his or her usage. Could this have been the circumstances of this case which would explain why the plaintiff was at pains to substantiate how he and his family came into occupation of the suit property? The jury is out there. Kuloba J (as he then was) appreciated the intricacies of African culture in a claim of adverse possession in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR when he stated thus in his obiter;

“The Court takes judicial notice, and does not feign ignorance, of the prevalent customs and usages under African socialism, whereby relatives, friends, clansmen, the landless and, increasingly, purchasers under annulled and avoided agreements and transactions, are allowed to remain in



possession of one's land for indefinite lengths of time for as long as the owner does not immediately require the land so occupied, on everybody's understanding that at one time or other, the person so accommodated shall have to leave and go away”

27. The upshot is that the court finds that the plaintiff did not prove his claim on a balance of probabilities. Consequently, the plaintiff's suit is hereby dismissed. It is trite law that costs follow the event and because the defendant neither entered appearance nor filed a defence, I will not award him costs.
28. Ultimately, I make the following disposal orders:
  - a. The plaintiff's suit is hereby dismissed with no orders as to costs.

**DELIVERED AND DATED AT SIAYA THIS 28TH DAY OF JULY 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**28/7/2022**

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

N/A for the Plaintiff

John Otieno Nyadero defendant; acting in person.

Court assistant: Ishmael Orwa

