



**Nyangwara v Ayienya & another (Environment & Land Case  
14 of 2017) [2022] KEELC 14422 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14422 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 14 OF 2017**

**A OMBWAYO, J  
OCTOBER 27, 2022**

**BETWEEN**

**GEORGE F NYANGWARA ..... PLAINTIFF**

**AND**

**NANCY AKOTH OGADA ..... 1<sup>ST</sup> DEFENDANT**

**JOSHUA ONYANGO AYIENYA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. George F Nyangwara (hereinafter referred to as the plaintiff) has come to court by way of originating summons against Joshua Onyango Ayienya and Nancy Akoth Ogada claiming to be in occupation and adverse possession of Kisumu/Kombura/381 and therefore the court ought to vest titles of the suit land to the plaintiff. The originating summons was based on grounds that the plaintiff purchased the suit land from the 1<sup>st</sup> defendant on October 8, 1987 when the land was still under adjudication, where the defendant promised to transfer title of the suit land into the plaintiff's name once the property was registered.
2. That the 1<sup>st</sup> defendant in total breach of the agreement, failed to transfer title to the plaintiff and instead, went ahead to cause the parcel to be transferred into the name of the 2<sup>nd</sup> defendants in the year 2016. That the said transfer was irregular and unlawful. That the plaintiff has been in constant occupation of the suit property without force, secrecy, permission or interruption for a period totaling 30 years.
3. In the supporting affidavit the plaintiff states that he purchased the suit property Kisumu/ Kombura/381 from the 1<sup>st</sup> defendant and thereafter entered into a sale agreement on October 8, 1987. That during the time of sale, the land was still under adjudication and the defendant promised to make a follow up to ensure that once the adjudication is complete, the same would be registered in the plaintiff's name.



4. That since the date of the agreement, the plaintiff has been in occupation of the said parcel of land for a continuous period totaling 30 years without force, interruption or secrecy.
5. That in 2016, it came to his knowledge that the 1<sup>st</sup> defendant irregularly caused the suit parcel to be transferred into the name of the 2<sup>nd</sup> defendant even when he was fully aware that he did not have good title to transfer the land to the said defendant or any other 3<sup>rd</sup> party for the matter. That he is advised by his advocate on record whose advise he verily believes to be true that by operation of section 6 and 7 of the Land Control Act he is unable to enforce his rights under agreement to demand specific performance but he can only claim a refund of the monies paid in exchange for the land.
6. That however, he has been on occupation of the suit land for a period of 30 years, and has heavily invested in it, and it will therefore be unfair if it is taken away from him.
7. That having been in occupation of the said land for period of 30 years without secrecy, permission or interruption, he believes that he qualifies to claim ownership of the land by virtue of adverse possession.
8. Nancy Akoth Ogada in reply stated that she is the current registered sole absolute proprietor of the land parcel known as Kisumu/Kimbura/381 measuring 0.17 hectares. That Dancan Arum is her husband and that they did acquire the interest in it jointly. That prior to acquiring the land it was vacant and no activity was taking place on it.
9. That they agreed with the 1<sup>st</sup> defendant to acquire the land and he agreed to sale to them a portion at Kshs 60, 000 which he was paid by her husband in full.
10. That they got interested in the other portion and the 1<sup>st</sup> defendant informed them that he had a dispute with the plaintiff over the same for a long time. That the plaintiff agreed to receive Kshs 110,000 and not to have issues over the sale of the portion and that her husband made payments to the plaintiff partly in the sum of Ksh 50,000 and Ksh 60,000 was to be in February,2015. That when the defendants went to pay the plaintiff Ksh 60,000 he was told by the Assistant Chief to bring his family to witness receipt of the money and he got annoyed. That subsequently he reversed the transaction.
11. Dancan Arum husband to the 2<sup>nd</sup> defendant states that in the year 2014 the 1<sup>st</sup> defendant approached him and informed him that he was selling land in Ahero and he discussed the matter with the 2<sup>nd</sup> defendant. That the land had 2 portions which were adjacent to each other but the title was in one name.
12. That they agreed with the 1<sup>st</sup> defendant to start with buying his portion at Kshs60,000 which he did on January 7, 2015 and they entered into a sale agreement. That at the time of buying the land all portions were vacant.
13. That the 1<sup>st</sup> defendant further informed him that they had a dispute with the former Chief who is the plaintiff in this suit.
14. That he visited the plaintiff while accompanied by Bishop Obara Nyangwea. That the plaintiff informed them that he indeed had a dispute with the 1<sup>st</sup> defendant over money to process titles.
15. That he informed Arum that they were to discuss, agree and upon such agreement being reached they would call Arum.
16. The plaintiff and the 1<sup>st</sup> defendant agreed to sale their portions with the plaintiff agreeing to receive Kshs 110,000 from Arum and 2<sup>nd</sup> defendant as payment.



17. That on the January 24, 2015 he paid Kshs 50,000 to the plaintiff by m-pesa statement .That in February, 2015 he wanted to pay him the balance of Kshs 60,000 and they proceeded to the office of the Assistant Chief for the purposes of him being a witness to the receipt of funds.
18. The plaintiff on the February 13, 2015 reversed the funds to Mr Arum. That the 1<sup>st</sup> defendant had already conveyed the land in full to the 2<sup>nd</sup> defendant and the issues between themselves are immaterial to the transaction as the 1<sup>st</sup> defendant dealt with the land as the registered proprietor.
19. That the plaintiff cannot be said to be an adverse possessor as he is not in occupation of the land, he has not had peaceful occupation of the suit land and he appears to be at the mercy of the 1<sup>st</sup> defendant, thus any interests he had in the land are with the 1<sup>st</sup> defendant's consent.
20. When the matter came up for hearing, PW1 being the plaintiff stated that he bought the land form the 1<sup>st</sup> defendant. He has been in occupation since 1987 without any force. Though the land is not fenced and his family does not reside on the same, he has been using the same for farming since signing the agreement. The plaintiff wholly relied on his supporting affidavit.
21. Defence witness 1 Joshua Onyango Ayienya states that he was the owner of the land in contention. He sold the land to the plaintiff on October 8, 1987. He was given Ksh 3,200/=. The plaintiff has not planted on the land and has not entered the land as he did not complete the price. According to the 1<sup>st</sup> defendant the land belongs to the 2<sup>nd</sup> defendant. On cross examination he states that the plaintiff bought the land during adjudication and has been in occupation for 30 years. He admitted that when he sold the land to the 2<sup>nd</sup> defendant the latter knew that the land had been sold to the plaintiff. The plaintiff and his 2<sup>nd</sup> defendant entered into agreement of sale but it did not materialize as the plaintiff refunded the money.
22. DW2 Nancy Akoth Ogada adopted her replying affidavit and statement as evidence in court. She reiterates that she bought the suit property from the 1<sup>st</sup> defendant and was issued with title on January 20, 2015. On cross examination she stated that she was aware that the plaintiff had purchased the property from the 1<sup>st</sup> defendant.
23. DW3 Dancan Arum stated that he is husband to 2<sup>nd</sup> defendant, he bought the property but caused it registered in the wife's name. He admits that the plaintiff had purchased the property from the 1<sup>st</sup> defendant. They refunded him the money but he also refunded the same. The plaintiff submitted he has proved his case on a balance of probability and therefore entitled to judgment.
24. I have considered the originating summons, supporting affidavit, replying affidavit and do find that the plaintiff has demonstrated that he bought the land in dispute in 1987. The 1<sup>st</sup> defendant in cross examination stated that he sold to plaintiff the parcel of land during adjudication but later he wanted the plaintiff to add more money. He admitted that the land has been in the plaintiff hand for approximately 30 years. He was using the land openly and without force. The 1<sup>st</sup> defendant sold the land to the 2<sup>nd</sup> defendant in 2015 despite the fact that the plaintiff was in possession after the 1<sup>st</sup> defendant selling to him the same land in 1987. The 1<sup>st</sup> defendant testified that the 2<sup>nd</sup> defendant knew that the land had been sold to the plaintiff. The 2<sup>nd</sup> defendant did admit that the land was in possession of the plaintiff by attempting to purchase the land from the plaintiff. The act of attempting to buy the land from the plaintiff was evidence that the plaintiff had obtained ownership of the land due to adverse possession.
25. This court has time and again dealt with the principle of adverse possession. In this case, it is the plaintiffs case that he has been in continuous, uninterrupted occupation and possession of the suit property for a period in excess of 12 years.



26. The burden of leading the court to ascertaining this lies with the plaintiff. This court agrees with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ No 283 of 1990 *Gabriel Mbuvi v Mukindia Maranya* [1993] eKLR, where the court held:

“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”

27. The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, 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 ceases 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 purposes 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.”

Finally, section 38 of the Act provides that:

“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.”

28. The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then 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 has been in possession of the requisite number of years.”

29. This right to be adverse to land does not automatically accrue unless the person in whom this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to court for orders of adverse possession. Set the findings of the court in Malindi App No 56 of 2014 *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR where it held;

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

30. Further, in the case *Mbira v Gachuhi* (2002) 1 EALR 137: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

31. Therefore, to determine whether the applicant’s rights accrued the court will seek to answer the following

- i. How did the applicant take possession of the suit property?
- ii. When did she take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long has the applicant been in possession?

32. I do find that the plaintiffs has established on a balance of probabilities that he is entitled to a declaration that he has acquired of adverse possession and that I do grant orders that the registration of the 2<sup>nd</sup> defendant as the owner of land parcel Kisumu/Kobura/381 be cancelled. I do declare the plaintiff an adverse possessor of Kisumu/Kobura/381. I do order that the Kisumu County Land Registrar to register the plaintiff as the owner Kisumu/Kobura/381. Costs are awarded to the plaintiff. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF OCTOBER 2022.**

**A. O. OMBWAYO**

**JUDGE**

