



**Oyange v Chimba (Environment & Land Case 29 of 2021)
[2022] KEELC 14438 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 29 OF 2021
AY KOROSS, J
OCTOBER 27, 2022
[ORIGINALLY KISUMU ELC CASE NO.20 OF 2019 (O.S)]**

BETWEEN

ANDREW OCHIENG OYANGE PLAINTIFF

AND

JOICE ODONGO CHIMBA DEFENDANT

JUDGMENT

Introduction

1. By an originating summons dated 18/06/2019, the plaintiff instituted suit against the defendant who is a sister of one Godia Jaramba [Godia]; the previous registered proprietor of land parcel number North Gem Malanga/64 hereinafter “suit property”. He sought several reliefs against her, inter alia;
 - a. A declaration the plaintiff had become entitled to the suit property by adverse possession;
 - b. An order that the defendant do transfer the suit property to the plaintiff and, in default the Deputy Registrar be authorized to execute all the relevant documents to effect the transfer; and
 - c. Costs to the plaintiff.
2. The summons was supported by the affidavit of the plaintiff. He annexed attachments which were inter alia, letters from chiefs and an official search over the suit property. He produced these documents in support of his case.
3. In his supporting affidavit, the plaintiff deponed, inter alia, he had been in actual, open, notorious and uninterrupted use of the suit property from the year 1986 which was when Godia left it in his care, use and possession. In the year 2015, the defendant sold the suit property to one Joshua Walgwe. Further, there had been probate proceedings over Godia’s Estate that pitted the defendant against him; he was



unsuccessful. It was his case that Godia's rights to the suit property had extinguished by operation of law.

4. In opposition to the originating summons, the defendant filed a replying affidavit dated 16/10/2019. She deponed, inter alia, she was registered the proprietor of the suit property pursuant to probate proceedings on Godia's estate; Godia was presumed dead pursuant to a court order. That after Godia left the suit property in 1980's, her mother one Jane Makhoha Jaramba utilized it until her death in the year 2009. If at all the plaintiff utilized the suit property, then it was with consent from her mother. In the probate cause, the plaintiff contended that he was a caretaker of the suit property hence the plaintiff's occupation was by consent, license or authority of the registered owner. She urged the court to dismiss the plaintiff's suit with costs.
5. In rebuttal, the plaintiff filed a further affidavit dated 22/03/2021. He contended that the change of ownership of the suit property from Godia's name to that of the defendant did not extinguish his claim. That save for using police officers to intimidate him, the defendant had not asserted her rights over the suit property. His occupation had been without permission from the owner.

Plaintiff's evidence

6. The plaintiff testified as PW1, he adopted his witness statement as his evidence in chief. It was almost similar to his affidavit in support of the summons and this court need not reiterate them. He contended that he was the defendant's nephew.
7. On cross examination, he testified that if Godia was to resurface, he would have no qualms in handing over the suit property back to him. He had never lived on the suit property but lived on a separate parcel of land. In the probate cause, he adduced a document which showed he was a caretaker of the suit property.
8. In re-exam, he contended that Godia was deceased and he had utilized the suit property for over 34 years.
9. PW2, Rose Anyango Otieno who led PW 1's evidence adopted her witness statement. She was the plaintiff's wife. She testified when she got married in the year 1990, she found the plaintiff cultivating the suit property and they had continued to do so to date. In her cross and re-exam, she reiterated her testimony that they utilized the suit property.
10. PW3, Sylvia Anyango also led the plaintiff's evidence. She testified that the suit property was fallow. In cross exam, she testified that if Godia was ever to reappear, the suit property would be handed over back to him.

Defendants' evidence

11. Upon an application by the defendant's Counsel Mr. Ooro E, the defendant withdrew her witness statements dated 11/10/2019 and 17/12/2021. She relied on her replying affidavit. She contended that she did not recall if she ever filed pleadings in opposition to the plaintiff's case. She did not want the plaintiff to be granted the suit property. She produced grant of letters of administration and a certificate of confirmation of grant.
12. During cross examination, she testified that she had not sold the suit property. She had not produced any documents to show that Godia had issued the plaintiff with a consent to use the suit property. Her plea to the plaintiff to stop tilling the suit property had fallen on deaf ears.



Parties written submissions.

13. As directed by the court, the defendant's Counsel filed his written submissions dated 12/04/2022. As at the time this court was writing this judgment, the plaintiff's Counsel Mr. Odera had not filed his. If at all they will be filed, this court will consider them as having being filed out of time. Counsel identified 3 issues for determination ;(i) whether the plaintiff had become entitled to the suit property by adverse possession (ii) whether the plaintiff was entitled to the orders sought and (iii) what appropriate orders could be granted.
14. On the 1st issue, Counsel submitted that the doctrine of adverse possession was well settled. He relied on the case of *Mbira v Gachubi* [2002] 1EALR 137 where the court stated thus;

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

Counsel also relied on the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR.
15. He also relied on the Court of Appeal decision of *Ndiema Samburi Soti v Elvis Kimtai Chepkesses* (2010) eKLR where the court expressed itself as follows;

“A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal, (*Wanje vs. Saikwa (No.2)* [1984] KLR 284)”.
16. Counsel argued that according to the plaintiff, the suit property was left in his care by Godia which would imply consent. Further, during cross-exam, the plaintiff admitted that if Godia was to reappear, he would surrender the suit property to him. From this testimony, the plaintiff had failed to prove he was an adverse possessor. Further, the plaintiff had admitted that there existed an agreement between Godia and him that he would be Godia's caretaker.
17. On the 2nd issue, it was Counsel's final argument that the plaintiff was estopped from changing tactics; from a claim of being a beneficiary of Godia's estate to being an adverse possessor. It was Counsel's position that this went against the grain of Section 7 of the *Civil Procedure ACT*. Counsel did not tender any authorities to this court.

Analysis and determination

18. I have considered the parties' pleadings, evidence and the defendant's submissions and in my considered view, the issues falling for determination are; (i) whether the plaintiff proved that he was an adverse possessor (ii) what appropriate orders should be granted? and (iii) who should bear the costs of this suit?
19. Some of the statutory underpinnings of the doctrine of adverse possession are set out in the Limitation of Actions ACT and the Land Registration ACT.
20. Section 7 of the *Limitation of Actions ACT* intimates that a proprietor cannot, after 12 years, recover land that had been acquired by adverse possession. Section 13(1) of the said ACT states that an adverse possessor must be in possession of land in order for a right of adverse possession to arise. Section 13(1) of the same ACT states that if adverse possession is interrupted, the period of adverse possession starts running afresh when the adverse possessor again takes possession of the land.



21. Section 17 states that, “subject to Section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.
22. Sections 38 (1) and (2) of the [Limitation of Actions ACT](#) states that “where a person claims to have become entitled by adverse possession to land, 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”.
23. Section 28 (h) of the [Land Registration ACT](#) recognises that all registered land is subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register; rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
24. The decision of *Mtana Lewa v Kahindi Ngala Mwangandi* (Supra) that was cited by the defendant was upheld by the Court of Appeal decision in [Mtana Lewa v Kahindi Ngala](#) (2015) eKLR, where the court held as follows:

“The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of the adverse possession 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”.
25. This decision indeed captures the settled principles of adverse possession. I will now proceed to juxtapose the facts of this case to the established legal framework in answering the identified issues which I shall deal with sequentially.
26. Adverse possession is a matter of fact and a court has to draw legal inferences from proven facts which inferences are matters of law. From the evidence adduced, it was common ground that at the time the suit was filed, the plaintiff was in possession of the suit property. The issue in contention was whether it was with permission or not.
27. Although the plaintiff’s possession was open, it was not in the sense envisaged by the doctrine of adverse possession. This is because according to the plaintiff, the deceased gave him express authority to use the suit property as a caretaker. The true owner was therefore never put on notice that a trespasser was in possession.
28. The plaintiff’s possession had to have been without permission of the owner. From the plaintiff’s pleadings, it is evident that Godia had left the suit property in his care. He was consistent in his testimony. No evidence was led that Godia ever withdrew his consent.
29. Because the plaintiff was given license to use the suit property, his entry and continued use did not depict one who had asserted a hostile title over the suit property. This was bolstered by his testimony that he would revert the suit property to Godia’s possession if he ever sought it. See *Ndiema Samburi Soti v Elvis Kimtai Chepkesses* (Supra)
30. The plaintiff attempted to contradict his testimony in his further affidavit and cross examination, however, it was evident that his possession was with permission.
31. Having evaluated the evidence adduced and also considered the applicable law, I find that the plaintiff did not prove his case on a balance of probabilities to enable this court declare that he had acquired title to the suit property by virtue of being in adverse possession.



32. What orders should this court grant? This court hereby dismisses the plaintiff's claim and because costs follow the event, I award costs to the defendant.
33. The upshot is that this court issues the following disposal orders;
- a. The plaintiff's claim for adverse possession is hereby dismissed with costs to the defendant.

It is so ordered

DELIVERED AND DATED AT SIAYA THIS 27TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS

JUDGE

27/10/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform;

In the Presence of

N/A for the parties

Court assistant: Ishmael Orwa

