



**Ogola v Opano (Environment and Land Case Civil Suit 30 of 2019)
[2022] KEELC 13436 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE CIVIL SUIT 30 OF 2019
DO OHUNGO, J
OCTOBER 12, 2022**

BETWEEN

DAVID OKONJI OGOLA APPLICANT

AND

SALOME MUSIMBI OPANO RESPONDENT

JUDGMENT

1. By Originating Summons (OS) dated September 28, 2015, the applicant claimed to have acquired the parcel of land known as L.R. No. Kisa/Emasatsi/349 (the suit property) by adverse possession and sought the following orders:
 - a. The ownership of the whole land parcel L.R. No. KISA/EMASATSI/349 claimed by the applicant for reasons set out in his affidavit filed herewith and upon other reasons as may be adduced.
 - b. A declaration that the applicant's father who is since deceased the Francis Ogola (sic) purchased the whole parcel L.R. No. KISA/EMASATSI/349 from the respondent's deceased father in law one Apisalom Oyango and the deceased brother one Silifano Moyi in 1957, the Applicant was born on the land in question, took vacant possession, has continued to be in open, peaceful, uninterrupted adverse possession to date.
 - c. A declaration that the Respondent holds the whole land parcel L.R. No. Kisa/Emasatsi/349 in trust for the Applicant to whom it should be transferred/ registered as sole absolute owner.
 - d. A declaration that the Respondent's right and interest in the whole land extinguished by operation of law/adverse possession.
 - e. That this court do further order as follows: -



- i. That the whole land parcel L.R. No KISA / EMASATSI/349 be transferred to and registered in the names of the applicant as sole absolute owner.
 - ii. That the Respondent be directed to sign all transfer documents in default the Deputy Registrar of this court be authorized to do so.
 - iii. That the Respondent do pay costs of this suit.
2. The OS was supported by an affidavit sworn by the applicant. He deposed that in 1957 or thereabouts his deceased father one Francis Ogola purchased the suit property from the respondent's father-in-law one Apisalom Onyango and his brother one Silfano Moyi at an agreed purchase price of KShs 1,000 which amount was duly cleared in 1957 or thereabouts and that the said Apisalom Onyango and Silfano Moyi put his father in possession in 1957. The applicant further deposed that he was born in the suit property in or about 1960 and that he remained therein up to the date of filing the OS. That he fully settled on the land and developed it by building four houses, planting maize, beans, and other crops on it. That he had been in open, peaceful, continuous, exclusive occupation or use of the suit property since 1960 and that the respondent had never used or occupied it since it was bought in 1957.
3. The respondent opposed the OS through a document titled "Reply to Originating Summons" in which she averred that the suit property was initially owned by her father-in-law one Absalom Onyango pursuant to a title deed issued to him on September 16, 1965 and that it was later transferred by way of succession to her late husband Francis Opano Sabuti who was a son of the late Absalom Onyango, and a title deed was issued to him on September 25, 1985. That her late husband died on June 25, 2005, and she obtained grant of letters of administration in respect his estate on September 26, 2006, which grant was confirmed on March 16, 2009, upon which she was issued with a title deed in respect of the suit property on November 23, 2012.
4. The respondent further averred that part of the history of the suit property that resulted into a dispute between her late husband and the applicant's father, one Francis Riga Ogola is documented in a letter from her late husband to the Land Registrar Kakamega dated April 3, 1985, which letter explains why a caution that was lodged by the applicant's father should be removed to enable her late husband be issued with a title deed. That the letter demonstrates that the agreement made between Absalom Onyango and Francis Riga Ogola was null and void and that the Land Registrar accepted the letter and issued a title deed to Francis Opano Sabuti.
5. The respondent went on to deny that the applicant was born on the suit property. She stated that the buildings referred to by the applicant were erected after she was issued with a title deed on November 23, 2012, thereby making the applicant a trespasser. She therefore counterclaimed as herein under:
 - i. The court to dismiss the plaintiff's suit and declare that land parcel No. KISA/EMASATSI/349 belongs to the defendant, and to further issue an eviction order directing the Plaintiff to move out of the said parcel of land.
 - ii. Cost of suit and interest in prayer (i) above.
 - iii. Any other relief or order that the Hon. Court may deem fit to grant.
6. At the hearing, the applicant testified as PW1 and stated that he is a farmer. He adopted his witness statement as his evidence in chief and generally reiterated the contents of his supporting affidavit which I have highlighted above.
7. Wilfred Odinga Shisala testified as PW2. He stated that he is a farmer living in Kisa and the applicant's neighbour. He adopted his witness statement filed on September 28, 2015. He further stated that he



knew the applicant as the elder son of the late Francis Ogola and added that the late Francis Ogola purchased the suit property from Apisalom Onyango and Silfano Moyi in or about the year 1957. That the applicant resides on the suit property, has developed it and that the applicant has been in occupation for a period of over twelve years. He concluded by stating that the respondent has never resided on the suit property.

8. Lastly, Joseph Sikochi Okunyanyi testified as PW3. He stated that the applicant was his neighbour and that he did not know the respondent. He adopted his witness statement filed on September 28, 2015. The said statement is replica of PW2's statement.
9. The applicant's case was then closed.
10. During defence hearing, the respondent testified as DW1. She stated that she was a farmer and that she knew the applicant. She adopted the "Reply to Originating Summons" as her evidence in chief. She further testified that her late husband told her that the applicant's grandfather wanted to buy the suit property from Absalom, that the applicant's grandfather did not complete the transaction and that the suit property remained with Absalom who used it all along.
11. Under cross examination, DW1 testified that Francis married her in 1970, that her husband and her never resided on the suit property and that she did not personally know what happened on the suit property before she got married. That in the year 2013, she learnt that the applicant was constructing on the suit property and that she was informed by her husband that, the applicant's father bought land from Absalom. That her husband filed for and obtained letters of administration knowing that the applicant's father had bought land from Absalom in 1957. That Absalom filed a case against Francis Ogola and got his land back. She further stated that since she got her title in 2012, she did not file any suit against the applicant to evict him from the land and that the last time she went to the suit property was in 2006. She added that the applicant's brother had been hostile and kept her away from the suit property and that she reported the matter to the area assistant chief. During re-examination, she stated that she was married in 1970 and that at that time, Absalom was using the plot for farming and no one else was using the plot. That Absalom passed away in 1979.
12. Aindi Injiri testified as DW2. He adopted his witness statement dated October 12, 2018. He stated that he is brother-in-law to the respondent, a brother to the late Francis Opano and a son to the late Absalom Onyango. That the suit property was first owned by Absalom Onyango, later by Francis Opano and finally succeeded by the respondent. That his father Absalom Onyango entered into an agreement for the sale of the suit property with the applicant's father, one Francis Riga Ogola in the year 1957 wherein Absalom was to sell the suit property at KShs 1,000. That the applicant's father presented a cow valued at KShs 300 as part of payment leaving a balance of KShs 700 which he later failed to pay on time. That on September 25, 1962 Absalom returned the cow back to the applicant's father before a council of elders. He added that the applicant was not born on the suit property and that he was not living there since his childhood.
13. DW2 further testified that Francis Ogola did not live on the suit property and was not buried on it. Although he stated that nobody was residing on the suit property as at the date of his testimony, he conceded that he had never visited the suit property. DW2 kept mixing himself up as to whether the purchase price was KShs 100,000 or KShs 1,000 and whether the deposit paid was worth KShs 30,000 or KShs 300.
14. The defence case was then closed, and parties filed and exchanged written submissions.
15. The applicant argued that he had proved his case on a balance of probabilities and that he had satisfied the requirements of adverse possession. It was the applicant's submissions that he had established that



he had been in use of the suit property with the knowledge of the respondent and with the knowledge of the previous owners who never asserted their rights on the suit property and that the respondent and her witnesses indeed confirmed the position by admitting on cross examination that neither she, her husband nor father in law ever used the land as the same was being used and occupied by the applicant and his family. The applicant asserted that the respondent's father-in-law surrendered the suit property to the applicant's father pursuant to the agreement of 20th June 1957. That even after certificate of confirmation of grant issued on 26th September 2006 and obtaining title, the respondent did not pursue a claim against the applicant to have him vacate the suit property but only filed a counter claim after the applicant sued her. That the respondent's inaction even after acquiring capacity to sue amounted to laxity on her part thus giving the applicant rights to the suit property. The applicant relied on [Raphael Kagali Mubindi –vs- Mary Cherotich Misoli](#) [2021] eKLR and urged the court to allow his claim as prayed.

16. In response, the respondent argued that the applicant lacks locus standi, since he did not demonstrate any interest in the suit property as a legal representative to the estate of the alleged purchaser. Further, that the applicant had not been in open, exclusive, and uninterrupted occupation for at least 12 years since the respondent who is the registered proprietor only became aware of the applicant's stay on the land since 2013. That although the applicant claims to have occupied the land since birth, the applicant only trespassed into it in 2013 after the respondent had been issued with title deed. That the applicant cannot successfully lay a claim for adverse possession as his occupation has not been open and exclusive for an uninterrupted period of at least twelve years. The respondent relied on [Wambugu v Njuguna](#) [1983] eKLR.
17. The respondent further argued that from the above authority, the proper way of assessing proof of adverse possession would be whether the respondent has been dispossessed or has discontinued possession for the statutory period of 12 years and not whether the claimant has proved that he has been in possession for the requisite number of years. The respondent contended that she was last in the suit property in 2006 and that the applicant only trespassed into it in 2013. The respondent therefore urged the court to dismiss the applicant's claim.
18. I have carefully considered the parties' pleadings, evidence, and submissions. The issues for determination are whether adverse possession has been established and whether the reliefs sought should issue.
19. The ingredients of adverse possession were discussed by the Court of Appeal in [Mtana Lewa v Kahindi Ngala Mwagandi](#) [2015] eKLR where the court stated that 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 period of 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 or 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.
20. From the material on record, it is apparent that the respondent is the registered proprietor of the suit property, as is demonstrated through her own testimony as well as through the copy of title and certificate of official search both of which show that she became registered proprietor on September 25, 2012. Prior to that date, Absalom Onyango was registered as proprietor on September 16, 1965 and Francis Opano Sabuti on September 25, 1985.
21. The applicant's case is that his late father, one Francis Ogola purchased the suit property from the respondent's deceased father-in-law one Absalom Oyango and Silfano Moyi in 1957 and that the



- applicant's father immediately took vacant possession of the suit property. It is also the applicant's case that he was born on the suit property in 1960 and that he settled thereon, built houses, and cultivated the land up to the date of his testimony. The respondent has not disputed that the applicant is the son of the late Francis Ogola.
22. The respondent has also not disputed that the applicant is in possession of the suit property, that is why she is seeking his eviction by way of counterclaim. Among the exhibits produced by the respondent is a copy of a letter from the respondent's late husband to the Land Registrar Kakamega dated April 3, 1985. The said letter confirms that the applicant's father was in the suit property both as far back as 1964 and as at the date of the letter.
 23. The respondent conceded in her testimony that her husband and her never resided on the suit property and that she did not personally know what happened on the suit property before she got married in 1970. She also stated that she learnt in the year 2013 that the applicant was constructing on the suit property, an indication that the applicant was on the property prior to that date. She seemed not to know much about the status of occupation of the property, going by her concession that the last time she went to the suit property was in 2006.
 24. Further, the applicant produced a judgement dated February 10, 1993, delivered in Kakamega PMCC No. 94 of 1987 between Francis O Sabuti (the respondent's late husband) and Francis Rega Ogola (the applicant's father) wherein Francis Sabuti sought eviction of the applicant's father from the suit property. The respondent's late husband's case in the said matter was that the applicant's father had been in possession since 1972. The court dismissed the suit. I am persuaded that the applicant was in the suit property with his father at least as at February 10, 1993. For purposes of computing time, time started to run from February 10, 1993. Although there was an attempted sale transaction, it seems to have failed and the applicant's father's as well the applicant's possession became adverse to the registered proprietor's title the moment efforts were made to evict them.
 25. In order to stop time which had started running from 10th February 1993, it must be demonstrated that the owner of the land took positive steps to assert his rights, by for instance taking out legal proceedings against the person on the land or by making an effective entry into the land. The respondent admitted being aware of the applicant's presence in the suit property in 2013. She however took no steps to evict the applicant from the suit property and only sprang up to mount a counterclaim in this case. Legally, that was too little, too late. As at September 28, 2015 when the OS herein was filed, the applicant had been in non-permissive, open, peaceful, uninterrupted, and adverse use of the suit property for a period of over 22 years.
 26. The suit property was registered under the [Registered Land Act](#), Cap 300. Even though the respondent became registered proprietor on September 25, 2012, the applicant's rights and adverse possession claim in respect of the suit property are overriding interests pursuant to Section 30 (f) of the [Registered Land Act](#) and Section 28 (h) of the [Land Registration Act](#), which were not affected by changes in registered ownership of the suit property and could be enforced at the expiry of the limitation period. See [Janet Ngendo Kamau v Mary Wangari Mwangi](#) [2007] eKLR.
 27. In view of the foregoing, the applicant has established adverse possession and is entitled to judgment. It follows that the respondent's counterclaim fails.
 28. I therefore make the following orders:
 - a. The respondent's counterclaim is dismissed.
 - b. It is hereby declared that the respondent's title to the parcel of land known as Kisa/Emasatsi/349 has been extinguished by adverse possession.



- c. It is hereby declared that the respondent holds the parcel of land known as Kisa/Emasatsi/349 in trust for the applicant to whom it should be transferred and registered as absolute owner.
- d. The respondent to sign all documents necessary to transfer the parcel of land known as Kisa/Emasatsi/349 to the respondent within 90 (ninety) days from the date hereof. In default, the Deputy Registrar of this court is authorized to sign all such documents on her behalf.
- e. Each party to bear own costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 12TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The plaintiff/applicant present in person

No appearance for the defendant/respondent

Court Assistant: E. Juma

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