



**Makoyoko v Odongo (Environment & Land Case 65 of 2018)
[2022] KEELC 15478 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 65 OF 2018
MN KULLOW, J
NOVEMBER 22, 2022**

BETWEEN

PETER MIENCHA MAKOYOKO APPLICANT

AND

MONICA ACHIENG ODONGO RESPONDENT

JUDGMENT

1. The applicant herein commenced this suit by way of originating summons dated May 7, 2018 and amended on June 23, 2021; seeking a determination of the following issues against the respondent: -
 - i. Whether the defendants rights to recover portion measuring 0.9 Ha in total of LR No Kamagambo/Kanyajuok/984 currently registered in the defendants name is barred under the Limitation of Action Act cap 22 laws of Kenya and the defendants title thereto extinguished on account of adverse possession by the plaintiff which adverse possession has been for a period exceeding 12 years and the same has been open, peaceful, continuous and uninterrupted.
 - ii. Whether upon finding favour of the plaintiff in paragraph 1 above herein, the plaintiff is entitled to be registered as an owner of the portion he has acquired by way of adverse possession which portion measure 0.9 Ha in total of LR No Kamagambo/KaNyajuok/984 which measures 1.3 Ha.
 - iii. Whether upon being registered as owner of LR No Kamagambo/Kanyajuok/984 measuring 1.3 Ha on December 11, 2015, the defendant holds the 0.9 Ha thereof in trust for the plaintiff who had long acquired title thereof by way of adverse possession.
 - iv. Whether the defendant should therefore be ordered to transfer 0.9 Ha of LR No Kamagambo/Kanyajuok/984 to the plaintiff and in default the deputy registrar to execute the subdivision and transfer documents in favour of the plaintiff.



- v. Whether the defendant should be permanently restrained by way of permanent injunction from interfering and/or trespassing onto the portion of LR No Kamagambo/Kanyajuok/984 which portion measures 0.9 Ha and has been acquired by the plaintiff by way of adverse possession.
 - vi. That, this court do order that the respondent pays costs of this application.
2. The applicant avers that he has been in occupation of a portion LR No Kamagambo/kanyajuok/984 measuring 0.9 Ha since 1978.
 3. The applicant contends that at the time of occupying the suit parcel, the same was registered in the name of Ogola Asigo(deceased) and he has been enjoying peaceful, quiet and continuous possession for more than 20 years without any interruption from the deceased or the respondent. The applicant further declares that he has been cultivating on the suit parcel and has attached photographs to support his application.
 4. The respondent, through the firm of M/s Odondi Awino & Co Advocates filed a memorandum of appearance dated 26/9/2018 and a replying affidavit sworn on 17/10/2018 in response to the originating summons. The respondent denied the averments made by the applicant that the applicant purchased the suit parcel as alleged. The respondent affirms that her father in-law Ogolla Asigo attempted to sell the suit parcel to the applicant but he defaulted by not paying the balance of the buying price and subsequently, the agreement became null and void.
 5. The respondent further contends that the applicant has never taken occupation of the suit parcel until recently when he wanted to forcefully occupy the land and further states that the applicant has not used the land for 12 years as alleged hence he is not entitled to benefit under the doctrine of adverse possession.

Trial

6. On 9/11/2021, the matter was certified ready for hearing and the same proceeded for hearing on the 18/1/2022. The plaintiff testified as PW1. He adopted his witness statement dated May 7, 2018 as his evidence in chief. It was also his testimony that he has attached the title deed of the suit parcel and that he has been staying on the suit land since he purchased the same in 1978 from the respondents father in-law who is now deceased. The applicant avers that he has been staying on the suit since the purchase and therefore asked the court to grant him the prayers sought in his plaint.
7. He produced the following documents as plaintiff exhibits 1-3 in support of his case as follows;
 - i. A copy of sale agreement dated 01/7/1978 - Pexhibit 1-
 - ii. A copy of the green card - Pexhibit 2
 - iii. Bundle of photographs – Pexhibit 3
8. On cross- examination; he maintained that he bought the suit parcel from the respondents father in-law and the balance of the purchase price was paid in full. He avers that the reason he filed the suit against the respondent was because she was erroneously registered as the owner of the suit parcel on December 11, 2015.
9. On re-examination, he reiterated that he had been using the suit parcel as at the time when the respondent was registered as the owner of the suit parcel. The plaintiff thereafter closed his case.



10. The respondents case adjourned to 23/3/2022 with the defendant appearing in person. She testified as DW1; it was her testimony that she knew the applicant but was not aware of the sale agreement until when she was shown by the applicant. It was her contention that according to the sale agreement; the purchase price of the suit parcel was Kshs 1680/= but the applicant only paid Kshs 400/=. The respondent states that the agreement was dated 01/7/2018.
11. The respondent further stated that she is the registered owner of the property and that she is currently occupying the property and cultivating on it.
12. On cross-examination; the respondent stated that she was not married to the family at the time when the agreement was made and was only told about what had transpired much later. She further stated that it was her mother in-law who had been cultivating the suit parcel and only took over upon her marriage to the family. She also stated that she succeeded her father in –law and that is why the transfer and subsequent registration was made in her name.
13. On re- examination, the respondent stated that she is the owner of the suit parcel who has been sued. The defence case was thereafter closed.
14. Upon close of the defence case, I issued directions on the filing of final written submissions, to be filed and exchanged within 21 days. Upon perusal of the court record, I do note that only the defendant filed their submission. Be that as it may, I will proceed to issue my determination as hereunder.

Analysis and Determination

15. I have carefully considered the amended originating summons and the respective exhibits together with the submissions filed herein ad I find that the issues arising for determination are as follows: -
 - a. Whether the applicant has proved his claim of adverse possession.
 - b. Whether the applicant is entitled to the reliefs sought.

A. Whether the applicant has proved his claim of adverse possession.

16. The legal framework for adverse possession is provided for in various statutory provisions to wit; sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and section 28 (h) of the [Land Registration Act](#).
17. Adverse possession is a situation where a person takes possession of land and asserts rights over it and the person having title and rights to the said land neglects to take action against the intruder in assertion of his title for a period of twelve (12) years.
18. In India Supreme Court decision in the case of [Kamataka Board of Wakf –vs- Government of India & others](#) [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true



owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.” (emphasis mine)

19. Further, the Court of Appeal in *Peter Kamau Njau vs Emmanuel Charo Tinga* - Civil Appeal No 29 of 2016 (unreported) stated as follows: -

“A registered owner of land, may not, by the provisions of section 7 of the Limitation of Actions Act bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner’s title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner’s permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner’s enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner.”

20. The applicant affirms that he has been in possession and occupation of a portion of the suit property measuring approximately 0.9 Ha since 1978 and has remained in occupation to date. He avers that there was an agreement for the sale of the said portion of land between him and the respondent’s father in-law who is since deceased; he paid a deposit of Kshs 400/= and later cleared the balance of Kshs 1280/=. It is his claim that he took immediate possession and occupation of a portion of the suit parcel upon payment of the deposit in 1978 and has been in occupation to date. He produced a copy of the said sale agreement dated 1/7/1978 as Pexh 1 and a bundle of photographs as Pexh 3 in support of his occupation and use of the suit parcel claims.
21. The defendant on the other hand contends that she is the rightful registered proprietor of the suit land and maintained that she is currently occupying and using the said property. She further denied the claims by the plaintiff that he was in occupation and use of the suit parcel for over 12 years. Even though she conceded that the alleged transaction between the plaintiff and her late father in-law took place before she was married, she averred that the land was being used by her mother in-law prior to her marriage and she thereafter succeeded her late father in-law and inherited the property.
22. Possession and occupation are one of the key requirements that need to be demonstrated in a claim for adverse possession. The same must be open, continuous, uninterrupted for a period of 12 years. The onus is on the plaintiff to demonstrate that he has acquired overriding interests over the suit property which are adverse to the rights of the defendant who is the registered owner.
23. It is important to note that the plaintiff’s initial entry into the suit land was consensual and permissive *vide* an agreement for sale produced as Pexh 1. The question that therefore arises is whether the said sale agreement remains valid, enforceable and capable of transferring an interest over a portion of the suit parcel. While the plaintiff maintains that he paid the entire purchase price as agreed, the defendant contends that the plaintiff defaulted in the payment of the purchase price by not paying the balance of the purchase price. I do also note that no land control board consent was obtained within the prescribed period of 6 months. To this end, it is my considered view that the said agreement became void, incapable of execution or of passing an interest over the suit land.
24. Having held that the Pexh 1 became void; I find that the plaintiff’s continued use and occupation on a portion of the suit land subsequently became adverse in the year 1991; thus at the time of filing the suit, he had occupied and used the suit the suit land for a period of 39 years, which period is in excess of the 12 years’ statutory period required in a claim for adverse possession. He further produced Pexh 3 as proof of his occupation and use of the claimed portion of land.



25. The defendant maintained that she is currently in occupation and cultivates the suit land and urged the court to dismiss the claims by the plaintiff. However, she did not produce any evidence of the said averments of occupation and exclusive use of the suit land. In the absence of any evidence to the contrary, I find that the bundle of photographs produced by the plaintiff in support of his claim are a true reflection of the status of the suit land. I am therefore inclined to grant the plaintiff the benefit of doubt and to find that he has been in occupation and use of the suit land.
26. Taking into consideration the totality of the evidence produced in court, testimonies of the various parties during the hearing and in the interest of justice, I find and hold that the plaintiff has satisfactorily proved on a balance of probabilities that his occupation and possession of a portion of the suit property to measuring 0.9 Ha to warrant the reliefs sought under adverse possession.
27. In the circumstances thereof, having held that the plaintiff has proved his claim on adverse possession against the defendant's title, to the required standard and I find that he is entitled to the reliefs sought.

Conclusion

28. The upshot of the above is that the plaintiff has proved his claim on adverse possession to the required threshold and I accordingly allow the amended originating summons dated June 23, 2021 as follows;
 - I. An order be and is hereby issued that the defendant's rights to recover a portion of LR No Kamagambo/Kanyajuok/984 measuring 0.9 Ha currently registered in her name is barred under the Limitation of Action Act cap 22 laws of Kenya and consequently, the defendant's title thereto extinguished on account of adverse possession by the plaintiff.
 - II. An order be and is hereby issued that, the plaintiff is entitled to be registered as an owner of the portion of LR No Kamagambo/Kanyajuok/984 measuring approx 0.9 Ha having acquired the same by way of adverse possession.
 - III. An order is hereby issued to the defendant to transfer a portion of LR No Kamagambo/Kanyajuok/984 measuring approx. 0.9 Ha to the plaintiff within 45 days from the date of this judgment and in default the deputy registrar is hereby directed to execute the transfer instruments in favour of the plaintiff.
 - IV. An order of permanent injunction is hereby issued restraining the defendant from interfering and/or trespassing onto the portion of LR No Kamagambo/Kanyajuok/984 measuring approx 0.9 Ha.
 - V. Costs of the suit be borne by the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22ND DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

.....for the Plaintiff

.....for the Defendant

Court Assistant- Tom Maurice

