



**Ondicho & another v Kimeli & 2 others (Environment & Land Case 108 & 132 of 2016 (Consolidated)) [2022] KEELC 15426 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15426 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 108 & 132 OF 2016 (CONSOLIDATED)  
SM KIBUNJA, J  
DECEMBER 20, 2022**

**BETWEEN**

**EVANS ORINA ONDICHO ..... PLAINTIFF**

**AND**

**LUKA KIPCHUMA KIMELI ..... 1<sup>ST</sup> DEFENDANT**

**PERIS CHEPKEMBOI TUM ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 132 OF 2016**

**BETWEEN**

**LUKA KIPCHUMA KIMELI ..... PLAINTIFF**

**AND**

**EVANS ONDICHO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff, Evans Orina Ondicho, commenced this suit through the originating summons dated April 29, 2016 seeking for a declaration that he has obtained title to land parcel No Uasin Gishu/Kimumu Settlement Scheme/7563, the suit land, measuring 0.1014ha, by way of adverse possession; that the 1<sup>st</sup> respondent’s title over the said parcel has been extinguished; and a vesting order should issue in his favour. He deposed that sometimes in 2003, his late mother bought a portion measuring 0.1014ha of land parcel Uasin Gishu/Kimumu Settlement Scheme/111, which was registered in the name of the 2<sup>nd</sup> defendant. That in August 2003, he moved onto the said land, erected structures thereon, and have been in occupation since. That the 2<sup>nd</sup> defendant subdivided land parcel No Uasin



Gishu/Kimumu Settlement Scheme/111 to create land parcels No Uasin Gishu/Kimumu Settlement Scheme/7555 to 7576. That the portion of the land he had been occupying is now comprised of land parcel No Uasin Gishu/Kimumu Settlement Scheme/7563, which was among the parcels that were created after the subdivision. That his occupation of the suit land has been adverse to the title of the registered proprietors, and their titles have been extinguished by operations of the law.

2. That vide a consent entered on the June 2, 2016, Eldoret ELC No 132 of 2016 was consolidated with this suit. The Eldoret ELC No 132 of 2016 had been commenced through the plaint dated the May 25, 2016 by the 1<sup>st</sup> defendant in Eldoret ELC No 108 of 2016, as the plaintiff, against the plaintiff in Eldoret ELC No 108 of 2016, as the defendant. The main prayer was for permanent injunction order against the defendant [plaintiff in ELC No 108 of 2016] in respect of the suit land and damages.
3. That after the consolidation order of the May 25, 2016, Luka Kipchumba Kimeli and Peris Chepkemboi Tum, the Defendants, filed the defence and counterclaim dated the June 20, 2016, on July 20, 2016, opposing the plaintiff's claim of having acquired the suit land by way of adverse possession. They maintained that the plaintiff was simply a trespasser, having encroached on the suit land sometime in February 2016, forcing the 1<sup>st</sup> defendant to issue a demand letter, and ultimately filing ELC No 132 of 2016 on May 25, 2015. They urged court to dismiss the plaintiff's suit, issue a permanent injunction against the plaintiff and to award them damages, interest and costs.
4. The consolidated suits were heard in ELC No 108 of 2016 through viva voce evidence. The plaintiff, Evans Orina Ondicho, testified as PW1, and called Isaac Shikutwa Mwale, an estate agent with Starland company, as a witness who testified as PW2. It was the evidence of PW1 that it was him and not his mother who bought the suit land, then provisionally referred as plot No. 1, from one Francis Omweri of Starland. He told the court that his mother died in 2007 and no succession in respect of her estate has been filed. That he initially did farming on the land from 2003, then started a car wash in 2008 and a timber business thereafter. PW2 told the court that Starland company is owned by Francis Omweri Nyaberi, who had bought two (2) acres out of plot number 111 that was seven (7) acres in August 2003 from the 2<sup>nd</sup> defendant. That they surveyed the land into ten (10) parcels of eighths and quarters though the 2<sup>nd</sup> defendant had not surrendered the title to the land to them, erected beacons and sold plot number 1 to the plaintiff for kshs. 320,000. That other people bought the remaining parcels. That the mutation over plot 111 into 19 parcels was registered by the 2<sup>nd</sup> defendant in 2015.
5. The 1<sup>st</sup> defendant testified as DW1 and called Nyakundi Moraa, the Land Registrar Uasin Gishu, who testified as DW2. DW1 told the court that he bought the suit land from the 2<sup>nd</sup> defendant after carrying out due diligence in 2016 for about kshs. 3 million which he paid in full. The land was vacant and was transferred to his name on February 9, 2016. On the February 16, 2016, the plaintiff claimed that the land was his and as a result he had his advocate do a demand notice to him and filed ELC No 132 of 2016. That later, he learnt the plaintiff had filed ELC No 108 of 2016 against him. He prayed for the plaintiff's claim to be rejected. That he was fencing the land when the plaintiff raised his claim of ownership and started erecting structures on it. DW2 confirmed that from the records held at the land registry, parcel 7563 is a subdivision of parcel 111 that was done on the September 9, 2015. That parcel 7563 was transferred to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant on the February 9, 2016 regularly, and no encumbrance has been registered against the said title since.
6. The learned counsel for the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions dated the July 5, 2022, July 29, 2022 and July 21, 2022 respectively, which the court has given due considerations.
7. The following are the issues for the court's determinations;



- a. Whether the plaintiff's occupation or possession of the suit land was pursuant to a sale agreement, and therefore permissive or adverse the title of the registered proprietor, and if permissive, whether it ever became adverse, and if so, when.
  - b. Whether the defendants are entitled to an order of permanent injunction, damages, interest and costs against the plaintiff.
  - c. Who pays the costs.
8. I have carefully considered the pleadings, evidence adduced by the parties, submissions by the learned counsel, the superior courts decisions cited thereon, and come to the following determinations;

- a. That section 38(1) of the *Limitation of Actions Act* chapter 22 of Laws of Kenya provides as follows;

38(1) "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."

Under the above provision, a person claiming title by way of adverse possession applies to this court, for an order to be registered as the proprietor of the suit land in place of the registered proprietor. That order 37 rule 7 of the *Civil Procedure Rules* provides the procedure for one claiming ownership or title under adverse possession to file an application by way of an Originating Summons supported by an affidavit to which a certified extract of the title to the land in question has been annexed. The plaintiff herein has therefore moved the court as required as the originating summons was accompanied by his affidavit to which was annexed certified copies of the green cards in respect of Uasin Gishu/Kimumu Settlement Scheme/ 111 and 7563. That the green card for parcel 111 that is attached and certified on the April 21, 2016, indicates at entry number 5 that the "title was closed on subdivision see new Nos 5188 – 5207" while the green card produced as exhibit and certified on the April 26, 2016 at entry number 5 states that "title closed on subdivision see new Nos 7556 – 7575." That none of the parties or witness explained the discrepancies on the two copies of green card in the reference numbers of the parcel allegedly subdivided from parcel 111.

- b. There is no doubt that the original parcel 111 was first registered on the May 12, 1986 in the name of Settlement Fund Trustee, and on the November 17, 1988, the 2<sup>nd</sup> defendant became the registered proprietor of the said land. That it is also not disputed that the 2<sup>nd</sup> defendant subdivided the said land into several parcels, including parcel 7563, the suit land, and had the title closed on the September 9, 2015. That there is also no dispute that the 1<sup>st</sup> defendant became the registered proprietor of the suit land on the February 9, 2016.
- c. The case of the plaintiff is that he has been in occupation of the portion of the land comprising of the suit land from 2003, which claim is disputed by the defendants who have taken the position that the plaintiff's claim of the suit land started on February 16, 2016. The issue as to when the plaintiff took possession of the suit land, if at all, is for the court to determine. The plaintiff's deposition at paragraph 2 of his supporting affidavit leaves no doubt that his claim to the suit land is traced to a portion of land his late mother bought from parcel 111 sometime in 2003. That though the plaintiff appeared to deviate from that deposition when



he testified that it was him who had bought the land, and not his late mother who died in 2007, it is important to remember that in civil claims, parties are bound by their pleadings. Whether the purchase had been by the plaintiff or his mother, the fact of the matter is that the initial entry, possession or occupation of the land bought was with the permission or license of the registered proprietor, and contrary to the plaintiff's claim, was therefore not adverse.

- d. The plaintiff has submitted that if the alleged purchase was to be taken into consideration, then the period of 12 years that the plaintiff was in adverse possession lapsed in February 2016 from the date the sale agreement “that is 12 years after the sale became null and void for want of consent of the Land Control Board. The mother did not take possession. instead it is the plaintiff who did and he is the one making the claim.” The plaintiff's claim that he has been in possession of the suit land since 2003 has been challenged or rebutted by the defendants through the pleadings in ELC No 132 of 2016, and their filed defence and counterclaim in the consolidated suits, and it would have helped the plaintiff's claim had he availed documentary evidence, like sale agreement and photographs, that could show when or whether he indeed took possession of that portion of parcel 111 that after subdivision in 2015 became registered as parcel 7563. That had the sale agreement and confirmation on when, if at all, the full purchase price of kshs 320,000 was made to the 2<sup>nd</sup> defendant, either by himself or his mother was availed, it would have also helped the court in determining whether the contract was with Starland company or its owner Francis Omweri Nyamberi, as the vendor, and when if at all, it became voidable for the purpose of determining when the plaintiff's occupation became adverse, if at all. That another matter that the above mentioned documents would have helped resolve is if indeed the plaintiff and or his late mother had bought the land from Starland company or Francis Omweri Nyaberi, did the vendor have capacity to sell land that was not in their name? In other words, did the vendor have any title to a portion of parcel 111 or the suit land that was capable of being sold and transferred to the plaintiff or his late mother when the sale transaction the plaintiff and his witness spoke of took place? From the available evidence, the answer to both questions is in the negative, but I hasten to add that Starland company and Francis Omweri Nyaberi are not parties in these proceedings, and the conclusions touching on them herein are not to be taken as settling any rights or liabilities affecting them and the plaintiff herein as they have not been heard.
- e. That as parties are bound by their pleadings, and the plaintiff in his testimony disclosed that no succession cause had been filed in respect of the estate of his late mother, who according to paragraph 2 of his supporting affidavit is the one who had bought the suit land as a portion from parcel 111, the court agrees with the submissions of the 1<sup>st</sup> defendant that the plaintiff is therefore without capacity to file the suit, as he had not obtained letters of administration ad litem.
- f. That from the evidence adduced by the plaintiff, he had entered onto the suit land as a purchaser, having bought the land from Starland, a land selling company. He believed that the said company had bought the land from the 2<sup>nd</sup> defendant, even though he did not produce any documentary evidence of the said purchase. He acknowledged during cross examination that he did not know when the subdivision of parcel 111 into the various parcels was done, but stated that Starland had indicated to him that titles were not ready. The plaintiff did not offer or attempt to explain to the court why the vendor never transferred the portion of the land bought by his late mother or himself since the year 2003. He did not also explain to court why the 2<sup>nd</sup> defendant chose to subdivide her land, plot 111, close the original title and have the new titles transferred and issued in favor of other people, including the 1<sup>st</sup> defendant, yet he claimed a portion of that land as a purchaser, without his interest being taken of, if indeed



the 2<sup>nd</sup> defendant was aware about it as he alleged. This leads the court to find favour with the 1<sup>st</sup> defendant's contention that when he bought the suit land, it was vacant, registered in the name of the 2<sup>nd</sup> defendant and it was transferred to his name in accordance with the law. That as it is not disputed that the plaintiff took possession of the suit land in 2016, then the period of twelve (12) years required to lapse when a trespasser is in exclusive, uninterrupted and continuous possession before the prescriptive right can kick in had not lapsed by May 5, 2016, when the plaintiff filed his claim through the originating summons dated the April 29, 2016.

- g. PW2, the estate agent working with Starland admitted to court that they sold the land which was neither transferred nor registered in their name. There is no evidence whatsoever presented before this court as to the existence of Starland, as a legal entity. The court has noted that when PW2 was cross examined on the company's existence, he admitted that he does not have its certificate of incorporation. From the evidence adduced by PW1 and PW2, and the pleading filed through the originating summons, the occupation of the suit land by the plaintiff was contrary to the pleading, not adverse but permissive. The plaintiff could only have taken possession of the suit land in 2003 under the belief that the Starland company had sold it to him after it bought it from the 2<sup>nd</sup> defendant. A person who claims land by adverse possession, must on the balance of probability prove that he did not have permission from the true owner of the land occupied, or that the permission had subsequently terminated. The plaintiff herein confirmed that when he moved onto the suit land, the 2<sup>nd</sup> defendant was still in occupation. That he even purchased some fencing posts from the 2<sup>nd</sup> defendant, who also pointed out the beacons of the suit land to him. What the above interactions between the plaintiff and 2<sup>nd</sup> defendant, who was then the registered owner of the land, show is that the plaintiff was not taking possession of the suit land as an adverse possessor, but as one with permission or license. The court therefore finds that the plaintiff has failed to demonstrate to court how and when his possession ceased to be permissive and became adverse as he was obligated to do by sections 107 to 109 of the Evidence Act chapter 80 of Laws of Kenya. In my view, the plaintiff was a licensee of the 2<sup>nd</sup> defendant, as the evidence adduced by PW1 and PW2 show the 2<sup>nd</sup> defendant was an acquaintance to the plaintiff and sold to him some fencing posts. Though no agreement of sale has been produced to prove that Starland had bought land from the 2<sup>nd</sup> defendant that was later sold to the plaintiff, both PW1 and PW2 have admitted that the 2<sup>nd</sup> defendant consented to the entry of the plaintiff onto the suit land. The period of possession or occupation of land where entry was with the permission or license of the registered owner cannot be counted in a claim based on adverse possession, unless where the permission or license has been terminated in one way or the other. The plaintiff has not established to the court at what point, or when, his possession of the suit land that was with permission or license, became adverse or hostile to the title of the 2<sup>nd</sup> defendant initially, and subsequently that of the 1<sup>st</sup> defendant.
- h. Further the plaintiff has also not demonstrated that he had unequivocal and exclusive occupation of the suit land at the exclusion of everyone else, including the owner of the land. For a plea of adverse possession to succeed, the plaintiff ought to have demonstrated that the owner of the land ceased to be in occupation, and that he has been in exclusive and continuous possession or occupation for a period of 12 years. The testimony of the plaintiff was that he bought a portion of the land parcel 111, and took possession in 2003 and that other buyers joined him much later. At that point Plot 7563 was not in existence until the subdivision of 2015, and what he and others, including the 2<sup>nd</sup> defendant must have been occupying or possessing were portions of Plot 111. The plaintiff has therefore failed to make a case of unequivocal exclusive possession or proved that he had deprived the 2<sup>nd</sup> defendant the possession and use of the suit land in 2003 or any other time thereafter. The fact of the plaintiff



initially cultivating the land, setting up a car wash and later timber business thereon did not in no way prevent the 2<sup>nd</sup> defendant and other occupants from using the Plot 111. The plaintiff has thus not demonstrated to court at what point his use of the suit land for cultivation and as a business premises become adverse to the title of the 2<sup>nd</sup> defendant for the court to make a finding in his favour.

- i. That this suit was filed in 2016, about one year after the subdivision of plot 111 on the September 9, 2015 into several parcel including 7563, the suit land. The 1<sup>st</sup> defendant became the registered owner of the suit land on the February 9, 2016, and if that was the sign that the permission given to the plaintiff to occupy or use the land had been terminated, then this suit was filed prematurely and before the twelve years could lapse after his occupation or possession became adverse to the title of the registered proprietor.
- j. The 2<sup>nd</sup> defendant and others occupiers of parcel 111 were free to use their portions of the land, and there is no prove tendered by the plaintiff that there was a discontinuance of possession of the suit land by the 2<sup>nd</sup> defendant, or that she was excluded from the said land following the possession by the plaintiff. The plaintiff did not prove that he had exclusive possession of the suit land for the statutory period of 12 years. In the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, the court stated that

“In our law, the mere fact that for twelve years or more there has been no suit brought against the squatter, or the mere fact that for twelve years the squatter has been in actual possession of the land, is not enough to make the Limitation of Actions Act operative; possession for twelve years cannot per se make the Act come into operation against an owner of land. The Act is operative only where there has been exclusive possession for the statutory period by the person to be protected by the statute: it must be shown that the title holder has been dispossessed or has discontinued his possession of the land for the statutory period. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession. It is not sufficient to prove that he enjoyed the use of the land in common with the true owner.”

The foregoing leads the court to make a finding that the plaintiff has not established to court on the balance of probability that his possession of the suit land was actual, open, notorious, regular, continuously uninterrupted, hostile, exclusive and without any form of permission from the 1<sup>st</sup> or 2<sup>nd</sup> defendants for a statutory period of 12 years. The court finds that the Originating Summons dated April 29, 2016 lacks merit.

- k. That as the procedure through which the 1<sup>st</sup> defendant acquired registration as proprietor of the suit land has been confirmed by the Land Registrar, DW2, to have been regular and in compliance of the statutory requirements, and as the title has not been successfully impugned as required under section 26 of the *Land Registration Act* No 3 of 2012, the court finds that he has on a balance of probabilities proved that he is entitled to an order of permanent injunction to keep off the plaintiff and those claiming under him from the suit land. That however, as the 1<sup>st</sup> defendant has not particularized what he intended to do with the suit land or the losses he has sustained as a result of the plaintiff activities thereof, no damages will be awarded as none has been proved.
- l. That as the 1<sup>st</sup> defendant testified and called a witness in defending the plaintiff's claim and prosecuting the counterclaim, the court finds he is entitled to costs as under section 27 of the



Civil Procedure Act chapter 21 of Laws of Kenya costs follow the events unless otherwise for good cause ordered.

10. That flowing from the above conclusions, the court finds and orders as follows;
  - a. That the plaintiff has failed to prove his claim against both defendants in ELC No 108 of 2016 to the standard required of a balance of probabilities and the same is hereby dismissed.
  - b. That the defendants have proved their counterclaim against the plaintiff partially, and an order of permanent injunction in terms of prayer (a) of the plaint filed in Eldoret ELC No 132 of 2016 is hereby granted.
  - c. That the plaintiff will pay the 1<sup>st</sup> defendant's costs in the main suit and counterclaim.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 20<sup>TH</sup> DAY OF DECEMBER 2022.**

**S. M. Kibunja, J.**

**IN THE PRESENCE OF;**

PLAINTIFF : Absent

DEFENDANTS : Absent

COUNSEL : Mr Momanyi for Plaintiff

M/s Lusigi for Omusundi for 1<sup>st</sup> Defendant

WISON .. COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

