



**Mulosi v Obonyo (Environment & Land Case 23 of 2020)
[2025] KEELC 488 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 23 OF 2020
SO OKONG'O, J
FEBRUARY 11, 2025**

BETWEEN

RISPER ACHOLA MULOZI PLAINTIFF

AND

GEORGE NGWENA OBONYO DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit by way of an Originating Summons dated 11th March 2020 seeking the determination of the following issues;
 1. Whether the Plaintiff purchased a parcel of land measuring 0.02 Ha. from one, Christine Awuor Obonyo(deceased) (hereinafter referred to only as “the deceased” where the context so permits) who was the Defendant’s mother.
 2. Whether the Plaintiff had an overriding interest under Section 28 (c), (e) and (j) of the Land Registration Act, 2012 on all that parcel of land known as Title No. Kisumu/ Kasule/3319(hereinafter referred to only as “the suit property”).
 3. Whether the Plaintiff is in adverse possession of the suit property.
 4. Whether the court should vest the suit property upon the Plaintiff.
 5. Whether the District Land Registrar should be directed to register the suit property in the name of the Plaintiff.
 6. Whether the Plaintiff is entitled to the costs of the application.
2. The Originating Summons was supported by the affidavit of the Plaintiff sworn on 11th March 2020. The Plaintiff averred that on 8th March 1988, she purchased a parcel of land measuring 0.02 of a hectare from one, Christine Awuor Obonyo, deceased (“the deceased”). The Plaintiff averred that the said



parcel of land was a portion of a larger parcel of land known as Plot No. 1255 which was still under adjudication. The Plaintiff averred that she moved to the said parcel of land and occupied the same with her family immediately upon purchase. The Plaintiff averred that after the conclusion of the adjudication exercise, Plot No. 1255 was subdivided into several portions and the portion thereof that was purchased by the Plaintiff was given land reference Kisumu/Kasule/3319 (the suit property).

3. The Plaintiff averred that in the same year, she purchased a second parcel of land from the deceased known as Plot No. 1846 which was also under adjudication. The Plaintiff averred that after the completion of the adjudication exercise, the land reference for Plot No. 1846 was changed to Kisumu/Kasule/2766 (Plot No. 2766). The Plaintiff averred that whereas Plot No. 2766 was transferred to her name by the deceased before she died, the deceased did not transfer to her the suit property. The Plaintiff averred that although the suit property was not transferred to her, she continued to occupy the same without any interruption.
4. The Plaintiff averred that the Defendant undertook succession proceedings in respect of the estate of the deceased and had the suit property registered in his name on 20th January 1998. The Plaintiff averred that she approached the Defendant to transfer to her the suit property but he refused to do so. The Plaintiff averred that she had occupied the suit property openly and continuously without any interruption since 1988. The Plaintiff averred that she had acquired the suit property by adverse possession.
5. The Originating Summons was opposed by the Defendant through a replying affidavit sworn on 30th April 2020. The Defendant averred that the Plaintiff did not purchase the suit property from the deceased. The Defendant averred that the agreement of sale dated 8th March 1988 relied on by the Plaintiff in support of her claim was fraudulent. The Defendant averred that the parcel of land that was sold to the Plaintiff by the deceased was Plot No. 2766 which had already been transferred to her. The Defendant averred that the Plaintiff had never occupied the suit property. The Defendant averred that the suit property was not a portion of Plot No. 1255 as claimed by the Plaintiff but a portion of Kisumu/Kasule/2678.
6. On 6th May 2021, the court ordered the County Land Registrar and the County Land Surveyor to visit the suit property and ascertain its occupation status. The County Land Registrar and the County Land Surveyor visited the suit property on 29th September 2021 and filed a report in court on 22nd November 2021. In their report, the County Land Registrar and the County Land Surveyor observed that there were clear demarcations on the ground showing what they referred to as “the plaintiff’s boundary and the defendant’s boundary”. The County Land Registrar and the County Land Surveyor drew a sketch map showing the status of the suit property on the ground.
7. At the trial, Martin Oduor Mulosi (PW1) gave evidence as an attorney of the Plaintiff whom he told the court was old and ill. PW1 told the court that the Plaintiff entered into two agreements of sale with Christine Awuor Obonyo, deceased. He stated that the first agreement (P.EXH.2) was for the suit property and the second agreement (P.EXH. 3) was for Plot No. 2766. He stated that the Plaintiff had occupied the suit property since 1989 openly. He stated that the Plaintiff was occupying the suit property and Plot No. 2766 and that she was made to believe that the two parcels of land were consolidated. The Land Registrar, Nicholas Obiero (PW2) was the Plaintiff’s second witness. PW2 produced the County Land Registrar and County Surveyor’s report dated 22nd November 2021 as an exhibit.
8. In his evidence, the Defendant (DW1) adopted his replying affidavit to the Originating Summons as part of his evidence in chief. He told the court that his mother, Christabel Awuor Obonyo deceased sold to the Plaintiff the parcel of land known as Kisumu/Kasule/2766 (Plot No. 2766) which was duly



transferred to the Plaintiff. He stated that that was the parcel of land on which the Plaintiff settled after putting up a house thereon. He stated that the suit property was vacant and that it had no development. He stated that he was using the suit property for cultivation. He stated that the deceased sold the Plaintiff only one parcel of land which the Plaintiff was occupying on the ground. He reiterated that the suit property was vacant.

9. The Defendant called a surveyor, Patrick Opiyo Adero (DW2) as his witness. PW2 told the court that he was a licensed land surveyor. DW2 stated that he was instructed by the Defendant to prepare a report on land parcel Nos. Kisumu/Kasule/ 3319, 2766 and 1769. He stated that when he visited the three parcels of land, he found the suit property fenced but vacant while parcel No. 2766 was developed with a house. He stated that the boundary of the suit property was conspicuous. He stated that there was no dispute on the ground but the owner of parcel No. 2766 was claiming that her parcel of land should be parcel No. 3319(the suit property). He stated that the owner of parcel No. 2766 had no problem with her land as it was on the ground and that her problem was that the land should be parcel No. 3319. DW2 stated that there was an anomaly in that the Registry Index Map(RIM) did not agree with the ground as far as the shapes of the parcels of land in dispute were concerned although the arrangements of the parcels of land on the RIM and the ground were the same. He stated that according to him, the Plaintiff's problem was in the numbering of the plots. DW2 produced his report dated 29th June 2023 as an exhibit.
10. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions dated 31st May 2024 on 3rd June 2024 while the Defendant filed submissions dated 29th July 2024 on the same date. I have considered the Originating Summons together with the supporting affidavit. I have also considered the replying affidavit. I have further considered the evidence adduced by the parties and the submissions by counsel.

Analysis and determination

11. The following in my view are the issues arising for determination in this suit;
 1. Whether the Plaintiff has proved her adverse possession claim.
 2. Whether the Plaintiff is entitled to the reliefs sought in the Originating Summons.
 3. Who is liable for the costs of the suit?
12. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:
 - “ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...
 19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that



date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person's favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* (supra).”

13. In *Gabriel Mbui v. Mukindia Maranya*[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
14. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion)...The possession must be



continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

15. It is on the foregoing principles that the Plaintiff’s claim falls for consideration. The burden was on the Plaintiff to establish the elements of adverse possession set out in the above cases. The Plaintiff had a duty to demonstrate how she entered the suit property, and that upon making such entry, she remained in continuous occupation thereof openly without any interruption for 12 years. I found it difficult to follow the Plaintiff’s evidence on how she entered the suit property. In her affidavit in support of the Originating Summons, the Plaintiff stated that she purchased two portions of land from the Defendant’s deceased mother, Christine Awuor Obonyo. According to the Plaintiff, the first portion of land that she purchased was a portion of a larger parcel of land known as Plot No. 1255 owned by the deceased. The Plaintiff averred that the first portion of land she purchased on 8th March 1988 measured 0.02 of a hectare. The Plaintiff averred that she moved into this parcel of land immediately upon purchase and settled thereon together with her husband and son. The Plaintiff averred that upon the conclusion of the land adjudication exercise, Plot No. 1255 was subdivided and the portion thereof that was sold to the Plaintiff was given parcel number Kisumu/Kasule/3319(the suit property). The Plaintiff averred that “later in the same year of 1988” she purchased the second portion of land from the deceased. The Plaintiff averred that the second portion of land which was also under adjudication was known as Plot No. 1846. The Plaintiff averred that the land reference number for the second portion of land was after adjudication changed to Kisumu/Kasule/2766 (Plot No. 2766). The Plaintiff averred that the second portion of land (Plot No. 2766) was transferred and registered in her name by the deceased while the first portion of land, Kisumu/Kasule/3319(the suit property) was never transferred to her.
16. The Plaintiff annexed to her affidavit in support of the Originating Summons an agreement of sale dated 8th March 1988 which she claimed to have entered into with the deceased in respect of the suit property. According to this agreement, the Plaintiff purchased from the deceased land measuring 20 x 15 steps. None of the parties provided evidence of the meaning of “step”. I will assume that a step is equivalent to a meter. The purchase price for this portion of land is indicated in the agreement as Kshs. 7000/- which is indicated to have been paid in full. There is no indication in the body of the agreement as to the reference number for the land that was being sold. There are however additional writings on the top of the agreement as follows: “P/No. 1255 Photo 3 DEM 23/10/79”. At the trial, the Plaintiff produced two agreements as exhibits. The first agreement was dated 8th March 1988. In this agreement, the land sold measured 20 x 15 steps and the purchase price was Kshs. 7000/-. According to the Plaintiff this was the agreement for the suit property. The second agreement was also dated 8th March 1988 (P.EXH.2). The agreement was between Roda Nyanje and Livingstone Angachi, and the deceased, Christine Awuor Obonyo. The land sold was indicated as measuring 57 x 27, 57 x 27 acres and the purchase price was Kshs. 19,000/-. The Plaintiff was one of the witnesses to the transaction. The third agreement that the Plaintiff referred to at the trial although the same was not produced as an exhibit was also dated 8th March 1988. The agreement which was attached to the Plaintiff’s Further List of Documents dated 18th November 2020 filed on 2nd December 2020 was between the deceased Christine Awuor Obonyo, and Risper A. Mulosi (the Plaintiff) and Martin Oduor. The land sold under this agreement measured 43 x 38 steps and the consideration was Kshs. 15,000/-. This is the agreement which is said to have been for the second portion of land, Kisumu/Kasule/2766 (Plot No. 2766). At the trial, the Plaintiff claimed that Plot No. 2766 was sold to other people by the deceased and when the said purchasers became unable to pay the full purchase price, the same was sold to the Plaintiff. How this could be a possibility is difficult to understand. This is because all the agreements produced in evidence are dated 8th March 1988 although the Plaintiff pleaded that she purchased Plot No. 2766 sometime after purchasing the suit property. The measurement of the land that was



purchased by Roda Nyanje and Livingstone Angachi from the deceased Christine Awuor Obonyo that is said to have been re-sold to Risper A. Mulosi (the Plaintiff) and Martin Oduor after Roda Nyanje and Livingstone Angachi failed to pay the purchase price is also different. It is therefore not clear as to when the Plaintiff purchased Kisumu/Kasule/2766(Plot No. 2766) if it was not the same parcel of land that was sold to the Plaintiff by the deceased through the agreement of sale dated 8th March 1988 measuring 20 x 15 steps at a consideration of Kshs. 7000/-. It is this Plot No. 2766 which is a subdivision of Kisumu/Kasule/1255(See the Mutation Form for the subdivision of Kisumu/Kasule/1255). From the Certificate of Official Search for Kisumu/Kasule/3319 (the suit property) and the Mutation Form for the subdivision of Kisumu/Kasule/2698, the suit property is a subdivision of Kisumu/Kasule/2698 and not of Kisumu/Kasule/1255 as claimed by the Plaintiff. It is also clear from the two mutations that it was Plot No. 2766 that came into existence first through the subdivision of Plot No. 1255 that took place on 18th November 1988. The suit property came into existence through the subdivision of Kisumu/Kasule/2678 which was registered on 14th August 1995. The suit property could not therefore have been sold to the Plaintiff on 8th March 1988 as a portion of Plot No. 1255 or otherwise. It was Plot No. 2766 (formerly Plot No. 1846) that was in existence and was a portion of Plot No. 1255. Plot No. 1255 and Plot No. 1846 were not separate parcels of land undergoing land adjudication as pleaded by the Plaintiff. As mentioned earlier, Plot No. 1846(also known as Plot No. 2766) is a portion of Plot No. 1255. The Plaintiff did not also give any explanation why the deceased could have chosen to transfer to her Plot No. 2766 which was purchased later rather than the suit property that was allegedly sold earlier. There was also no evidence that the Plaintiff had at any time demanded that the deceased transfer to her the suit property.

17. From the foregoing, it is my finding that the Plaintiff purchased from the deceased Christine Awuor Obonyo, occupied and developed only one parcel of land namely, Kisumu/Kasule/2766. The agreements produced by the Plaintiff in evidence do not support the alleged purchase and occupation of the suit property by the Plaintiff. As mentioned earlier in the judgment, the court had ordered the Kisumu County Land Registrar and Kisumu County Land Surveyor to visit the suit property, Kisumu/Kasule/3319 to ascertain its occupants and status. I did not find the findings in the report by the Kisumu County Land Registrar and Kisumu County Land Surveyor useful to the court. The report talks of clear demarcations on the ground showing the Plaintiff's and the Defendant's boundaries. In his evidence, the Plaintiff told the court that she had her main building on Plot No. 2766 and that she had two buildings which were used as a store on the suit property. The Plaintiff also mentioned the existence of a well on the suit property. The Kisumu County Land Registrar and Kisumu County Land Surveyor were supposed to come out clearly as to whether or not there were structures on the suit property and if there were, what they were. I am unable to identify the buildings and other developments referred to by the Plaintiff in his testimony in the "the sketch" at the end of the Kisumu County Land Registrar and Kisumu County Land Surveyor's report.
18. The Defendant contended that the suit property was neither developed nor occupied by the Plaintiff. The Defendant's witness Patrick Opiyo Adero (DW2) who is a licensed surveyor supported this position. As mentioned earlier, the burden of proof rested with the Plaintiff. I am not satisfied from the evidence before me that the Plaintiff has proved on a balance of probability that she entered the suit property in 1988, developed the same and had remained in occupation openly for 12 years as at the time she brought the Originating Summons on 12th March 2020. It is my finding therefore that the Plaintiff has failed to prove her adverse possession claim and as such she is not entitled to the reliefs sought in the Originating Summons. On the issue of costs, under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. The Plaintiff has failed in her claim against the Defendant. The Plaintiff will have to bear the costs of the suit.



Conclusion

19. In conclusion, the Plaintiff's suit is dismissed with costs to the Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Plaintiff

Ms. Raburu h/b for Mr. Omondi for the Defendant

Ms. J. Omondi-Court Assistant

ELC 23 OF 2020 (O.S.) JUDGMENT Page 3

