



**Asewe & 2 others v Odeny (Sued as the Legal Representative of the Estate of Gilbert Odeny Otieno - Deceased) (Environmental and Land Originating Summons 62 of 2020) [2024] KEELC 429 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 429 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 62 OF 2020  
SO OKONG'O, J  
FEBRUARY 1, 2024**

**BETWEEN**

**SIMEON JUMA ASEWE ..... 1<sup>ST</sup> APPLICANT**

**MARGARET AJWANG' OBONGO ..... 2<sup>ND</sup> APPLICANT**

**BRIAN OCHIENG ONYANGO ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PAUL AUGO ODENY ..... RESPONDENT**

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GILBERT  
ODENY OTIENO - DECEASED**

**JUDGMENT**

1. The Applicants brought this suit against the Respondent by way of an Originating Summons dated 11<sup>th</sup> September 2020 seeking the following orders;
  - a. That the Applicants be declared to have acquired the whole of all that parcel of land known as Title No. North Nyakach/Gem Rae/Kadongo/567 measuring 1.1 hectares (hereinafter referred to only as “the suit property”) by adverse possession.
  - b. That the register of the suit property be rectified by the cancellation of the name of Gilbert Odeny Otieno, deceased as the proprietor of the property and substituting the same with the name of the Applicants, and that the Applicants be issued with a title deed in respect of the property.
  - c. That the suit property be vested upon the Applicants as the absolute proprietors thereof and the Deputy Registrar be authorised to sign all forms necessary to vest the property upon the Applicants.



- d. That the costs of the suit be paid to the Applicants.
2. The Originating Summons was supported by separate affidavits sworn by each of the Applicants on 11<sup>th</sup> September 2020. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were the son, daughter-in-law and grandson of Bernadus Asewe Oliech, deceased (hereinafter referred to only as “Oliech”). The Applicants averred that the Respondent was the legal representative of Gilbert Odeny Otieno, deceased (hereinafter referred to only as “the deceased”). The Applicants averred that the deceased was registered as the proprietor of the suit property.
3. The Applicants averred that during the land adjudication process in North Nyakach Gem Rae, Oliech who had always occupied the suit property was in occupation of the same. The Applicants averred that despite the occupation of Oliech of the suit property, the property was adjudicated in favour of the deceased. The Applicants averred that the suit property was registered in the name of the deceased by mistake as the property was owned by Oliech. The Applicants averred that the deceased had filed a suit in the High Court at Kisumu in 1987 for the eviction of Oliech from the suit property namely, Kisumu HCCC No. 89 of 1987.
4. The Applicants averred that judgment was entered in favour of the deceased against Oliech on 17<sup>th</sup> December 1992 in which Oliech was ordered to vacate the suit property within three months failure to which he be forcefully evicted. The Applicants averred that Oliech remained in occupation of the suit property with the applicants and his other family members even after the said eviction order. The Applicants averred that they were not evicted from the suit property and had continued to occupy and enjoy the same as at the time of filing the suit.
5. The Applicants averred that the 1<sup>st</sup> Applicant was born in 1953 on the suit property and had occupied the suit property continuously without any interruption since then. The Applicants averred that the 2<sup>nd</sup> Applicant entered the suit property in 1974 when she got married into Oliech’s family and that she had remained in occupation of the property since then. For the 3<sup>rd</sup> Applicant, the Applicants averred that he was born in 1998 on the suit property. The Applicants averred that the 3<sup>rd</sup> Applicant had similarly remained in occupation of the suit property since 1998 without any interruption.
6. The Applicants averred that they had built their homes on the suit property on which they were living and that the deceased had never occupied the suit property. The Applicants averred that they had buried several relatives on the suit property.
7. The Applicants averred that having occupied the suit property without any interruption for more than 12 years, they had acquired the same by adverse possession. The Applicants averred that the deceased held the title to the suit property in trust for them.
8. The Applicants annexed to their affidavits in support of the application among others, a copy of the extract of the register for the suit property and a copy of the decree issued in Kisumu HCCC No. 89 of 1987 on 17<sup>th</sup> December 1992.
9. The Respondent opposed the Originating Summons through a replying affidavit sworn on 11<sup>th</sup> January 2021. The Respondent admitted that the suit property was registered in the name of the deceased as the proprietor thereof. The Respondent admitted further that he was undertaking the process of succession in respect of the estate of the deceased. The Respondent denied that the suit property belonged to Oliech and that the same was registered in the name of the deceased by mistake.
10. The Respondent averred that the Applicants had for decades refused to vacate the suit property although the same was adjudicated during land adjudication in favour of the deceased. The



- Respondent averred that the Applicants had been served with several notices to vacate the suit property which they had ignored thereby preventing the deceased and his family from using the property.
11. The Respondent admitted that the deceased sued Oliech in the High Court at Kisumu (HCCC No. 89 of 1987) and sought his eviction from the suit property. The Respondent averred that Oliech was ordered by the court to vacate the suit property and hand over possession of the same to the deceased. The Respondent averred that the Applicants' claim was res judicata the issues raised therein having been raised, heard and determined in Kisumu HCCC No. 89 of 1987. The Respondent urged the court to dismiss the Applicants' suit with costs.
  12. The Respondent's res judicata point was also raised as a preliminary objection to the suit through a Notice of Preliminary Objection dated 26<sup>th</sup> November 2020. The preliminary objection was heard and dismissed on 28<sup>th</sup> October 2021. The court held that the Applicants' suit was not res judicata.
  13. At the trial, the 1<sup>st</sup> Applicant told the court that the dispute over the suit property was initially between his deceased father, Oliech (Oliech) and Gilbert Odeny Otieno (deceased). He stated that Oliech who died in 1999 was living on the suit property and had occupied the same since 1942. He adopted his witness statement that was filed together with the Originating Summons as part of his evidence in chief and produced the documents annexed to his affidavit sworn on 11<sup>th</sup> September 2020 as exhibits.
  14. The 1<sup>st</sup> Applicant (PW1) stated that he was born in 1953 on the suit property and that he had occupied and lived on the property peacefully since then. He stated that in addition to having their residences on the property, they were also cultivating the suit property.
  15. On cross-examination, PW1 stated that his homestead was not on the suit property. He stated that it was his son, Dennis Juma Asewe who was living on the suit property together with the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. He stated that the 2<sup>nd</sup> Applicant was his sister-in-law, while the 3<sup>rd</sup> Applicant was his nephew. He stated that it was the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants who were occupying the suit property. He stated that his claim to the suit property was on account of his son's occupation of the land.
  16. The Respondent adopted his replying affidavit to the Originating Summons as his evidence in chief and produced the documents annexed to the same affidavit as exhibits. On cross-examination, the Respondent admitted that the 1<sup>st</sup> Applicant's father, Oliech occupied the suit property with his family and that he was buried on the suit property. He stated that although an order had been issued for the eviction of Oliech from the suit property, at the time of his evidence, the family of Oliech had not been evicted from the property. He stated that he was the administrator of the estate of his deceased father, Gilbert Odeny Otieno (deceased). He denied however that he was the administrator of the estate of the deceased when the suit was filed against him. He stated that he had not made any attempt to evict the Applicants from the suit property.
  17. On examination by the court, the Respondent stated that he was issued with a Grant of Letters of Administration in respect of the estate of the deceased on 14<sup>th</sup> December 2021.
  18. After the close of evidence, the parties made closing submissions in writing. The Applicants filed submissions dated 15<sup>th</sup> September 2023. The Applicants framed three issues for determination by the court. The first issue was whether the Respondent was the administrator of the estate of the deceased, Gelbert Odeny Otieno. The Applicants submitted that the Respondent was issued with a Grant of Letters of Administration intestate in respect of the estate of the deceased on 8<sup>th</sup> September 2020 and that the said Grant was confirmed on 14<sup>th</sup> December 2021. The Applicants annexed to their submissions a copy of the said Grant and Certificate of Confirmation thereof. The Applicants submitted that this suit was filed on 16<sup>th</sup> September 2020 after the Respondent had obtained a Grant of



Letters of Administration in respect of the estate of the deceased and as such he was the administrator of the estate of the deceased at the time he was sued.

19. The second issue that was framed by the Applicants was the effect of non-execution of the judgment made on 17<sup>th</sup> December 1992 in Kisumu HCCC No. 89 of 1987(the High Court judgment). The Applicants submitted that the Respondent's preliminary objection to the suit on the ground that it was res judicata was dismissed on 28<sup>th</sup> October 2021. The Applicants submitted that the High Court judgment had remained unexecuted for over 27 years since it was delivered.
20. The Applicants submitted that under Section 4(4) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya the said decree could not be executed. The Applicants submitted that no action can be taken upon a judgment after the expiry of 12 years from the date when the judgment is delivered. In support of this submission, the Applicants cited among others, M'Ikiara M'Rinkanya and Another v. Gilbert Kabeere M'Mbijiwe[2007]eKLR. The Applicants submitted that the effect of non-execution of the High Court judgment was that it had become legally stale and of no benefit to the person in whose favour it was made.
21. The other issue was whether the Appellants had proved their adverse possession claim. The Applicants cited Mtana Lewa v. Kahindi Ngala Mwangandi[2015]eKLR and submitted that they had satisfied all the elements of adverse possession. The Applicants submitted that they had established that; they were in occupation of the suit property, their occupation of the property was open, and that the occupation was uninterrupted for 12 years before the filing of the suit. The Applicants submitted that they had occupied the suit property for more than 12 years after the deceased's right to execute the High Court judgment became statute-barred.
22. The Applicants submitted that they had proved their claim against the Respondent and urged the court to allow the Originating Summons.
23. The Respondent filed submissions dated 4<sup>th</sup> October 2023. In his submissions, the Respondent framed only one issue for determination. The issue was whether the Applicants had proved their case to warrant the grant of the orders sought in the Originating Summons. The Respondent cited several cases on proof of adverse possession and submitted that the Applicants had not demonstrated that their possession of the suit property was notorious, open and adverse to the deceased. The Respondent submitted that the evidence of the 1<sup>st</sup> Applicant that he adduced on his behalf only and not on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants fell short of proving the said elements of adverse possession.
24. The Respondent submitted in conclusion that the Applicants had failed to prove their case against the Respondent on a balance of probabilities. The Respondent urged the court to dismiss the Applicants' suit with costs.
25. I have considered the Originating Summons together with the supporting affidavits. I have also considered the replying affidavit filed by the Respondent in opposition to the Originating Summons. I have considered the evidence tendered by the Applicants in support of their case and the Respondent in his defence. In *Salim v. Boyd and Another* [1971] E. A. 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. 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, nec plecario (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.”

26. In his replying affidavit, the Respondent admitted in paragraph 8 that the Applicants had for decades refused to vacate the suit property that was registered in the name of the deceased despite notices to vacate served upon them over the years. In his evidence on cross-examination, the Respondent admitted that Oliech occupied the suit property with his family. The Respondent admitted further that after the death of Oliech, members of Oliech’s family remained in occupation of the suit property and had not been evicted. The Respondent admitted further that the Applicants were in occupation of the suit property and that he had not made any attempt to evict them from the suit property.
27. It is clear from the foregoing that the Respondent did not deny that the Applicants were in occupation of the suit property. The 1<sup>st</sup> Applicant produced in evidence photographs showing the homesteads of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants on the suit property. This evidence was not challenged in any material aspect by the Respondent. I am satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were in occupation of the suit property at the time this suit was brought and that they had occupied the same openly and continuously for over 12 years at the time the Originating Summons herein was filed. I have not found the failure on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants to give evidence fatal to their claim. This is because their occupation of the suit property for over 12 years before the filing of the suit was admitted by the Respondent and the evidence that was adduced by the 1<sup>st</sup> Applicant supported and proved their claim.
28. For the 1<sup>st</sup> Applicant, there is no dispute that he was born on the suit property in 1953 and that he occupied the suit property for some time before he moved out. In his evidence on cross-examination, he told the court that he was no longer residing on the suit property. He stated that the houses in the photographs that he produced in evidence belonged to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, and his son, Dennis Juma Asewe. He stated that his claim over the suit property was on account of the portion thereof that was occupied by his son. The 1<sup>st</sup> Applicant did not tell the court the age of his said son or whether he had brought the suit on his behalf. There was also no evidence as to when the son entered the suit property. I am of the view that the 1<sup>st</sup> Applicant having occupied and subsequently vacated the suit property could not maintain an adverse possession claim in respect thereof. If the 1<sup>st</sup> Applicant’s son was the one in occupation of the suit property, then an adverse possession claim could only be brought by him and not by the 1<sup>st</sup> Applicant.
29. I agree with the Applicants that the execution of the High Court judgment delivered on 17<sup>th</sup> December 1992 in favour of the deceased became statute-barred on 17<sup>th</sup> December 2004. The said judgment did not therefore have any effect on the Applicants’ adverse possession claim whose time is reckoned from 17<sup>th</sup> December 2004 when the said judgment became ineffective. From the copies of the Grant of Letters of Administration intestate produced by both parties, I am satisfied that the Respondent was the administrator of the estate of the deceased Gilbert Odeny Otieno at the time this suit was filed on 16<sup>th</sup> September 2020. I therefore find no merit in the technical objections that were raised by the Respondent against the Applicants’ claim.
30. Due to the foregoing, it is my finding that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants’ adverse possession claim against the Respondent has been proved. The 1<sup>st</sup> Applicant’s claim however fails for lack of locus standi.
31. In conclusion, I hereby make the following orders;
  - a. I declare that Margaret Ajwang’ Obongo and Brian Ochieng Onyango, the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants’ have acquired all that parcel of land known as Title No. North-Nyakach/Gem Rae/ 567 measuring approximately 1.1 hectares by adverse possession.



- b. The Deputy Registrar of this court shall execute on behalf of the Respondent all documents necessary to facilitate the transfer of all that parcel of land known as Title No. North-Nyakach/Gem Rae/ 567 to the name of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.
- c. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicants shall pay all fees and other statutory charges required for the transfer of Title No. North-Nyakach/Gem Rae/ 567 from the deceased Gilbert Odeny Otieno to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.
- d. The 1<sup>st</sup> Applicant's claim is dismissed.
- e. Each party shall bear its own costs.

**DELIVERED AND SIGNED AT KISUMU ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024**

**S. OKONG'O**

**JUDGE**

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

Mr. Okoth for the Applicants

Mr. R.Odhiambo for the Respondents

Ms. J. Omondi-Court Assistant

