



REPUBLIC OF KENYA



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**Odek v Odera & another (Environmental and Land Originating Summons  
144 of 2018) [2024] KEELC 707 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 707 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 144 OF 2018  
MN KULLOW, J  
FEBRUARY 6, 2024**

**BETWEEN**

**MARK OKECH ODEK ..... APPLICANT**

**AND**

**NORBET OKELLO ODERA ..... 1<sup>ST</sup> RESPONDENT**

**WILKISTER AKINYI NYAMORI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant herein commenced this suit by way of an Originating Summons dated 21<sup>st</sup> December, 2018 against the Respondents seeking the following orders: -
  - i. That this Honourable Court do declare the Applicants to have acquired Adverse Possession of part of L.R. No. Suna East/ Wasweta 1/1942 measuring approx. 0.8Ha now registered as Suna East/ Wasweta 1/13105. The Applicant's portion therefore falling in land parcel L.R. No. Suna East/ Wasweta 1/13105 measuring 0.14Ha.
  - ii. That this Honourable Court be pleased to further order for excision of the portion of the land pleaded to from Suna East/ Wasweta 1/13105 measuring approx. 0.14Ha and the same be transferred to the Applicant.
  - iii. That this Honourable Court be pleased to issue an Injunction restraining the Respondents from interfering with the Applicant's enjoyment of the said portion of the suit land herein.
  - iv. That this Court do order the Respondents to pay costs of this Application.
2. The Originating Summons is premised on 12 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date. It is his claim that he purchased a portion of the suit land measuring approx. 0.14Ha from the 1<sup>st</sup> Respondent and his mother, one Isabela Muga who is since deceased. Pursuant to the said sale, he immediately took possession of the said portion. Further, it is his assertion



that at the time of the said sale, the suit land was vacant, save for one house which was part of the transaction and was paid for as part the agreement for sale.

3. It is his contention that Isabela Muga unfortunately died before transferring the suit land to him. Be as it may, he has continued to be in open, continuous and uninterrupted occupation of the purchased portion for over 18 years to date. He stated that he has extensively developed the suit land; put up structures, planted crops and trees since the year 2000.
4. It is further his claim that the original land L.R. No. 1942 has since been subdivided into 2 portions; No. 13104 and 13105 and his portion falls on parcel No. 13105, which is currently registered in the name of the 2<sup>nd</sup> Respondent. Despite the said subdivision, transfer and registration of the suit land, his occupation has never been interrupted and he has remained on the suit land to date.
5. His case against the Respondents is that sometimes in the year 2018; the Respondents started threatening to evict him from his portion of the suit property, claiming that he has trespassed into the land hence the instant suit. He maintained that no precipitate action to defeat or interrupt his occupation has ever been taken by the Respondents.
6. He now avers that his occupation and possession of the said portion of land has been adverse to the interest of the Respondents' over the same portion and he has thus acquired overriding interests capable of registration.
7. The 1<sup>st</sup> Respondent entered Appearance through the firm of S.O. Odingo & Co. Advocates and filed a Replying Affidavit sworn on 12<sup>th</sup> February, 2019. It was his assertion that he was the registered owner of the original suit land No. 1942 measuring 0.8Ha the same being a subdivision of parcel No. 890 that was initially registered in the name of Walter Aoomo Ochieng.
8. It was his claim that in the year 1998, he sold a portion measuring 100 ft by 100ft of the suit land No. 13105, which portion was later sold to the 2<sup>nd</sup> Respondent.
9. He further contended that one Isabela Muga has never at any given time been the owner of the suit land No. 1942 and maintained that he has never sold the suit land or participated in the sale thereof to the Applicant as alleged.
10. He confirmed that he subdivided the original suit parcel No. 1942 into 2 parcels; No. 13104 which he retained and subsequently sold to different individuals and parcel No. 13105 which belongs to the 2<sup>nd</sup> Respondent. He dismissed the Applicant's claims on residing on parcel No. 13105 and stated that he is a squatter and does not have any right over the same. He urged the court to dismiss the same with costs.

## **Trial**

11. The Applicant's case proceeded for hearing on 30.05.2022, the Applicant testified as PW1. It was his testimony that he bought a portion of the suit land measuring 0.8Ha from one Isabela Muga, who is the 1<sup>st</sup> Respondent's mother and is since deceased.
12. It was further his testimony that he has lived on the suit land since 21.2.2000; where he has his home, cultivates and has also planted trees. It was his claim that the Respondents, who are husband and wife, want to evict from the said portion of land without any reasons, they have destroyed his crops and have encroached on the land.
13. He produced the following documents as Plaintiff Exhibits 1 - 5, Sale Agreement dated 21.2.2000 as Pexh. 1, Green Card for parcel No. Suna East/ Wasweta 1/ 1942 as Pexh. 2, copy of Green Card of



parcel No. Suna East/ Wasweta 1/13104 as Pexh. 3a and 13105 as 3(b), Copy of Mutation for Suna East/Wasweta 1/1942 as Pexh. 4 and bundle of photographs as Pexh. 5 (a) – (c).

14. On cross- examination by Mr. Omwenga; he conceded that he did not have any other witness to confirm that he lives on the suit land. He however maintained that he bought the land from Isabela Muga and the 1<sup>st</sup> Respondent but admitted that the name of the 1<sup>st</sup> Respondent did not appear on the same agreement.
15. He further conceded that at the time of the sale, the suit parcel was registered in the name of the 1<sup>st</sup> Respondent and the same was confirmed by the official search he conducted. It was his claim but that the vendor, Isabela Muga informed him that the land was hers.
16. He maintained that the Green Card produced showed that the suit land was transferred and registered in the name of the 2<sup>nd</sup> Respondent.
17. The Defence case proceeded for hearing on 24/7/2023, the 1<sup>st</sup> Respondent testified as DW1. He adopted his Replying Affidavit as his evidence in chief. It was further his testimony that he neither knows the Applicant nor sold the portion of the suit land to him. He claimed that he was not aware that her mother, Isabela Muga, had sold the land to the Plaintiff as alleged.
18. It was his claim that the Plaintiff has never been in occupation of the suit land and further that there are no houses on the suit land.
19. On cross- examination by Mr. Singei; he reiterated that he was registered as the owner of the original suit land No. 942 in the year 1981 but he later subdivided the land around 18/12/2003. He maintained that he never participated in the sale of the suit land between his mother and the Applicant and further that even though the names and the ID number on the sale agreement are his, the signature against his name is a forgery.
20. He also confirmed that he was not the one occupying parcel No. 13105 and that he lives on parcel No. 25358.
21. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and considered.

### **Analysis and Determination**

22. I have reviewed the pleadings herein, the respective exhibits and parties' rival submissions in totality and on that account it is my considered opinion that the following issues arise for determination: -
  - a. Whether the Applicants have sufficiently proved their claim on Adverse Possession.
  - b. Whether the Applicants are entitled to the reliefs sought.

### **I. Whether the Applicants have sufficiently proved their claim on Adverse Possession Claim of Adverse Possession**

23. Sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and section 28 (h) of the *Land Registration Act* provides the statutory framework for the doctrine of adverse possession.
24. Makhandia, JA in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR defined the doctrine of adverse possession as follows: -

“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 certain period, in Kenya, it is 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. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act.....*”

25. The requirements for a claim of adverse possession are now well settled; The land in question must be registered in the name of a person other than the Applicant, the Applicant must demonstrate that he took possession of the parcel of land, asserted his rights over it in an adverse manner to the title of the land owner and the said title holder did not take any precipitate action against the said Applicant for a period of 12 years. Lastly, he must then demonstrate that his possession and occupation of the said land was not by force or under the licence of the land owner and that the said possession was open, in continuity for an uninterrupted period of over 12 years.
26. With regards to the possession; the claimant must also establish the date he took possession, the nature of his possession, the duration of his possession and whether the same was open and uninterrupted for the 12 years’ statutory period. See Court of Appeal decision in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR)
27. The first ground to be established is the registration of the suit land. It is not in dispute that the original land parcel No. 1942 was registered in the name of the 1<sup>st</sup> Respondent. This was confirmed by the 1<sup>st</sup> Respondent in his pleadings and testimony in court as well as the Applicant’s Pexh. 2 and during cross-examination, when he confirmed that at the time of sale the land was registered in the name of the 1<sup>st</sup> Respondent.
28. The said original land No. 1942 was however subdivided into 2 portions; parcel No. 13104 and 13105. It is the Applicant’s claim that his portion of land falls under parcel No. 13105, which is registered in the name of the 2<sup>nd</sup> Respondent. He produced a copy of the Green Card as Pexh. 3b in support of the same. This fact was further confirmed by the 1<sup>st</sup> Respondent in his Replying Affidavit. It is therefore settled that the registration of suit land is not in the name of the Applicant.
29. Upon establishing the registration of the suit land the next issue for determination is on the Applicant’s possession, occupation and use of the suit land. The onus is on the Applicant, who is alleging the occurrence of an event to demonstrate the duration and nature of his possession and whether he acquired any prescriptive and overriding rights over the suit land, capable of registration.
30. It is the Applicant’s claim that he took possession of the suit land on 21/2/2000 pursuant to a sale transaction between himself and the 1<sup>st</sup> Respondent’s mother, one Isabela Muga, for a portion measuring approx. 0.14Ha and he produced Pexh. 1 in support of the said averments.
31. The 1<sup>st</sup> Respondent on his part vehemently denied the said assertions. He denied knowledge of the Applicant or ever selling any portion of the suit land to the Applicant. It was further his contention that the said Isabela Muga had no capacity to sell the said land since she was not the registered owner thereof. During cross-examination, he conceded that the name and ID number contained in Pexh. 1 as a witness were his but he maintained that the signature therein was a forgery. However, no evidence was adduced to support the said allegations of forgery.
32. Be as it may, the validity of the said sale agreement is not an issue for determination in the instant claim for adverse possession. The evidence of purchase is relevant as it explains how the Applicant came into possession of the land and in turn relates to whether the Applicant has proved his claim on adverse possession.



33. Pexh. 1 is proof and signifies that the Applicant's possession and occupation was consensual and permissive and as I have held in a number of cases, permissive possession is inconsistent with adverse possession. Therefore, an Applicant must demonstrate how and when his possession ceased to be permissive and became adverse. This position was buttressed in the case of *Jandu v Kirpal* [1975] EA 225 held that possession does not become adverse before the end of the period for which permission to occupy has been granted. See also *Wambugu v Njuguna* [1983] KLR
34. Guided by the decision above; I am of the considered view that even though the Applicant's entry into the suit land was by consent and permission vide the agreement for sale, time for adverse possession started to run either upon the expiry of the license period or upon full payment of the agreed purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
35. In the present case, the agreement for sale of the portion of the suit land was entered into on 21/2/2000. There has not been any demonstration of the steps taken after the signing of the sale agreement, payment of the purchase price and the Applicant taking possession of the purchased portion. No Land Control Board Consent was obtained within the requisite timelines at the time, the vendor, one Isabela Muga died before transferring the said land to the Applicant herein. Further, there is no evidence of any steps taken or precipitate action by the Respondents to interrupt/ interfere with the Applicant's occupation and use of the said land.
36. It is therefore my considered opinion that time for adverse possession started running in the year 2006, upon lapse of the 6 years' contract period without its final completion. At the time of filing the suit herein, the Applicants had used the suit land for a period of 12 years which is the statutory period for a claim of adverse possession.
37. Lastly, the Applicant needs to demonstrate the adverse nature of his occupation and use of the suit land against the rights of the Respondents over the same land. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR)
38. PW1 produced Pexh. 5 (a- c) as proof of his occupation and use of the portion of the suit land measuring 0.14Ha. The 1<sup>st</sup> Respondent on his part gave different accounts of the Applicant's possession and use of the suit land marred with inconsistencies. On one hand, it was his assertion that the Applicant does not have any rights over the suit land and is living on the suit land as a squatter. During trial, it was his testimony that he neither knows the Applicant nor is he in occupation of the suit land. He dismissed the bundle of photographs produced by the Applicant as having been taken from elsewhere and not on the suit land. It was also his claim that the house on the photograph cannot be used as a residing place by anyone.
39. Be that as it may, DW1 did not challenge and/or controvert Pexh. 5 (a- c) as produced by the Applicant in support of the occupations claims. He did not also provide a different bundle of photographs to show the actual status of the suit land and in support of his allegations that the photographs produced by the Applicant were taken from elsewhere. In the absence of any contrary proof, I find that Pexh. 5 (a- c) is the actual reflection of the status of the suit land and the same confirms the Applicant's occupation and use of a portion of the suit land.
40. By building structures, cultivating and planting crops on a portion of the suit land measuring 0.14Ha without obtaining permission from the 2<sup>nd</sup> Respondent herein, the Applicant manifested *animus possidendi*, a clear mind and intention of dealing with the suit land as if it was exclusively his and



in a manner that was in clear conflict with the 2<sup>nd</sup> Respondent's rights. The 2<sup>nd</sup> Respondent was consequently dispossessed of the suit land.

41. Further, adverse possession is a fact to be observed upon the land and not on the title. Thus, even though the original land No. 1942 has since been subdivided and a portion transferred and registered in the name of the 2<sup>nd</sup> Respondent; the said transfer and registration did not affect and/or interrupt the Applicant's occupation, use and rights over the said land.
42. The totality of the foregoing is that the Applicant has sufficiently demonstrated that he has acquired prescriptive rights over the portion of the suit parcel No. 13105 measuring 0.14Ha by virtue of his occupation and use of the suit land. Therefore, it is my finding that the Applicant has proved his claim on a balance of probabilities to warrant the reliefs sought.
43. Having held that the Applicant has proved his claim on adverse possession against the Respondents' title to the required standard, I accordingly find that they are entitled to the reliefs sought.

### **Conclusion**

44. The upshot of the above is that the Applicant has proved his claim against the Respondents and I accordingly allow the Originating Summons dated 21<sup>st</sup> December, 2018 on the following terms;
  - i. A Declaration is hereby issued that the Applicant has acquired by way of Adverse Possession a portion of L.R. No. Suna East/ Wasweta 1/1942 now registered as Suna East/ Wasweta 1/13105 measuring 0.14Ha.
  - ii. An Order be and is hereby issued for the transfer of a portion of the suit land Suna East/ Wasweta 1/13105 measuring approx. 0.14Ha in favor of the Applicant.
  - iii. Further, an Order of Injunction is hereby issued restraining the Respondents from interfering with the Applicant's enjoyment of the said portion of the suit land herein.
  - iv. Costs of this suit be borne by the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 6<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**MOHAMMED N. KULLOW**

**JUDGE**

In presence of; -

Ms Aeleon for the Applicant

1<sup>st</sup> Respondent present in person

Court Assistants - Tom Maurice/Victor

