



**Ologi v Hassanali & another (Environmental and Land Originating Summons E004 of 2023) [2024] KEELC 1712 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1712 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

**E ASATI, J**

**APRIL 4, 2024**

**IN THE MATTER OF: AN APPLICATION FOR ACQUISITION  
OF TITLE BY ADVERSE POSSESSION OF THE PARCEL OF  
LAND KNOWN AS KISUMU/ MUNICIPALITY BLOCK 8/472**

**BETWEEN**

**FLORENCE ATIENO OLOGI ..... PLAINTIFF**

**AND**

**KARIM MUHAMMED HASSANALI ..... 1<sup>ST</sup> DEFENDANT**

**AMIN MUHAMMED HASSANALI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. *Vide* the Originating Summons dated 21<sup>st</sup> August, 2023, the Plaintiff Florence Atieno Ologi sued the Defendant for orders that:
  - a. a declaration be issued that the applicant has been in adverse possession of the whole land parcel number Kisumu/Municipality Block 8/472 for a period of 12 years.
  - b. a declaration be issued that the applicant has acquired title to 0.20Ha comprised in the land title number Kisumu/Municipality Block 8/472.
  - c. an order be issued that the Respondents hold the title to land parcel number Kisumu/Municipality Block 8/472 in trust for the applicant.
  - d. An order that land parcel No. Kisumu/Municipality Block 8/472 be transferred to the applicant/plaintiff and the applicant/plaintiff be registered as the owner of the said land parcel number Kisumu/Municipality Block 8/472.



- e. an order that the Respondents do execute all transfer documents in favour of the applicant and in event of default the Deputy Registrar of the court do execute the same documents for transfer.
  - f. costs be provided for.
2. The Plaintiff's case is that she has been in constant and exclusive occupation, use and possession of the land parcel known as Kisumu/Municipality Block 8/472 (the suit land herein) since the year 2005 to date without any interruption, a period of over 12 years and has therefore acquired title thereto by adverse possession. That since the year 2005, she has lived on the suit land together with her family. That although the suit land is registered in the name of the Defendants, it is the Plaintiff who has been exercising all the rights of ownership over it. That she has built a permanent house on the land and hence the Defendants' rights on the land have been extinguished by operation of the law.
  3. The Plaintiff testified in court and adopted the contents of her Supporting Affidavit sworn on 21<sup>st</sup> August, 2023 as her evidence in chief. In the Supporting Affidavit, she had deposed that she entered the suit land in or about November, 2005 without the consent or permission of the Defendants who are the registered owners. That she took possession and built permanent structures on the land. That it would be just and equitable if the suit land is registered in her name by virtue of her continuous, peaceful, exclusive and uninterrupted occupation of the same for a period totaling to more than 12 years.
  4. The Plaintiff produced exhibits namely; a Chief's letter dated 17<sup>th</sup> August, 2023 as exhibit P.1, certificate of official search for Kisumu Municipality Block 8/472 as exhibit P.2 and photographs as exhibit P.3.
  5. Adverse possession is a doctrine of law *vide* which one acquires title to land by reason of continuous, open, uninterrupted and peaceful possession for a period of over 12 years of land belonging to another. The doctrine is anchored in sections 7, 13, 17 and 38 of the [Limitation of Actions Act](#). The procedural provision on how to approach the court for a relief based on adverse possession are contained in Order 37 of the [Civil Procedure Rules](#), 2010. Other provision of the law that are relevant include article 40 of [the Constitution](#) of Kenya which protects the right to property, section 7 of the [Land Act](#) which lists adverse possession as one of the methods of land acquisition and Section 28(h) of the [Land Registration Act](#) which recognizes rights acquired by reason of adverse possession as an overriding interest to which all registered land is subject.
  6. Exhibit P.2 (the green card/ copy of the register in respect of the suit land) shows that the suit land is registered in the names of the Defendants herein. Order 37 Rule 7 (2) of the [Civil Procedure Rules](#) requires that an extract of the title to the suit land be annexed to the Affidavit in support of the Originating Summons. The requirement was complied with in this case.
  7. The suit was undefended. At the stage of service of the Originating Summons upon the Defendants, the Plaintiff filed an application seeking for leave to serve process upon the Defendants by substituted service. The Plaintiff averred that the Defendants could not be traced for purposes of personal service hence was constrained to make the application to be allowed to serve the Defendants by way of substituted service.
  8. It was the Plaintiff's testimony that she had had open, continuous and peaceful occupation of the suit land since the year 2005 when she entered there onto. To support this, she produced exhibits P.1, a letter dated 17<sup>th</sup> August, 2023 signed by the Assistant Chief, Southern Sub-Location, Town Location, Kisumu. The contents of the letter are that the Plaintiff is a resident of Milimani estate plot number



Kisumu Municipality 8/473 Block. That she is a person of good conduct. The Plaintiff also produced a bundle of 3 photographs to show the developments on the suit land.

9. I have considered the evidence placed before the court and the law on adverse possession. I find that the sole issue that arises for determination is whether or not the Plaintiff has acquired title to the suit land by adverse possession.
10. The first point that a claimant must prove in a claim of adverse possession is existence of the suit land and its registration in the name of the Defendant sued. The requirement that the Plaintiff annexes a certified extract of the title to the suit land to the Affidavit in Support of the Originating Summons is meant to satisfy this requirement. From the copy of certificate of official search exhibited, the suit land namely; Kisumu Municipality Block 8/472 which measure 0.2017 Hectares is registered in the joint names of the Defendants.
11. The next requirement is that the entry onto and/or occupation of the suit land by the Plaintiff must be with the knowledge but without the permission or consent of the registered owner. The Plaintiff's case is that she entered the suit land in the year 2005 without the permission or consent of the Defendants and has remained thereon to date. I find no evidence that the Defendants were or are aware of the Plaintiff's entry onto and occupation of the suit land. *Vide* her application for substituted service, the Plaintiff confirmed that she does not know the whereabouts of the Defendants.
12. In Kisumu Civil Application No.110 of 2016, *Richard Wafwafwa Songoi –vs- Ben Munyifwa Songoi* [2020]eKLR the Court of Appeal held that a person claiming adverse possession must establish on what date he came into possession, what was the nature of his possession, whether the fact of his possession was known to the other party, for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years. In the present, I find no evidence that the fact of the applicant's entry onto, possession, occupation and use of the suit land was known to the Respondents. Time will not start to run against a title holder who is not aware of the entry and/or possession of the subject land by the adverse possessor.
13. The Plaintiff produced the Chief's letter and the photographs as her evidence of her occupation and development of the suit land. However, the parcel number mentioned in the chief's letter (exhibits P.1), which Kisumu Municipality Block 8/473, is different from the parcel number in the Originating Summons which is Kisumu Municipality Block 8/472. Secondly, though the photographs show a house and some plants, there is no evidence that the house was developed by the Plaintiff. There is also no evidence connecting the said house and plants to the suit land especially in view of the contents of exhibits of P.1. There is no evidence that those developments (the house and plants) are actually on land parcel No. Kisumu Municipality Block 8/472 And Not Kisumu Municipality Block 8/473 or any other land.
14. The effect of a finding that a party has had adverse possession of land include loss of title by the registered owner hence loss of the right to land as protected under article 40 of *the Constitution* of Kenya. There has to be credible evidence of adverse possession to enable the court come to such finding.
15. Though the suit was undefended, under sections 107, 108 and 109 of the *Evidence Act*, the burden of proof remains with the Plaintiff to prove her case on a balance of probabilities. In the case of *Charter House Bank Limited (Under Statutory management –vs- Frank N. Kamau* [2016] e KLR the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“ we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the



defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

I find that the burden has not been discharged.

16. For the foregoing reasons, the plaintiff's claim fails. The suit is hereby dismissed with no order as to costs as the suit was not defended.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 4<sup>TH</sup> DAY OF APRIL, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Miss Otieno for the Plaintiff/Applicant.

No appearance for the Defendants/Respondents.

