



Oloo (Suing on behalf Michael Oloo Ogutu-Deceased) v Ouma & 2 others (Environment & Land Case 15 of 2021) [2024] KEELC 3519 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 15 OF 2021**

AY KOROSS, J

APRIL 4, 2024

BETWEEN

FELIX ODUOR OLOO (SUING ON BEHALF MICHAEL OLOO OGUTU-DECEASED) PLAINTIFF

AND

MAURICE OTIENO OUMA 1ST DEFENDANT

JOSEPH OWINO OUMA 2ND DEFENDANT

OUMA OKOTH PETER 3RD DEFENDANT

JUDGMENT

Background of the case

1. This suit is instituted by an originating summons (OS) dated 11/09/2014 brought pursuant to the provisions of Order 37 of the Civil Procedure Rules and Section 38 of the *Limitation of Actions Act*.
2. The OS is supported by the affidavits of the deceased Michael Oloo Ogutu (Plaintiff) which he deposed on even date and that of Felix Oduor Oloo (Felix) which he swore on 19/09/2023. Michael died on 22/05/2022 and he was substituted by his son Felix.
3. The defendants are the registered owners of land parcel no. East Ugenya/Kathieno 'B' 237 (suit property).

Plaintiff's case

4. It was the plaintiff's case that he had allegedly acquired the suit property by adverse possession and thus sought the following reliefs from this court:-
 - a. The plaintiff be declared the absolute owner of the suit property.



- b. The defendants be ordered to execute all documents of transfer in respect of the suit property in the plaintiff's favour failure of which, the deputy registrar be empowered to execute the suit property's documents to enable the land registrar register it in the plaintiff's name.
 - c. The defendants, their agents, servants or any other person claiming through them do give vacant possession and be restrained by injunction from alienating or subdividing the suit property.
 - d. Cost of the suit be awarded to the plaintiff.
5. In reply to the OS, the 1st defendant who had authority of the 2nd, 3rd and 4th defendants filed a response deposed on 19/05/2023.

Plaintiff's evidence

6. Felix testified as PW1 and his evidence in chief was composed of his oral testimony, affidavit, witness statement and documents he produced in support of his case which were produced and marked as Pex1-Pex5. They were respectively a limited grant in his favour, the suit property's greencard, chief's letters and bundle of photographs.
7. It was his testimony in February 2001, the plaintiff purchased 1 acre of the suit property (disputed portion) from one Daniel Ochieng Ogak (Daniel) who had earlier on purchased it from Fredrick Ouma Oludhe (Fredrick).
8. It was his further testimony that immediately upon such purchase, the plaintiff constructed a homestead and commercial block upon it and lived there with his family.
10. Further, it was his evidence and even he and his siblings including Kevin Juma Oloo (Kevin) who testified PW2 and Caleb Otieno Juma (Caleb) had constructed homes upon the disputed portion. According to him, they had been in peaceful, quiet, continuous and uninterrupted occupation of the disputed portion since 2001.
11. In addition, it was his testimony that though his family owned land parcel no. East Ugenya/Kathieno 'B' 236 (236) which was an adjacent property, the dispute herein was not a boundary dispute.
12. On cross examination, it was his testimony Daniel occupied the disputed portion not as a lessee but as a purchaser and that immediately Daniel vacated the disputed portion, the plaintiff's family entered the suit property.
13. When PW2 testified, he corroborated Felix's evidence. During cross examination, it was his evidence that the agreement for sale between Daniel and the plaintiff had a consideration of ksh. 30,000/- which was witnessed by Petro Wambia Olude who testified as PW3.
14. In addition, he testified the plaintiff and his mother were buried in 236 because that was where the family's graveyard stood which was also where the plaintiff's first wife lives. It was his further evidence that the defendants occupy the lower portion of the suit property.
15. In his exam in chief, PW3 stated he was privy the plaintiff purchased the suit property but the 1st defendant had declined to register the disputed portion in the plaintiff's name.
16. On cross examination, PW3 stated the plaintiff and Daniel were his relatives and he lived within the neighbourhood of the suit property. He testified Daniel was not a lessee and that he (Daniel) had lived on the suit property for 10 years and he had witnessed an agreement for sale between Daniel and Fredrick.



17. However, he stated he was not familiar with an agreement for sale between the plaintiff and Daniel. According to him, a boundary dispute could not arise between the suit property and 236 since a 7-meter road separated them and the plaintiff's family occupied the disputed portion. On re-examination, the plaintiff testified Daniel had buried his children on the disputed portion.

Defendants' case

18. The 1st defendant who was Fredrick's wife testified as DW1 and relied on her witness statement as her evidence in chief and also produced documents in support of her case which were marked as DEx.1 to DEx.10. They were respectively a title deed of the suit property, an official search over 236, a letter by Fredrick dated 19/10/1995, summonses from the district surveyor, police OB, bundle of photographs and demand letters.
19. It was her evidence Daniel was a lessee of the disputed portion having so entered into such an oral agreement in her presence. It was her testimony Daniel paid ksh.8,000/- and the lease was to last for only 10 years.
20. Further, she stated during the tenure of the lease, they had no qualms whatsoever with Daniel's occupancy and upon the lease tenure coming to an end, Daniel vacated the suit property and they took possession before the plaintiff subsequently entered the disputed portion claiming it was his.
21. According to her, it was a boundary dispute and a finding had been made in her favour. It was her evidence the plaintiff started claiming he had bought the disputed portion and wanted a refund of the purchase price which she declined. She stated the plaintiff's sons had caused havoc to her property and when she reported this incident to the police, they compensated her.
22. Her evidence in cross examination was consistent as that of her exam in chief and she testified Fredrick's letter indeed affirmed that Daniel was a mere lessee who had constructed on the disputed portion and buried his children on it. It was her testimony the plaintiff entered the suit property in a year she could not recall and had occupied it with his 2nd wife and children.
23. DW1's evidence was led by DW2 one Rose Obare who was an in law to DW1. Her evidence was contained in her witness statement and she corroborated DW1's evidence.
24. It was her testimony the oral transaction between Fredrick and Daniel took place in her presence and that of DW1, Fredrick and Fredrick's mother one Martina Aloo.
25. She stated that when the lease term came to an end, Daniel vacated it and when he so did, the defendants started utilising the suit property. She testified that unfortunately all this changed when Fredrick died because that was when the plaintiff made entry.
26. During cross examination, her evidence was consistent with that of her exam in chief. However, she contradicted herself when she testified that the plaintiff entered the suit property after Daniel vacated it. In addition, she testified she was unsure of when the plaintiff entered the disputed portion. However, when she was pressed further, she testified it was in 1994.

Parties' submissions

27. After closing the plaintiff and defence cases, parties' counsels sought to file written submissions. In giving directions on 31/10/2023, this court gave the plaintiff's counsel on record M/s Ashioya & Co. Advocates 14 days to file submissions and gave the defendant's counsel M/s. O.H. Momanyi & Co. Advocates corresponding leave.



28. In addition, the court issued a mention date of 4/12/2023 for purposes of confirming compliance and issuing a judgment date. However, both counsels were a no show and to make it worse, none of them had filed their respective submissions.
30. Therefore, bearing in mind practice direction no. 43 of the ELC practice directions contained in gazette notice no. 5178, this court reserved the suit for judgment.
31. Despite such reservation, both counsels blatantly and without seeking leave, filed their respective written submissions on diverse dates of 2/02/2024 and 22/02/2024. These submissions are improperly on record and are hereby expunged.
32. It is noted the last date the plaintiff ought to have filed his submissions was Monday 18/12/2023 while taking into consideration the provisions of Order 50 Rule 4 of the Civil Procedure Rules, the defendant ought to have filed his submissions by Friday 26/01/2024.

Undisputed facts

33. From parties' evidence, it emerged that there were certain undisputed facts. Firstly, Daniel at one time occupied the disputed portion and even buried his kin upon it, secondly, the plaintiff and his family including his 2nd wife and children occupied the disputed portion and such occupancy was without permission, thirdly, the defendants were the registered owners of the suit property and lastly, the plaintiff's family owned 236 which was within the locale of the suit property.

Issues for determination

34. I have considered the pleadings and evidence adduced by the parties including undisputed facts which were laid down earlier in this judgment. Being guided by provisions of law and judicial precedents, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and the issues for determination are: -
 - I. Whether the plaintiff proved his claim of adverse possession against the defendants.
 - II. What appropriate orders should be granted including an order as to costs.

Analysis and Determination

35. The issues that were earlier recognised as arising for determination shall be addressed herein in a sequential manner: -

I. Whether the plaintiff proved his claim of adverse possession against the defendants.

36. The common law doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act* and it is one of the ways of acquiring land in Kenya.
37. The relevant provisions are underpinned in Sections 7, 13 and 38 thereof and from these provisions of law and settled case law, the onus is on the plaintiff who claims adverse possession to prove that he is an intruder, he has been in unlawful occupation for a period of over 12 years to the time of filing suit, the claim is against the registered owner, show clear and unequivocal evidence he has dispossessed the owner or the owner has discontinued possession in a manner that is without permission and that his occupation is, with the knowledge of the true owner, without secrecy, peacefully, without evasion and he is in continuous occupation of a determinable portion of the suit property. See *Mtana Lewa v Kahindi Ngala* (2015) eKLR and *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another* [1977] eKLR.



38. It is settled law claims of adverse possess possession is a matter of fact to be observed on the land. See *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR.
39. Even if it unquestionable from undisputed facts the plaintiff has met the 1st, 2nd, 3rd and 4th principles of occupancy, occupancy without permission, occupancy of a determinable portion of one acre and the defendants are the suit property's registered owners, these are not sufficient for him to be deemed an adverse possessor as he has to prove all elements of adverse possession.
40. On the 5th principle of occupancy in a manner that is peaceful, continuous, with the knowledge of the true owner, without secrecy and without evasion, the plaintiff's witnesses were consistent in their testimony that since the date of entry in February 2001, they had occupied the disputed portion peacefully and without interruption from the owner.
41. The 1st defendant refuted this by testifying the parties had encountered several disputes which were adjudicated by the chief and land registrar and that at one point in time, she reported the plaintiff's sons to the police for destroying her crops.
42. To support her argument, the 1st defendant produced summonses from the land registrar, demand letters from the defendants' advocate, photographs and OB records. On scrutiny of these documents, it emerges the boundary dispute was not limited to the suit property and 236 but extended to several parcels of land and the outcome of this dispute was not tendered before court.
43. However, the defendants efforts as evidenced in these documents did not amount to their assertion of title which is either by entering the disputed portion, evicting the plaintiff or even suing him for trespass before the lapse of 12 years. Further, these documents do not show they interfered with the plaintiff's peaceful occupancy.
44. Therefore, there was neither interruption of the passage of time on the plaintiff's occupancy nor was his peace disturbed. I adopt the court of appeal decision of *Jason Masai v Masai Kipsamii* [1997] eKLR which held:-
- “ There is no evidence whatsoever that the respondent attempted to obtain possession from the appellant either by physical entry or by filing a suit for possession. The said two letters, in our view, are insufficient to prevent the operation of the *Limitation of Actions Act*. Those letters did not in any way disturb the appellant's possession of the suit land.”
45. Further, although there is an OB record from the police which shows the defendants' maize plantation was destroyed and the 1st defendant's evidence that this damage was committed by the plaintiff's children was uncontroverted, this occurred on 8/07/2022 which was long after the subsistence of this suit and it had no impact on this case.
46. Adding to this and in answering the limb of openness of occupancy with the knowledge of the owner, the plaintiff's evidence on this is not controverted and the defendants advocates' letters which were produced as Dex.10 reveals that the defendants were privy of the plaintiff's occupancy by stating thus: -
- “ After ten years of cultivation you decided to sale the land to Mr. Michael Oloo Ogutu.”
47. On the 6th principle of accrual of time for purposes of determining the question of whether the plaintiff had occupied the disputed portion for a period of 12 years prior to filing suit, the plaintiff's witnesses testified time started to accrue in February 2001.



48. On the other hand, the defendants' witnesses were uncertain of when the plaintiff entered the suit property. Though they testified that during the interim period of Daniel's vacation and plaintiff's entry the defendants had utilized the suit property, DW2 contradicted herself when she testified that upon Daniel's departure, the plaintiff entered the suit property.
49. The plaintiff's witnesses were consistent in their testimony while DW2's evidence on this date of entry was contradictory. Thus, I conclude the plaintiff's witnesses were truthful and consistent. Further Dex.10 shows Daniel departed from the suit property in 2001 thus holding credence the plaintiff commenced occupancy in 2001. This suit was filed 13 years later meaning the plaintiff's claim was ripe.
50. On the last principle of dispossession or discontinued possession, the Court of Appeal in the decision of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR cited with approval the decision of *Littledale v Liverpool College* [1900] 1 Ch 19, 21 where Lindley MR expressed himself as follows: -

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”
51. Dispossession is where a person comes in and drives another out of the land whilst discontinuance of possession is where the person in possession goes out and another person takes possession. See *Gabriel Mbui v Mukindia Maranya* [1993] eKLR.
52. Earlier in this judgment, this court satisfied itself the plaintiff entered the suit property in 2001 which was the year Daniel vacated the defined portion.
53. Nonetheless, the plaintiff's witnesses testified that Daniel was a purchaser and not a lessee. Still, they did not produce an agreement for sale or even lead evidence whether such an agreement for sale was oral or written.
54. Conversely, the 1st defendant and DW2 were consistent and clear that Daniel was a mere lessee. They vividly described how the oral agreement was entered into and who the witnesses were. On this basis, this court is satisfied that Daniel was a lessee who occupied the disputed portion from 1991 to 2001 as evidenced by Dex.10.
55. I must mention that Fredrick's letter that ostensibly characterized his relationship with Daniel was in dholuo dialect and in the absence of its interpretation including producing a certificate of interpretation, this court cannot rely on it.
56. Even so, the plaintiff's entry to the disputed portion was by way of a purported agreement for sale and this is evidenced by DW1 and DW2's testimony and Dex.10.
57. Being a mere lessee, Daniel did not have capacity to dispose of the disputed portion in the manner he did and thus the alleged agreement for sale between him and the plaintiff was illegal and a nullity. However, that is the essence of adverse possession; unlawful occupation of the legal owner's land.
58. By entering the suit property upon Daniel's departure without the lawful owners entering the disputed portion, the plaintiff had met the principle of dispossession or discontinued possession. I find the plaintiff has met the ingredients of adverse possession.



II. What appropriate orders should be granted including an order as to costs

59. For the reasons stated above, it is my ultimate finding the plaintiff proved his claim of adverse possession to the required standards. It is trite law costs follow the event and in the absence of special circumstances, I award costs to the plaintiff which shall be borne by the defendants. In the end, I make the following final disposal orders;
- a. A declaration be and is hereby made that the title for land parcel no. East Ugenya/Kathieno 'B' 237 measuring 1 acre has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act*.
 - b. At the plaintiff's cost, it is hereby ordered that within ninety (90) days from the date hereof, a subdivision and transfer be conducted by the Land Registrar, Ugenya/Ugunja or such other officer as shall be delegated by the Land Registrar, Ugenya/Ugunja to survey, ascertain and excise a portion measuring 1 acre within land parcel no. East Ugenya/Kathieno "B" 237 for purposes of registration in the plaintiff's favour.
 - c. In default of compliance with the orders, the deputy registrar or authorized officer do execute all the necessary documents to confer a portion measuring 1 acre within land parcel no. East Ugenya/Kathieno "B" 237 to the plaintiff.
 - d. Costs to the plaintiff.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 4TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

04/04/2024

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

N/A for the plaintiff

Mr. Momanyi for the defendants

Court assistant: Mr. Ishmael Orwa.

