



**Mathonye v Ambuchi & another (Enviromental and Land Originating
Summons 24 of 2019) [2024] KEELC 3985 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 24 OF 2019**

SO OKONG'O, J

MAY 2, 2024

BETWEEN

JOSEPH OTIENO MATHONYE APPLICANT

AND

JAELE ANYOSO AMBUCHI 1ST RESPONDENT

**BONFACE OMAMO OMOLLO (SUED AS THE LEGAL REPRESENTATIVE OF
JANE AKINYI OWUOR - DECEASED) 2ND RESPONDENT**

JUDGMENT

1. The Applicant brought this suit against the Respondents by way of an Originating Summons dated 23rd July 2019 seeking the following orders;
 - a. That the Applicant be declared the absolute owner of all that parcel of land known as Title No. Kisumu/Kogony/2228 (hereinafter referred to as “the suit property”).
 - b. That the Respondents be ordered to execute the instrument of transfer of the suit property in favour of the Applicant in default of which the Deputy Registrar of the court should be empowered to execute the same on behalf of the Respondents.
 - c. That the Respondents be ordered to give vacant possession of the suit property to the Applicant and the consent of the Land Control Board be dispensed with.
 - d. That the title deeds that were issued to the Respondents be cancelled and the suit property be registered in the name of the Applicant who has acquired the same by adverse possession.
 - e. That an order of a permanent injunction does issue restraining the Respondents and any other person claiming through them from interfering with the Applicant’s occupation of the suit property.



- f. That the costs of the application be awarded to the Applicant.
2. The Originating Summons was supported by an affidavit sworn by the Applicant on 23rd July 2019. The Applicant averred that he had lived on and occupied the suit property since he was born in 1974. The Applicant averred that the Respondents were threatening to evict him from the suit property. The Applicant averred that he had had uninterrupted occupation of the suit property for over 12 years.
 3. The Originating Summons was opposed by the 1st Respondent through a replying affidavit sworn on 28th October 2022. The 1st Respondent averred that she purchased the suit property from the 2nd Respondent on 18th November 2011. The 1st Respondent averred that upon paying the purchase price in full, the suit property was transferred to her and she was issued with a title deed on 2nd February 2012. The 1st Respondent averred that the suit property was vacant when she purchased the same. The 1st Respondent denied that the Applicant had occupied the suit property since he was born in 1974. The 1st Respondent averred that it was some years later after she had purchased the suit property that the Applicant entered the suit property and started cultivating maize thereon. The 1st Respondent averred that in 2019 she served the Applicant with a notice to vacate the suit property and that was when the Applicant decided to file the present suit.
 4. At the trial, the Applicant adopted his affidavit in support of the Originating Summons as his evidence in chief. On cross-examination by the advocate for the 1st Respondent, the Applicant stated that he was not aware that the suit property was registered in the name of Jane Akinyi Owuor, deceased on 3rd February 1992. The Applicant stated that he started cultivating the suit property in 2011 and put up a house thereon in 2013. He stated that he was not aware that his father who died in 1992 had sold the suit property to Jane Akinyi Owuor, deceased. He denied that he entered the suit property in 2014 and that he had promised the 1st Respondent that he would vacate the property.
 5. The Applicant called one witness, Diengsius Ogoye Ambayo (PW2). PW2 told the court that the suit property was given to the Applicant by the Applicant's deceased father while he was alive. On cross-examination, PW2 stated that the Applicant's father was occupying the suit property before his death. PW2 stated that the Applicant's mother was not staying on the suit property. He stated that the Applicant was staying with his mother at a place known as Kotur before he moved to the suit property.
 6. The 1st Respondents first witness was Margaret Auma Ayieko (DW1). DW1 told the court that the Applicant was her stepbrother. She stated that they were born to the same father but different mothers. She stated that Jane Akinyi Owuor, deceased was known to her and that she purchased the suit property from their deceased father. She stated that the 1st Respondent acquired the suit property from the children of Jane Akinyi Owuor, deceased.
 7. The 1st Respondent gave evidence next. The 1st Respondent adopted her replying affidavit as part of her evidence in chief. The 1st Respondent produced the agreement of sale with the 2nd Respondent through which she acquired the suit property as Defence Exhibit 1. She also produced a copy of a title deed for the suit property in her name as Defence Exhibit 2. The 1st Respondent stated that after purchasing the suit property, she came and viewed it, and found it vacant. She stated that it was not until 2014 that the Applicant entered the suit property and started growing maize thereon. The 1st Respondent stated that she reported the Applicant to the Chief. She stated that the Applicant claimed that the suit property belonged to his father. She stated that when she purchased the property, the same belonged to the 2nd Respondent. The 1st Respondent produced an extract of the register for the suit property as Defence Exhibit 3. The 1st Respondent stated that while at the Chief's office with the Applicant, the Applicant undertook to vacate the suit property. She stated that the Applicant did not honour that undertaking. She stated that she engaged an advocate who served the Applicant with a notice to vacate



- the suit property. She produced the notice as Defence Exhibit 4. The 1st Respondent urged the court to dismiss the Applicant’s case with costs. On cross-examination, the 1st Respondent stated that when she purchased the suit property, the same was vacant and that the Applicant planted maize on the suit property in 2014 and put up a house thereon in 2015.
8. The last to give evidence was Maricus Otieno Mitiro(DW3). DW3 was a village elder at Kanyamedha where the suit property is situated. He adopted his witness statement dated 10th November 2022 as part of his evidence in chief. He stated that when the 1st Respondent purchased the suit property, the Applicant was not occupying the same. On cross-examination, DW3 stated that he had known the Applicant from the time the Applicant was born. DW3 stated that the Applicant came to the Chief’s office with the 1st Respondent and requested for time to vacate the suit property
 9. After the close of evidence, the parties were directed to make closing submissions in writing. The 1st Respondent filed submissions dated 20th December 2023. The Applicant did not file submissions. Instead, the Applicant filed a Notice of Preliminary Objection dated 19th December 2023 against his suit. The Applicant contended that the suit is fatally defective, frivolous and amounts to an abuse of the court process.
 10. I have considered the Originating Summons together with the supporting affidavit. I have also considered the replying affidavit filed by the 1st Respondent in opposition to the Originating Summons. I have further considered the evidence tendered by the parties and the submissions by the 1st Respondent. In *Salim v Boyd and Another* [1971] EA 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, *nec vi, 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.”
 11. From the evidence before the court, the suit property was registered in the name of Jane Akinyi Oduor, deceased (hereinafter referred to only as “the deceased”) as the first registered owner on 3rd February 1992. The suit property was transferred to the 2nd Respondent by transmission on 20th January 2012. The suit property was transferred and registered in the name of the 1st Respondent on 2nd February 2012 on which date she was also issued with a title deed for the property. The 1st Respondent had purchased the suit property earlier from the 2nd Respondent on 18th November 2011.
 12. In his affidavit in support of the application, the Applicant claimed that he was born on the suit property in 1974 and that he had occupied the property his entire life. At the trial where the Applicant adopted his affidavit in support of the Originating Summons as his evidence in chief, the Applicant stated in cross-examination that he started cultivating the suit property in 2011. The Applicant told the court further that his father had two wives and that he was a son to the second wife. He stated that it was his father’s first wife who had her home on the suit property. He stated that his mother had a home at a place known as Kotur. The Applicant told the court that he entered the suit property in 2014 and that before he constructed a house on the suit property which he did in 2013, he was cultivating the property. On examination by the court, the Applicant stated that he started living on the suit property in 2013 and that before he moved to the suit property, he was staying in a rented house.



13. The Applicant's witness, PW2, stated that the Applicant was living with his mother at Kotur before he came to settle on the suit property. The 1st Respondent's witness, DW1, who was the Applicant's step sister told the court that the Applicant had not always occupied the suit property as he claimed. She told the court that their father who died in 1992 sold the property to Jane Akinyi Oduor, deceased in the 1980s. The 1st Respondent told the court that when she purchased the suit property, the same was vacant and that it was not until 2014 that he noted that someone was cultivating maize on the suit property who turned out to be the Applicant.
14. From the totality of the evidence before the court, I am not persuaded by the Applicant that he was born on the suit property in 1974 and that he had occupied the property continuously without any interruption for over 45 years at the time he brought this suit. The evidence before the court shows that the Applicant's father had two wives and that the Applicant's mother was settled at a place known as Kotur. The evidence before the court shows that it was the Applicant's stepmother who was living on the suit property. DW1 who was her daughter told the court that her mother was moved from the suit property. The Applicant as I mentioned earlier, told the court that he started cultivating the suit property in 2011 and put up a homestead thereon in 2013. The Applicant told the court that he moved to the suit property from a rented house where he was staying.
15. It is clear from the evidence on record that the Applicant was not staying on the suit property from 1974 as he claimed. From his evidence, the Applicant entered the suit property between 2011 and 2014. Initially, the Applicant cultivated maize on the suit property. He subsequently put up a house thereon. The Applicant brought this suit on 23rd July 2019. The Applicant having entered the suit property between 2011 and 2014, had not occupied the property for the statutory 12 years required for an adverse possession claim.
16. Due to the foregoing, the Applicant has not proved his adverse possession claim over the suit property. Although the 1st Respondent sought some reliefs in her submissions, I did not find any basis for the same in the primary pleadings. The 1st Respondent will have to file a fresh suit against the Applicant who is a trespasser on the suit property for possession if he fails to move out willingly.
17. In conclusion, the Applicant's Originating Summons dated 23rd July 2019 is dismissed with costs to the 1st Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 2ND DAY OF MAY 2024

S. OKONG'O

JUDGE

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

The Applicant in person

Mr. Cheruiyot for the 1st Respondent

Ms. J. Omondi-Court Assistant

