



Ouko v Estate of Amondi Bunde & 2 others (Environmental and Land Originating Summons 511 of 2015) [2024] KEELC 4032 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4032 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 511 OF 2015**

**E ASATI, J
MAY 2, 2024**

BETWEEN

DORIS ATIENO OUKO PLAINTIFF

AND

THE ESTATE OF AMONDI BUNDE 1ST DEFENDANT

JAMES OCHENG NYAYAL 2ND DEFENDANT

MODOCH ONYANGO OMONDI 3RD DEFENDANT

JUDGMENT

1. The suit herein was first filed in court on 2nd July 2012 vide the Originating Summons dated 29th June 2012. The suit land in the Originating Summons was Kabondo/ Kodhoch/291. Pursuant to leave granted by the court on 13th November 2017, the Originating Summons was amended. *Vide* the amended Originating Summons dated 24th November 2017 brought pursuant to the provisions of section 38 of the *Limitation of Actions Act*, and Order 37 Rule 7 & 8 of the *Civil Procedure Rules*, Doris Atieno Ouko who claims to have acquired title to land parcels numbers Kabondo Kodhoch East/1384 and 1385 (which were subdivisions of parcel No. Kabondo Kodhoch/291) placed the following questions before the court for determination herein:
 - a. Whether Doris Atieno Ouko has been in occupation of the land measuring nine acres and a half (9.5 Acres) or thereabouts of the parcels of land known as Kabondo Kadhoch/east /1348 & 1385 for a period exceeding 12 years from the date she took possession in 1974 to date.
 - b. Whether the said occupation was open, without force, peaceful and continues without interruption for a period exceeding twelve years.



- c. Whether the Respondent as administrator of the estate of the late Amondi Bunde and the 3rd Respondent hold title to the said parcels of land in trust and or for the benefit of the applicant herein.
 - d. Whether the title of the estate of the late Amondi Bunde and that of the Respondents herein to the said land became extinguished on the expiry of 12 years after the applicant took possession in 1974.
 - e. Whether the registration of the Respondents as proprietors of the said land should be cancelled and the applicant be registered as the proprietor thereof.
 - f. Whether the costs of the suit should be borne by the Applicant or the Respondents or as the court may direct.
 - g. Whether the Respondents should be ordered to execute documents of transfer of the said land in favour of the Applicant herein and whether failing which the Deputy Registrar of this Court should be empowered to execute the same in his stead.
2. The Originating Summons was opposed vide the contents of the Replying Affidavit sworn by the 2nd Defendant, James Ochieng Nyayal on 13th August 2012.
 3. Directions were taken on 16/3/2022 inter alia, that the matter be disposed of by way of *viva voce* evidence.

The evidence

4. The plaintiff's evidence comprised of her testimony and the exhibits she produced. She testified as PW1 and adopted the contents of her Supporting Affidavit sworn on the 29th June, 2012 and witness statement of the same date. She had deposed in the Supporting Affidavit that in May, 1974, her and her late husband entered into an agreement with the late Amondi Bunde to purchase Amondi Bunde's land and present during the agreement was one Raphael Oyoo and herself. That the said Amondi Bunde handed over the final land adjudication record for the said parcel to her and her husband after payment. That she began using, tilling and cultivating the entire parcel of land as hers without any interruption or complaint from anybody as she knew the land was hers. That her husband passed away some years ago.
5. That she has over the years used the said land to grow maize, potatoes and other crops for subsistence and food security and presently the land has maize, beans and potatoes cultivated by her. That she was surprised to receive a letter dated 16th June, 2012 from the lawyer acting for James Nyayal demanding that she ceases occupying and using the suit land.
6. She deposed further that Amondi Bunde Ruothe died without a child and his widow also died after him. That the Respondent herein is a son to Amondi's brother and when she went to the lands office at Kosele to inquire how the Respondent obtained title, she was informed by the District Land Registrar that James Nyayal sought and obtained Grant of Letters of Administration to the estate of his late uncle Amondi Bunde Ruothe. That as an administrator of the estate of Amondi Bunde Ruothe, James Nyayal obtained title of the suit land by transmission.
7. Her witness Statement dated 29th June 2012 had similar contents as the Supporting Affidavit.
8. She produced as her exhibits; agreement of sale of land, land adjudication record in respect of original parcel number Kabondo Kodhoch/291, a demand letter dated 16/6/2012 and green cards in respect of Land parcel numbers Kabondo Kodhoch /291, 1384 and 1385.



9. On cross-examination she stated that her husband whose name was Henry Ouko Okello died in the year 2007. That she has authority to sue on his behalf and that she does not have any certificate of marriage. That her husband's name does not appear on the sale agreement produced as Exhibit 1. That she doesn't see her name as a purchaser on the agreement. That her name appears as a witness. That she wrote her name but did not sign the agreement. That it is her husband who bought the land.
10. She stated further that James Nyalal undertook succession and that she challenged the succession. That she got the title after Amondi Bunde had died. That there is evidence that she has been using the land. That she never sued Amondi Bunde in his lifetime to give her title to the land. That it is her husband who sued him. That she filed the present suit in 2012 though Amondi Bunde died in the year 2006. On re-examination she stated that land parcel numbers Kabondo Kodhoch/ 1384 and 1385 are currently registered in the name of James Ochieng Nyayal.
11. The evidence of the Defendants comprised of the testimony of DW1 and DW2 and the exhibits they produced. DW2 was the 2nd Defendant. He adopted the contents of his Replying Affidavit sworn on 13th August, 2012 and his witness statement dated 18/4/2023 as his evidence. He had deposed in the Replying Affidavit that he is a grandson and personal representative and beneficiary of the Estate of Amondi Bunde, deceased. That he sought and obtained Grant of Letters of Administration to the deceased's estate and that grant still stands with all terms and conditions as well as assets and liabilities. That the plaintiff/applicant's claim herein was not one of the liabilities under the Grant and no challenge has been lodged to the Grant to date.
12. He deposed further that since the plaintiff approached the Court on the basis of a purported purchase by her deceased husband, she needs a Grant of Letters of Administration to represent her deceased husband's estate. That the claim herein is accordingly incompetent, a non-starter and mis-conceived for want of legal capacity on the part of the Applicant and as the purchase is alleged to have been executed on or about 1974, the claim is time-barred pursuant to *Limitations of Actions Act*.
13. DW1 further deposed that the plaintiff's claim which is premised on a controlled transaction under the provisions of the *Land Control Act*, Cap 302 Laws of Kenya in a land controlled area, is accordingly void under Section 6 thereof.
14. That by virtue of Article 165(5) as read with Article 162 of *the Constitution* and Section 30 of the *Environment and Land Court Act*, this court lacks jurisdiction. That the plaintiff is not in possession of the suit land. That the suit is lodged contrary to the provisions of Order 37 Rule 7(2) of the *Civil Procedure Rules* 2010 and accordingly bad in law for want of "certified extract of title".
15. DW1 produced Grant of Letters of Administration intestate, copy of Certificate of Death for Amondi Bunde, Copy of Demand Letter dated 16th June, 2012 and sale agreement dated 10th February, 2012.
16. On cross-examination DW1 stated that he is the Administrator of the Estate of Amondi Bunde. That the Grant was obtained on 23rd September, 2011. That the land was transferred to him in the year 2012. That the green card shows that the land was transferred to him on 18th September, 2014. That this was in respect to parcel No. 1384 and 1385 but that parcel number 1385 was subsequently transferred to the 3rd Defendant. That it is Doris the Plaintiff who is using the land currently though illegally. That he knows Nyatundo and Company Advocates. That the demand letter by the Plaintiff states that the Plaintiff has been using land parcel No. Kabondo/kodhoch /east/291. That he has not filed any suit against the Plaintiff. That the Plaintiff has not been using the land since 1974 but since the year 2007. And on re-examination he stated that she began using the Land from the year 2007 or 2012. That her workers were chased away from the Land. That he also reported to the Chief who stopped them. Later she resumed work. That a demand letter was written to her. That she filed the suit after the letter from



his lawyer. That she had obtained title that was confiscated by the Land Registrar. That the plaintiff has not had continuous occupation.

17. The contents of his witness statement dated 18th April 2023 were similar to the contents of the Replying affidavit.
18. DW2 was the 3rd Defendant. He relied on the contents of his witness statement dated 18th April, 2023 which was adopted as evidence-in-chief. He stated that he bought land measuring approximately 0.77 Ha in the year 2012 from the 2nd Defendant. That as at the time of purchase the land was vacant. That nobody has laid claim to that land to date. On cross-examination he stated that the sale agreement was done in February, 2012. That the land is about 35 to 40km from Oyugis town and that he does not have residence near the land. That he operates from Oyugis town. That the land was transferred to him on 16th October, 2014. That the 1st Defendant did not inform him of a court case concerning the land as at the time of the transfer. That he knows an advocate called Nyatundo Advocate but he has never been to his Office. That when he started cultivating the land in the year 2014 after he obtained title he found James Nyayal had been using it. That in the year 2012 the land was in the name of James Nyayal's father one Amondi Bunde who was by then deceased.

Submissions

19. At the close of the evidence, parties filed written submissions on the case. Written submissions dated 1st December, 2023 were filed on behalf of the plaintiff by the firm of Ko'winoh and Company advocates. Similarly, written submissions dated 21st February 2024 were filed by the firm of Omedo Leah and Company Advocates on behalf of the Defendants.

Issues for determination

20. The questions presented *vide* the amended Originating Summons form the issues for determination herein.

Analysis and determination

21. The first question presented for determination is whether Doris Atieno Ouko has been in occupation of the land measuring nine acres and a half (9.5 Acres) or thereabouts of the parcel of land known as Kabondo Kadhoch/east /1348 & 1385 for a period exceeding 12 years from the date she took possession in 1974 to date.

The plaintiff pleaded that together with her husband they bought the original suit land No. Kabondo Kodhoch East/291. That after paying the purchase price in the year 1974, they took possession and have had occupation and use thereof to date. She produced a land sale agreement to demonstrate the purchase.

The Defendants denied that the plaintiff purchased the land or took possession thereof in the year 1974. DW1's evidence was that the plaintiff did not enter the land in the year 1974 but in the year 2007.

It was submitted on behalf of the plaintiff that the plaintiff's evidence that she entered the land in the year 1974 was confirmed by the Defendant *vide* the demand notice by Nyatundo & Company Advocates asking the Plaintiff to vacate the suit land. Further, that the Defendant confirmed the plaintiff's evidence that she has been cultivating, using and/or trespassing on the suit land for a long time. That DW1 confirmed that the said use was not with permission and was indeed a trespass.

22. The Defendants denied that the plaintiff had been in possession of the suit land for a period of 12 years. DW2 testified that when he bought parcel No. 1385, it was being utilized by James Nyayal. It



- was submitted on behalf of the Defendants that under the provisions of section 107 of the [Evidence Act](#) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
23. Although the plaintiff claimed to have had possession of the suit land since 1974, she produced no evidence to prove the occupation. The agreement had no clause to the effect that the plaintiff and her husband were to take occupation or had been put in occupation. There were no photographs to show her developments, activities or other evidence of occupation and possession of the suit land or surveyor's report to support her evidence. The burden of prove lay with her. Although the 2nd Defendant admitted that the Plaintiff was cultivating the land as at the date of testifying, he stated that it was in the year 2007 that the plaintiff entered the suit land. This suit was filed in the year 2015. From the year 2007 to 2015 only 8 years had elapsed.
 24. I find that on the basis of the material placed before the court, there is no evidence that the Plaintiff had had possession or occupation of the suit land for a period of 12 years.
 25. The next question is whether the said occupation was open, without force, peaceful and continues without interruption for a period exceeding twelve years. This court has already found that the plaintiff has not proved that she has had occupation of the suit land for a period of 12 years. And for whatever period she has had occupation the same has not been without interruption as there is evidence that the DW1 caused the plaintiff's workers to be chased from the land, she was reported to the chief and that a demand notice from the defendant's lawyer for her to vacate was served upon her. Even if her occupation had been peaceful and uninterrupted, the length of the period does meet the threshold for adverse possession under sections 7, 13, 17 and 38 of the [Limitation of Actions Act](#).
 26. The next question is whether the Respondent as administrator of the estate of the late Amondi Bunde and the 3rd Respondent hold title to the said parcels of land in trust and or benefit of the applicant herein. I find no evidence that the Respondents hold the suit land in trust for the plaintiff. The 2nd Respondent obtained title to the original parcel No. 291 on the basis succession proceedings in respect of the estate of the registered owner. He subsequently subdivided the land and sold one of the portions to the 3rd Defendant. There is no evidence that the orders made in the succession cause have been set aside or challenged.
 27. The next questions are whether the title of the estate of the late Amondi Bunde and that of the Respondents herein to the suit land became extinguished on the expiry of 12 years after the applicant took possession in 1974, whether the registration of the Respondents as proprietors of the said land should be cancelled and the applicant registered as the proprietor thereof, and whether the Respondents should be ordered to execute documents of transfer of the said land in favour of the Applicant herein and in default failing which the Deputy Registrar of this Court should be empowered to execute the same instead of the Respondents. The answers to these questions can only be in the affirmative if it is established that the plaintiff has had adverse possession of the suit land. The first two questions have already been determined herein in the negative. Under section 17 of the [Limitation of Actions Act](#), a person's title to land only becomes extinguished at the expiry of the period prescribed by the Act for that person to bring action to recover the land. It has not been demonstrated that such period had expired before the suit seeking to declare the Defendant's title as extinguished was filed.
 28. Furthermore, the grounds for cancellation of title to land as provided for in section 80 of the [Land Registration Act](#) include where the registration was obtained, made or omitted by fraud or mistake. These grounds have not been demonstrated. I therefore find no basis to order for transfer of the suit lands in favour of the plaintiff or cancellation of the titles held by the Respondents.



29. The plaintiff's claim being entirely based on the doctrine of adverse possession, I find that the ingredients of adverse possession expressed as *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion) as outlined in the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a* [2017] eKLR, relied on by the Respondents have not been proved. No evidence was adduced of open, notorious, continuous and exclusive use and actual possession of the property by the plaintiff.
30. Further in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the Court held that:
- “.....This proposition means that the plea of adverse possession is always based on facts, and the facts must be asserted, pleaded and proved. The factual proof requires the person who claims adverse possession to show on what date he took occupation of the premises, the nature of his possession or the possessory acts, whether the factum of his possession was known to the owner of the land, how long the possession went on, whether his possession was open and undisturbed. All these are questions of fact and unless they are asserted and proved, a plea of adverse possession must fail.”
31. Guided by the above cited provisions of the law, the cited authorities and the evidence adduced, I find that the plaintiff has not proved her case on a balance of probabilities. The suit is hereby dismissed. Costs to the Defendants.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2ND DAY OF MAY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Plaintiff.

Omedo for the Defendants.

