



**Asikoye v Murundu (Environmental and Land Originating Summons
E001 of 2023) [2024] KEELC 14143 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 14143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023
E ASATI, J
OCTOBER 9, 2024**

BETWEEN

MARY ACHAYI ASIKOYE PLAINTIFF

AND

ZADOCK OBUCHERE MURUNDU DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 20th July, 2023, Mary Achayi Asikoye, the Plaintiff, sought for orders against Zadock Obuchere Murundu, the Defendant that;
2.
 - a. A declaration that the title of Zadock Obuchere Murundu to the land parcel number (suit land) 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. The Plaintiff has become entitled in adverse possession to the suit land in Vihiga District and registered under the *Land Act* in the name of the Defendant.
 - c. An order that the Land Registrar Vihiga register the Plaintiff as absolute proprietor of land parcel number West Bunyore/Ebusiekwe/692 in place of the Defendant or anyone deriving title from the Defendant.
 - d. The Land Registrar Vihiga be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendant to the Plaintiff.
 - e. Costs of the proceedings be borne by the Defendant.
3. The Originating Summons was supported by contents of the Supporting Affidavit sworn by the Plaintiff on 20th July, 2023.



4. In response to the Plaintiff's claim, the Defendant filed a Replying Affidavit sworn on 16th October, 2023 in essence stating that the suit land belongs to him having bought it from the Plaintiff's husband one Asikoye Murundu. That he has developed the land. That the Plaintiff has never had any adverse possession of the subject parcel of land.
5. That the Plaintiff has not obtained Letters of Administration of the estate of Asikoye Murundu so she lacks locus standi to file the suit.
6. Directions under Order 37 Rules 16 and 19 were taken that the Originating Summons be disposed of as a suit by way of viva voce evidence.

Summary of the evidence.

7. The Plaintiff testified as PW1 and called 2 witnesses. She stated vide her Supporting Affidavit sworn on 20th July, 2023 whose contents she adopted as her evidence in chief that in 1976 she had an agreement with Crispo Oneni over L.R. No. West Bunyore/Ebusiekwe/692 and has been in occupancy of the same since. That she had occupied the land openly, continuously and without any interference from the Defendant for a period of over 45 years. That she has put up a home and buried her kin and her sons have built their houses and started raising their families on the suit land.
8. That there have been no succession proceedings in respect of of Crispo Oneni's estate part of which is the suit land. That the Defendant intermeddled with the estate of the deceased and has acquired title. That she has fully developed the suit land. That the Defendant might carry out his threats to unlawfully evict and dispossess her of the property.
9. She produced copy of green card in respect of the suit land as exhibit.
10. On cross-examination, she stated that she does not know the Defendant, was not related to him and had never seen him. She denied that her husband sold land to Zadock Murundu and stated that she lives on land parcel No.691 while she plants crops on the suit land.
11. PW2 Raphael Tsindoli Alfayo testified through his witness statement dated 9th January 2024 that he witnessed the land sale agreement between Crispo Oneni now deceased and the Plaintiff in respect of land parcel No. West Bunyore/Ebusiekwe/692 which was done on 1st January, 1976. That since that day, Mary Achayi Asikoye had been staying, cultivating and has built house on the suit land.
12. On cross-examination, he stated that Mary had built her house and houses for her children on the suit land.
13. PW3 was Patrick Ochanda Japheth. He testified vide his witness statement dated 9th January, 2024 that he was a witness in the land sale agreement between Crispo Oneni now deceased and Mary Achayi Asikoye. That he had a copy of the agreement.
14. On cross-examination, PW3 stated that Mary has lived on the suit land for about 50 years and that she had built a house for herself and houses for her children.
15. On behalf of the Defence, the Defendant testified as DW1. He adopted the contents of his Replying Affidavit dated 16th October, 2023 and witness statement dated 8th January, 2024 as his evidence in chief.
16. The contents of the Replying Affidavit and the witness statement are similar in material particulars; that he bought the suit land from the Plaintiff's husband to enable the Plaintiff's family get money to transport the remains of their son who had died in Nairobi, home for burial. That the land is registered



in his name and that the Plaintiff has not had adverse possession thereof. The Defendant produced land sale agreement dated 18th December, 2021, Title Deed, Certificate of Official Search for the suit land, maps, agreement dated 1st May, 2023, minutes dated 26th January, 2023, OB, Letters dated 5th July, 2022 and 24th January, 2023 and green card as exhibits.

17. On cross-examination, he stated that he entered into the agreement with Asikoye Murundu in the year 2011. That Mary Achayi is the one who signed the agreement dated 1st May, 2023. That by the time the land was transferred to his name, Crispo Oneni the previous owner had died. That he did not know whether succession had been undertaken to the estate of Crispo Oneni estate.
18. DW2 was James Otanya. He testified vide his witness statement dated 8th January, 2024. He stated in the witness statement he was the Assistant Chief, Ebusiekwe sub-location. That the Defendant entered into land sale agreement with the Plaintiff's husband in the year 2011 and bought land parcel No. West Bunyore/Ebusiekwe/692.
19. He further testified that the Defendant assumed possession of the land and title deed was processed and the Defendant has existed peacefully on the land until the death of Asikoye Murundu in the year 2014 and thereafter. That in the year 2022, the Plaintiff started to trespass onto the land. That PW2 has held several meetings over the dispute and that the matter was referred to the police.
20. DW3 was Samson Mabinda Omusebe. He adopted the contents of his witness statement as evidence. He had stated in the witness statement that the Defendant bought the suit land from the husband of the Plaintiff to enable the Plaintiff's family get money to transport home the remains of their son who had died in Nairobi, for burial. That the Plaintiff started to trespass onto the suit land in the year 2022. That the land is the property of the Defendant. On cross-examination, DW3 stated that the Plaintiff resides on the suit parcel.
21. DW4 was Philip Asitiwa Imende. He adopted the contents of his witness statement dated 8th January, 2024 as his evidence in chief. He confirmed that Mary is like her mother and the Defendant like her son. So they are all family. That Mary stays on parcel No.691 where her houses are.
22. On cross-examination, he stated that he was present when Zadock bought the land.

Submissions

23. It was submitted on behalf of the Plaintiff vide the written submissions dated 19th September, 2024 filed by the firm of Samwel Mainga & Co. Advocates that the Defendant illegally and fraudulently obtained title deed to the suit land.
24. That if the Defendant indeed bought the land why did the Plaintiff's family continue using it even burying their son Joel Asikoye Murundu thereon.
25. That the title deed in the name of the Defendant should be cancelled and a new title be issued in the name of Mary Achayi Asikoye.

No submissions were filed for the Defendant.

Issues of Determination

26. From the pleadings filed, the evidence and submissions, the substantive issue that emerges for determination is whether or not the Plaintiff has had adverse possession of the suit land hence entitled to the orders sought.



Analysis and Determination

27. The grounds upon which the Plaintiff's claim is based as stated in the Originating Summons are that she had settled on the suit land continuously and without interference from the Defendant since 1976 and has been in actual open physical and uninterrupted possession of the suit premises for a period of more than 12 years. That she had fully developed the suit land and buried her kin thereon. That the Defendant had full knowledge of the Plaintiff's occupation and possession which has lasted for over 45 years.

She gave the details of her developments on the suit land.

28. The plaintiff however admitted on cross-examination that she does not live on the suit land but on land No. West Bunyore/Ebusiekwe/691 where her houses are. That on parcel No.692 (the suit land), she only plants crops. That only one house was on parcel No.692 (the suit land) which house belonged to her deceased son by the name of Joel Asikoye.

29. She produced no photos to prove that she actually plants crops or carries any activities on the suit land. No Surveyor's report was produced to confirm the plaintiff's allegations.

The Plaintiff's witnesses insisted that she lives on the suit land.

30. The Defendant denied that the Plaintiff has occupation of the suit land.

31. The burden of proof under the provisions of section 107, 108 and 109 of the *evidence Act* was with the plaintiff to prove her claim.

32. Further, from the green card annexed to the Originating Summons, it is clear that from the year 1970 to 2013, the suit land was registered in the name of Crispo Oneni. This means that if any adverse possession occurred in respect of the suit land during that period, then it was against the title or rights of Crispo Oneni. Crispo Oneni or his personal representative has not been sued herein. In any event the Plaintiff's evidence is that she entered the land with the permission of Crispo Oneni who sold the land to her.

33. The Defendant herein only became registered owner on 30th January, 2013. From 30th January, 2013 to 21st July, 2023, when the Originating Summons was filed, a period of 12 years had not elapsed. A claim of adverse possession cannot be sustained against the Defendant.

34. Adverse possession is a doctrine of law through which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of the land to the exclusion of the registered owner for a prescribed period. Under section 7 of the *Limitation of Actions Act*, the prescribed period is 12 years. Adverse possession is an extinctive process whereby a possessor of land acquires a right by extinguishing the legal right of another, the registered owner. Under section 17 of the same Act the rights and/or title of the registered owner are extinguished upon expiry of the prescribed period.

35. In *Kimani Ruchure vs Swift Rutherfords & Co. Ltd (1980)* KLR 10 Kneller J held that "the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)

36. In the case of *Gabriel Mbui vs Mukindia Maranya [1993]* eKLR adverse possession was defined as

"..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of



possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it."

37. I find that the Plaintiff has failed to discharge the burden of proof and to prove her case against the Defendant on a balance of probabilities. The case is hereby dismissed.

38. Under section 27 of the Civil Procedure Rules costs follow the event. Costs to the defendant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 9TH DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

Plaintiff present in person.

Mare h/b for Wesonga for the Defendant

