



**Karan v Onyango & another (Environment & Land Case E028 of 2022)
[2024] KEELC 6456 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E028 OF 2022**

AY KOROSS, J

OCTOBER 3, 2024

BETWEEN

JENIFA AKUMU KARAN PLAINTIFF

AND

VINCENT OMONDI ONYANGO 1ST DEFENDANT

GEORGE OCHIENG ONYANGO 2ND DEFENDANT

JUDGMENT

1. At the heart of contention is a portion of 0.2 ha (disputed portion) of land parcel no. North Ugenya/ Karadolo/145 (suit property) that is registered in the defendants' name. The defendants inherited the suit property from their father Onyango Odigo (Onyango) who was its 1st registered owner.
2. The parties are all close relatives with the plaintiff's father-in-law Rakes Odigo (Rakes) and Onyango being stepbrothers- their father Odigo Okuk (Odigo) was a polygamist. The plaintiff's husband is called Karan Rakes (Karan).

Plaintiff's case

3. By an originating summons (OS) dated 20/12/2022, the plaintiff instituted the suit against the defendants contending she had acquired the disputed portion by adverse possession. Consequently, she sought the following reliefs from this court: -
 - a. A declaration the plaintiff had acquired the disputed portion by adverse possession.
 - b. The defendants be ordered to subdivide the suit property and transfer the disputed portion to her and a title deed be issued.
 - c. A vesting order of the disputed portion be issued in her name as the absolute owner.



4. The summons was supported by grounds in support of the motion which were, that she had met the ingredients of adverse possession; Onyango, and subsequently the defendants acquired the suit property by fraud, misrepresentation, deceit, and mistake; she had utilized the disputed portion since 1963 and lastly, she occupied the suit property with consent and authority of Onyango and the defendants.
5. Additionally, the OS was supported by the plaintiff's affidavits which she deponed on diverse dates of 20/12/2022 and 22/03/2023.

Defendants' cases

6. In opposition, the defendants deposed replying affidavits on 22/12/2022. The 2nd defendant also filed a further affidavit which was sworn on 30/01/2023. After issuing pretrial directions, the suit proceeded by viva voce evidence.

Plaintiff's evidence

7. The plaintiff testified as PW1 and her evidence was composed of her affidavits, oral evidence, and documents she produced and were marked as Pex.1-3 which were respectively photographs, a letter by the land registrar lifting a restriction over the suit property and a green card of the suit property. Her evidence was led by Unita Achieng Juma (PW2), Richard Muruka Rakes (PW3), and John Mudiwo Rakes (PW4) who were all relatives of the parties.
8. It was her testimony that when she got married in 1963 to Karan, she found PW2 who is the wife of Juma Rakes (Juma)- a brother to Karan- tilling the entire suit property which was ancestral land.
9. She stated due to old age, PW2 had over the years progressively ceded portions of the suit property to her to the extent she currently occupied almost the entire portion of the suit property, and only a small portion was being used by PW2.
10. It was her case that the suit property was family land with the defendants occupying a portion of it. She asserted she only discovered in 2019 that Onyango was the 1st registered owner of the suit property. She stated that she occupied 0.05 ha of the suit property. She also admitted that she resided in land parcel no. North Ugenya/Karadolo/147 (147).
11. On cross-examination, she testified that she was seeking ½ acre of the suit property but asserted she was unsure of the portion of land she occupied. She asserted all the sons of Odigo were given their portions of ancestral parcels of land and Karan's portion included part of the suit property.
12. She averred she was uncertain if she occupied 147 or if it was given to Karan. She was also unsure if the suit property was given to Onyango but was emphatic that the suit property and another parcel of land known as 146 which adjoined each other were family lands. She testified she fenced off the disputed portion in 2019. On re-examination, it was her testimony she only planted seasonal crops in the suit property.
13. PW2's evidence was erroneously indicated as a supporting affidavit but be that as it may, she corroborated the PW1's testimony that they had both utilized the disputed portion. She stated she knew the suit property belonged to Odigo.
14. On cross-examination, she denied Onyango was ever given any land but stated the defendants were entitled to the suit property but that they could not inherit it.



15. However, she contradicted herself and stated the defendants occupied other neighbouring parcels of land but at the same time asserted they tilled the suit property. She was categorical that she and the plaintiff owned the suit property as of right. On re-examination, she testified that the defendants had never interfered with where the plaintiff tilled.
16. PW3 testified that Rakes, the initial owner of the suit property, shared it with Onyango, each having their respective portions. However, at adjudication, Rakes was deceased hence the suit property was erroneously and illegally registered in Onyango's name.
17. On cross-examination, he testified that though Onyango never lived on the suit property, the defendants did. He testified that 147 belonged to the plaintiff but the plaintiff tilled a portion of the suit property.
18. PW4 who was Karan's son testified that at adjudication, Rakes was deceased hence Onyango mistakenly registered the suit property in his name despite both of them being in occupation.
19. He testified that the disputed portion had been utilized successively by his family- Rakes until 1940, PW2 and her husband upto 1963, and thereafter Karan and the plaintiff. He asserted that despite the illegal registration, the plaintiff continued to utilize the suit property.
20. On cross-examination, he testified he and his family including the plaintiff lived in 147 but tilled the disputed portion and that the defendants lived on a portion of the disputed property.

Defendants' evidence

21. The defendants respectively testified as DW1 and DW2 and their evidence was composed of their affidavits, oral evidence, and documents that were produced as Dex 1- 6. Their evidence was led by Conslata Aloo Masinde and Stephen Ouma Omondi who respectively testified as DW3 and DW4.
22. DW1 rehashed the plaintiff's evidence on their relationship and admitted the defendants were the registered owners of the suit property. He testified that all of Odigo's sons acquired portions of family land but trouble started when the plaintiff's son encroached on the suit property in 2019. He stated that one cannot claim adverse possession over family land.
23. He stated that they (defendants) occupy the suit property to the exclusion of the plaintiff and that she (plaintiff) occupied 147 which belonged to Karan.
24. On cross-examination, he testified he and Onyango lived on the suit property and asserted the plaintiff had used the disputed portion for a long period including during Onyango's lifetime. On reexamination, he testified that on the ground, no road traversed the suit property.
25. DW2's evidence in chief corroborated that of the DW1. On reexamination, he testified that the defendants had never utilized the disputed portion.
26. In her evidence in chief, DW3 who is the defendants' sister, corroborated their evidence in chief. However, on cross-examination, she testified that she got married in 1968 and did not live within the precincts of the suit property but was familiar with its ongoings. She stated as of 1968, the plaintiff had not entered the suit property.
27. In a similar fashion, DW4 corroborated the defendants' evidence in chief. On cross-examination, he testified that he did not know if the plaintiff utilized the suit property and he was not familiar with who planted crops thereon.



28. Upon the close of the parties' cases, the court directed counsels to argue their cases by written submissions and their respective counsels duly complied.

Parties' submissions

29. The plaintiff's counsel on record Ms. Omondi Abande & Co. Advocates filed written submissions dated 29/04/2024 and they identified 3 issues for determination: whether the plaintiff had met the threshold of adverse possession, whether the plaintiff is entitled to the disputed portion and who should bear the costs of the suit.
30. Whereas Mr Ouma, counsel for the defendants, filed written submissions dated 22/04/2024 and the defendants' issues were a replica of that of the plaintiff.
31. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective counsels' arguments on the particular issue and also consider provisions of law they relied upon to advance their respective arguments. As for legal authorities, none of them availed their authorities and, on that basis, they will not be appraised by this court.

Issues for determination

32. I have considered the pleadings, evidence adduced, and rival written submissions. Being guided by well-cited provisions of law that have been highlighted in the submissions, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim, and the issues for determination are:-
- I. Whether the plaintiff proved her claim of adverse possession to the required standards.
 - II. What appropriate orders should be granted including an order as to costs?

Undisputed facts

33. The undisputed facts of this case are that the defendants are the registered owners of the suit property and the 1st registered owner was Onyango. The parties have close family relations who could trace their ancestry to Odigo and that Onyango and Rakes were step-brothers. It was also undisputed that Rakes's son Karan had married the plaintiff.

Analysis and Determination

34. The issues that were earlier recognized as arising for determination shall be addressed together.
35. As was well captured by both counsels in their submissions, the doctrine of adverse possession arises where a person in possession of land owned by a registered proprietor may by some colour of right acquire valid title to it, so long as certain common law requirements are met, and the adverse possessor had it for a sufficient period, as defined by the *Limitation of Actions Act*.
36. Section 7 of the *Limitation of Actions Act* states the definition of adverse possession as follows:
- “an action that may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”
37. Section 38 of the *Limitation of Actions Act* authorizes a person who claims to have been entitled to land by adverse possession to apply to the court for an order that she be registered as the proprietor in place of the registered proprietor.



38. Section 28 (h) of the *Land Registration Act* is also key. It states that land is subject to certain overriding interests such as rights acquired or in the process of being acquired by any written law relating to the limitation of actions or by prescription. This overriding interest subsists and affects the interests of proprietors even when it is not noted on the register.
39. As was held in *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 that was cited with approval in the case *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the primary function of the court in dealing with adverse possession is to draw legal inferences from proved facts and such inferences are matters of law. In such claims, proof of all principles of adverse possession must co-exist and be strictly proved.
40. The decision of *Maliamu Ncurubi M'ibiri v Francis M'imanyara M'ringera* [2011] eKLR quoted with approval the well-cited decision of *Mbira Vs. Gachuhi* [2002] 1 EA which summarized the principles thus: -
- “ a) That there had been absence of possession by the true owner through abandonment.
 - b) That the adverse possessor had been in actual possession of the piece of land;
 - c) That the adverse possessor had no colour of right to be there other than his entry and occupation;
 - d) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
 - e) That there was a sufficient animus to dispossess and an animus (sic) possidendi;
 - f) That the statutory period, in this case twelve years, had elapsed.
 - g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and
 - h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.”
41. Having pleaded the claim of adverse possession, the onus was on the plaintiff to strictly prove that her claim had met the threshold of adverse possession.
42. At the outset, even without going into the merits of the case, the plaintiff's claim inevitably fails since she could not claim adverse possession while at the same time challenge the legality of Onyango's and the defendants' title over the suit property.
43. In her claim, she categorically stated that Onyango's and to an extent the defendants' title was acquired using fraud, misrepresentation, deceit, and mistake. Some of her witnesses also described Onyango's acquisition as illegal.
44. In claims of adverse possession, a claimant must first concede to the legality of the title held by the registered owner as to do otherwise would be legally unsustainable. In arriving at this, I adopt the holding of *Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank* (2014) eKLR



which was cited by the Court of Appeal decision of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR where the court stated: -

“In Haro Yonda Juaje –v- Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR it was stated:

(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff’s averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. “

45. Even assuming for a moment that the plaintiff did not challenge the legality of the defendants’ title over the suit property which without contradiction she did, her claim of adverse possession would not have succeeded. This is because the parties have close family relations.
46. These family relations and the nature of the usage of the disputed portion as a permissive hand-me-down from one family member to another, made the plaintiff’s claim unassailable.
47. In point of fact, she claimed the suit property as of right and not because of her entry and occupation which is usually one of the principles of adverse of adverse possession. The complexity of adverse possession claims amongst families was elucidated in the Court of Appeal decision of Samuel Kihamba v Mary Mbaisi [2015] eKLR where the court expressed itself thus: -

“Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.”

48. Further, notwithstanding this court is satisfied the plaintiff is in occupation of the suit property and has ploughed it for over 12 years and I say so because DW1 admitted she had tilled it for a long time, this long usage was not sufficient to sustain her claim.
49. It emerged during the hearing that 147 was conferred to the plaintiff’s household and registered in Karan’s name. Other family members too had their respective parcels registered in their names including the suit property that was registered in Onyango’s name.
50. Put another way, family members intended that Onyango’s and Karan’s customary rights over family land would be crystalized by each one of them having their portions registered in their respective names. Therefore, customary trust could not suffice. See the Court of Appeal decision of Eunice Karimi Kibunja v Mwirigi M’ringera Kibunja [2013] eKLR.



51. Accordingly, I find the plaintiff did not prove her claim of adverse possession on a balance of probabilities. Her claim of adverse possession fails.
52. Given the above finding and in dealing with the 2nd issue, I hereby dismiss the plaintiff's case. It is trite law costs follow the event but considering the special relations between the parties who have close familial relations, each party shall bear their respective costs of the suit. Ultimately, I make the following final disposal orders;
- a. The plaintiff's suit against the defendants is hereby dismissed.
 - b. Each party shall bear their respective costs of the suit.
53. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 3RD DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

03/10/2024

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERRING PLATFORM**

In the Presence of:

N/A for plaintiff

Mr. Ouma for the defendants

Court assistant: Ishmael Orwa

