



REPUBLIC OF KENYA



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**Osieyo v Ochola & 2 others (Environment & Land Case E004 of 2022)  
[2023] KEELC 686 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 686 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E004 OF 2022  
AY KOROSS, J  
FEBRUARY 9, 2023**

**BETWEEN**

**ROSE AKOMO OSIEYO ..... PLAINTIFF**

**AND**

**STEPHEN ODHIAMBO OCHOLA ..... 1<sup>ST</sup> DEFENDANT**

**BONFACE OTIENO OCHOLA ..... 2<sup>ND</sup> DEFENDANT**

**WILLIAM OLENGO OCHOLA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By an originating summons dated 2/03/2022, the plaintiff instituted suit against the defendants who are the registered proprietors of land parcel no. North Ugenya/Uyundo/1314 ('suit property') which measured 2.54 hectares. She averred that she had acquired 1.2 hectares out of the suit property. She identified the following issues for this court's determination;
  - a) Whether she had been in open, quiet and notorious possession of an area measuring 1.2 Ha of the suit property for a period exceeding 12 years and whether title for this occupied portion should be issued to her;
  - b) Whether the defendants title to 1.2 Ha of the suit property had become extinguished upon expiry of 12 years from the year 1968 which was the year she commenced occupation of it; and
  - c) Who should bear the costs of this suit.
2. The Originating Summons was accompanied by the plaintiff's supporting affidavit and witness statements and several documents which she produced in support of her case which were title documents for land parcels no. North Ugenya/Uyundo/323, 1314, 343, 934, 935,936 and 1315,



Registry Index Map (RIM), chief's letter, summons for boundary identification, survey report and a letter by her advocates to the district surveyor-Ukwala.

3. The plaintiff deposed *inter alia*, the suit property which was registered in the defendant's joint names was a subdivision of North Ugenya/Uyundo/343 and was adjacent to her parcel of land known as North Ugenya/Uyundo/323; she and her deceased husband John Osieyo Otieno occupied a portion of the suit property peacefully from 1968 and had established a home on it and cultivated it; North Ugenya/Uyundo/343 and North Ugenya/Uyundo/323 were 1<sup>st</sup> registrations with the former being registered in the defendants' father's name before its subsequent transmission to the defendants.
4. She further deposed, there had never been a boundary dispute on the adjoining parcels of land until May 19, 2021 when the defendants' surveyors informed her that 1.2 Ha of her land was in the suit property and the said portion was erroneously registered in the defendants' father's name during adjudication.
5. Despite service the defendants did not participate in these proceedings and the suit proceeded as an undefended claim.

### **Plaintiff's evidence**

6. The plaintiff testified as PW1 and she relied on her witness statement and produced several documents that were itemized in her list of documents; both were dated 2/03/2022. Her evidence was led by John Radido who testified as PW2 and in a similar fashion, he adopted as his evidence in chief his witness statement dated 2/03/2022.
7. The assertions made in the plaintiff's witness statement were analogous to those contained in her supporting affidavit and this court need not rehash them. In her oral testimony, she testified the disputed portion of the suit property belonged to her husband and some persons wanted to 'grab' it from her. She had not encroached on the suit property. She ploughed a bigger portion than what was registered in her name and, the defendants had sold several portions that had emanated from North Ugenya/Uyundo/343 save for the suit property.
8. It was PW2's testimony that surveyors had established that during adjudication in 1970, part of the plaintiff's land had been erroneously registered in North Ugenya/Uyundo/343 and surveyors had recommended the RIM to be amended to correspond with the ground situation and he knew the plaintiff had been in occupation of a portion of the suit property for over 30 years and her homestead was on it. He asserted the plaintiff bought a portion of the suit property and North Ugenya/Uyundo/323. He evaded answering an enquiry from the court as from whom the plaintiff purchased the said alleged portion of the suit property and North Ugenya/Uyundo/323.

### **Plaintiff's written submissions.**

9. As directed by the court, the plaintiff's counsel Mr. Odera filed his written submissions dated November 18, 2022. Counsel identified two issues for determination (i) whether the plaintiff had met the threshold of adverse possession and the 2<sup>nd</sup> issue which was tied to the 1<sup>st</sup> issue was (ii) whether the plaintiff was entitled 1.2 ha of the suit property.
10. On the 1<sup>st</sup> issue, Counsel submitted the doctrine of adverse possession were anchored on Sections 7, 13 and 38 of the [Limitation of Actions Act](#). These provisions provide as follows;

7. Actions to recover land



An action may not be brought by any person to recover land after the end of twelve 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.’

Section 13 reads;

13. Right of action not to accrue or continue unless adverse possession
  - (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
  - (2) .....
  - (3) .....

Lastly, Section 38 provides thus;

38. Registration of title to land or easement acquired under Act
  - (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.’

11. It was counsel’s submission that the doctrine of adverse possession was well settled and he placed reliance on the Court of Appeal decision of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR where the court stated thus;

18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu v Kirplal & Another* [1975] EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period.’

12. Juxtaposing the facts of the case to the well settled principles, counsel contended that from the evidence adduced, the plaintiff was in occupation of a portion of the suit property without her own knowledge or that of the defendants’ father and all parties acted as though the land belonged to the plaintiff and as a result, the plaintiff’s occupation was non-permissive and it was undisputed that she had been in occupation of the said portion for 52 years. Counsel submitted that documentary evidence demonstrated that the plaintiff had dispossessed the original owner and her occupation was open, without secret with the purpose of acquiring ownership.



13. On the 2<sup>nd</sup> issue, counsel submitted the plaintiff claimed an identifiable parcel of land and had complied with the provisions of Order 35 Rule 7 of the [Civil Procedure Rules](#) by tendering a copy of the green card of the suit property and he placed reliance on the case of *Githu v Ndele* where the court held that;

The identification of the land in possession of an adverse possessor is important and intergral part of the process of proving adverse possession."

14. It was counsel's argument the plaintiff had proved her case on a balance of probabilities and her claim should be upheld.

### **Analysis and determination**

15. I have considered the evidence by the plaintiff including the documents she produced in support of her case as well as the submissions by counsel. Being guided by the provisions of law and judicial precedents that have been well articulated in counsel's submissions, I shall now proceed to consider the merits or otherwise of the plaintiff's claim to the suit property and logically the main single issue for determination is whether the plaintiff proved her claim of adverse possession to the required standards.
16. Section 28 (h) of the [Land Registration Act](#) recognises that all registered land is subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register; rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
17. The greencard of North Ugenya/Uyundo/343 that was produced in court was registered in the name of Ochalo Obulo on 6/4/1970; he was the defendants' father. Upon succeeding his estate, the defendants subdivided the parcel of land into 3 portions; North Ugenya/Uyundo/934, 935 and 936. North Ugenya/Uyundo/934 was subsequently subdivided into several parcels of land including the suit property.
18. The RIM has not been amended to reflect the subdivisions and what is evident is that North Ugenya/Uyundo/323 and North Ugenya/Uyundo/343 were adjacent to each other. North Ugenya/Uyundo/323 was registered in the plaintiff's name on November 22, 2017.
19. The plaintiff was required to prove that she had met the ingredients of adverse possession as set down in the statutory provisions and those that had been settled by legal principles.
20. The plaintiff's evidence that she occupied 1.2 ha of the suit property and had constructed a house on it and further that she cultivated it from 1968 in a manner that was non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 54 years was not controverted.
21. The Ugenya sub county surveyor's report that was proffered before this court showed the plaintiff had occupied a portion of the suit property for a period of over 50 years without disturbance. Shortly, I will address other admissions that were introduced in the said report.
22. Prove of such elements such as actual, open, notorious and exclusive occupation were not sufficient enough to make the provisions of the [Limitation of Actions Act](#) become operative in respect of adverse possession; the plaintiff needed to prove the defendants or their predecessor in title had either been dispossessed of 1.2 ha or had discontinued their possession of it during the statutory period. From the evidence adduced by the plaintiff, she did not allude that the defendants were dispossessed off 1.2 ha or had discontinued their possession of it. In other words, the plaintiff did not prove that she either



ousted the defendants from the suit property or the defendants vacated the suit property to enable her possess a portion of it. See *Gabriel Mbui v Mukindia Maranya* [1993] eKLR.

23. In the case of *Gabriel Mbui v Mukindia Maranya* (*Supra*) Kuloba J expressed himself as follows;

The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously (*sic*) dispossessed, cannot be said to have been evicted or to have quite (*sic*) the land: Chanan Singh J, in *Jandu v Kirpal* [1975] E A 225, at p 237; Simpson, J (as he then was), in *Wainaina v Murai and others* [1976] Kenya L R 227 at p 231."

24. How the plaintiff came into occupation of a portion of the suit property and the intent of the plaintiff's occupancy will unravel the fate of her claim.

25. No evidence was advanced that the defendants or their predecessors in title had ever been in occupation of the disputed portion. My understanding of her evidence is that she occupied this portion as of right and it was erroneously registered in the name of the defendants' father during land adjudication process in 1970.

26. The surveyor's report indeed affirms this position when in referring to North Ugenya/Uyundo/323 he stated 'the parcel mentioned above was erroneous (*sic*) drawn on the map. What the owner occupies on the ground is much bigger than what is in the map'. A note appended by the same surveyor in a letter by Wanyama & Co. Advocates scribbled the followings words on the face of the letter 'the office can only handle the matter after court ascertainment to rectify map and deed as per ground.'

27. It was the plaintiff's case that she and the defendants became privy to the position obtaining on the suit property when the defendants brought a surveyor to the suit property; both she and the defendants were not privy this disputed portion lay in the suit property and being alive to this, she argued in her submissions that neither she, the defendants nor their predecessors in title were cognizant of this anomaly. This particular portion of the submissions holds credence to her evidence.

28. Taking note of the legal position in *Gabriel Mbui v Mukindia Maranya* (*Supra*), her evidence and that of PW2 ran afoul with some the principles of adverse possession. That is to say, she claimed ownership as of right and not by virtue of adverse possession. Both parties had not come to the knowledge that the plaintiff occupied a portion of the suit property and the defendants had not been dispossessed off 1.2 ha or had discontinued their possession.

29. For the reasons stated above, it is my finding that the plaintiff has not proved on a balance of probabilities her claim of adverse possession. The defendants did not participate in these proceedings and I shall not award them costs. I hereby dismiss the plaintiff's case. She shall bear her own costs.

**DELIVERED AND DATED AT SIAYA THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

09/2/2023

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

In the Presence of:

Mr. Odera for the plaintiff



N/A for defendant

Court assistant: Ishmael Orwa

