



**Okoth v Okoth (Environment & Land Case 17 of 2021)
[2023] KEELC 17126 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 17 OF 2021**

AY KOROSS, J

MAY 4, 2023

BETWEEN

DORSILA AKELO OKOTH PLAINTIFF

AND

JENIFA ACHIENG OKOTH DEFENDANT

JUDGMENT

1. The registered proprietor of North Sakwa/Ajigo 470 (hereinafter referred to as ‘the suit property’) is James Ouma Okoth (‘James’) who is deceased. The defendant was his mother and she died on 9/06/2020. She was also the administratrix of his estate. The plaintiff and deceased defendant were co-wives having been married to the deceased Habart Okoth Obondo (‘Habart’).
2. By way of an originating summons dated 08/04/2020, the plaintiff asserted she had acquired one half portion over the suit property (hereinafter ‘disputed portion’) by adverse possession or in the alternative, by customary trust. In support, the plaintiff filed a supporting affidavit deposed on 8/04/2020.
3. The deceased defendant died before she entered appearance and allegedly in opposition, the deceased defendant’s daughter one Christine Juma Omondi filed a replying affidavit which she deposed on 13/11/2020. The suit thereafter proceeded by viva voce evidence.

Plaintiff’s evidence

4. The plaintiff testified as PW1. Her evidence was composed of her oral evidence, supporting affidavit, undated witness statement and further witness statement filed on diverse dates of 9/04/2020 and 12/04/2022 together with documents she produced in support of her case. Her evidence was led by her daughter Alice Nancy Ochieng who testified as PW2. PW2 relied on an undated witness statement filed on 12/04/2022.



5. In brief, PW1 testified Harbat and or her father in law Elijah Bonyo ('Bonyo') allocated the suit property to the parties with each having an equal share. She had utilised the disputed portion for over 50 years. James was registered as the proprietor merely because he was Harbat's first son.
6. On cross examination, she testified Harbat, James and her biological son Kennedy were all allocated land by Bonyo. She had used the suit property even prior to the deceased defendant's marriage.
7. PW2 corroborated PW'1s testimony. The plaintiff had planted crops on the disputed portion. The deceased defendant had leased out her portion and intended to dispose it off.
8. On cross examination, PW2 admitted that she was not present when the suit property was allocated to the parties.

Defendant's evidence

9. Siprosa Gwaru Bonyo testified as DW1. Her evidence was contained in her affidavit dated 13/02/2022 and oral testimony. She was married to Harbat's brother. The suit property was never to be held in trust by James. Bonyo distributed parcels of land to his male heirs.
10. On cross examination, she admitted that in a peaceful manner, the parties had always ploughed the suit property before and after James's death. Disputes emerged during distribution of James's estate.
11. Christine Juma Omondi, who had allegedly substituted the deceased defendant testified as DW2. Her evidence was composed of her replying affidavit, witness statement dated 15/03/2022, oral evidence and documents she produced.
12. It was her testimony that at adjudication, Bonyo allocated all his surviving male heirs parcels of land. Within their home, Harbat was allocated North/ Sakwa/ Ajigo/466, 521 and 538, Kennedy was allocated North/ Sakwa/ Ajigo/476, 527 and 534 while in a similar fashion James was allocated North/ Sakwa/ Ajigo/480, 526 and the suit property. The plaintiff had intermittently ploughed the suit property with permission from the deceased defendant.
13. On cross examination, she admitted that she was not privy if the plaintiff ploughed the disputed portion before she was born. She did not have documents to prove permission.

Plaintiff's submissions

14. Mr. Madialo, counsel for the plaintiff, filed written submissions dated 02/02/2023. Counsel identified 3 issues for determination; (a)whether the plaintiff had met the threshold of adverse possession (b)whether the plaintiff was entitled to the disputed portion and, (c)who should bear costs.
15. On the 1st issue and placing reliance on *Maweu v Liu Ranching & Farming Cooperative society* [1985] eKLR which was cited in *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR Civil Appeal No. 164 of 2011, counsel submitted adverse possession was a fact to be observed upon land. He also relied on *Gabriel Mbui v Mukindia Maranya* [1993] eKLR which stated: -

'the adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.'



16. Counsel submitted that the plaintiff had proved her claim of adverse possession. He relied on Mbira v Gachubi (2002) IEALR 137 where the court held that an adverse possessor must prove: -

‘... non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...’

17. On the 2nd issue, counsel submitted that a claim of adverse possession must be on a disputed portion and to this end, he placed reliance on the case of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR which held: -

‘the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776.’

Defendant’s submissions

18. Mrs. Kariuki-Owesi, counsel for the alleged defendant, filed undated written submissions on 27/02/2023. She identified two issues for determination; (a) whether the plaintiff could claim adverse possession over the suit property and (b) whether the suit property was held in trust for the plaintiff by James.

19. On the 1st issue, counsel submitted the plaintiff was granted permission to utilise the suit property thus her claim of adverse possession could not stand. She placed reliance on several authorities including Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR where the court stated that: -

‘...in order to be entitled to the land by adverse possession the Claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition...’

20. On the 2nd issue, counsel submitted customary trust could not suffice because Bonyo had allocated his land to all his surviving sons and grandsons. Counsel cited the Supreme Court of Kenya decision of Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR and the case of Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR.

21. Counsel submitted the plaintiff did not meet any of the criteria encapsulated in Isack M’inanga Kiebia v Isaaya Theuri M’lintari (*supra*).

Analysis and Determination

22. I have perused and considered the parties’ pleadings, evidence adduced by witnesses before this court, counsels’ submissions as well as cited provisions of law and authorities. In my considered view, the issues falling for determination are;

- a. Whether the suit against the deceased defendant and or against her administratrix was competent.
- b. Whether the plaintiff proved her claim of adverse possession to the required standards.
- c. Whether the plaintiff proved James held the suit property in trust for her.



a. Whether the suit against the deceased defendant and or against her administratrix was competent.

23. Section 7 of the [Limitation of Actions Act](#) states as follows:

‘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.’

24. In the case of [Chevron \(K\) Ltd v Harrison Charo Wa Shutu](#) [2016] eKLR, the Court of Appeal stated: -

‘It is a settled principle that a claim for adverse possession can only be maintained against a registered owner.’

25. My understanding of this provision and settled law is that at the expiration 12 years, the registered proprietor’s title would be extinguished by operation of law and in light of Section 38 of the [Limitation of Actions Act](#), the plaintiff was entitled to approach the ELC for an order that she be registered as the proprietor of an identifiable portion which was the disputed portion.

26. In this case, James died on 18/8/1993. Notwithstanding the deceased defendant was the administratrix of his estate, the suit was filed against her in her personal capacity. It was evident the plaintiff’s claims were not directed at James or his estate but rather against the deceased defendant and this is evidenced by prayers 3 and 4 of her pleadings.

27. This is buttressed by paragraphs 7 and 9 of her supporting affidavit where she deposed ‘our husband... specifically allocated the applicant and respondent...North Sakwa/AJogi (sic)/470...as co-wives and tilled our respective allocation...’

28. The deceased defendant has never been the registered proprietor of the suit property and any claim against her in her personal capacity was bound to fail.

29. In my view, since the claim of adverse possession was only maintainable against James, the proper defendant was the deceased defendant in her capacity as the administratrix of James’s estate. See Order 3 Rule 7 of the [Civil Procedure Rules](#) and [Titus Mutuku Kasuve v Mwaani Investments](#) (*supra*).

30. Even if the suit was sustainable against the deceased defendant which was not so, the deceased defendant was not substituted in accordance with the provisions of Order 24 Rule 4 of the [Civil Procedure Rules](#) by DW2 who had obtained limited grant from the probate court.

31. Armed with an order from the probate court, DW2 was expected to extract the grant and move this court in accordance with the provisions of Order 24 Rule 4 (1) of these [Rules](#). As it were and in accordance with the Order 24 Rule 4 (1) of these [Rules](#), the suit against the deceased defendant abated on 10/06/2021 which was one year from when she died. I find the suit against the deceased defendant incompetent and hereby strike out the suit.

32. Notwithstanding this issue has disposed of the suit, it is paramount I address the residual issues. I say so because the parties had scathed each other in various probate proceedings. This property was set aside by the probate court from the schedule of James’s assets pending this court’s determination.

b) Whether the plaintiff proved her claim of adverse possession to the required standard

33. 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 is in possession of it for a sufficient period of time, as defined by the *Limitation of Actions Act*.

34. The principles of adverse possession are settled and I concur with authorities that have been cited by both counsels. The settled principles must co-exist for one to prove a claim of adverse possession.
36. As submitted by the plaintiff's counsel, the primary function of the court is to draw legal inferences from proved facts and such inferences are clearly matters of law.
37. From the proceedings, several issues were undisputed. The plaintiff and deceased defendant were Harbat's wives and at adjudication, Bonyo distributed land to all his male heirs who were then surviving him; each son of the parties was allocated 3 parcels of land and similarly too, Harbat was allocated 3 parcels.
38. All witnesses except DW2 were consistent the parties always ploughed the suit property. DW1 who was a sister in law of the parties and had no interest in the suit property. She testified that when she got married to one of Bonyo's son's in 1975, she found both parties ploughing the suit property.
39. On the other hand, the DW2 contradicted DW1 and testified the plaintiff ploughed the suit property intermittently with permission from the deceased defendant.
40. There was no evidence to dispute that the plaintiff's occupation of the suit property was peaceful except the erstwhile probate proceedings. It is my finding that the evidence of the plaintiff, PW2 and DW1 were consistent and credible that the plaintiff had always tilled the suit property for several years peacefully without interruption.
41. DW2 testified that she was born in 1976 and she was uncertain if the plaintiff tilled it from 1960. Even though DW2 testified the plaintiff tilled the disputed portion from either 1996 or 1997 with permission from the deceased defendant, she did not substantiate this with tangible evidence.
42. I find the plaintiff had been in non-permissive, actual, open, peaceful, uninterrupted exclusive possession of the disputed portion from 1960 which was a period of 60 years to the time she filed this suit. The question that suffices was whether the satisfaction of these ingredients was sufficient to deem her an adverse possessor. My answer to this is in the negative.
43. The plaintiff was required to also satisfy that James was dispossessed or discontinued possession. The Court of Appeal decision of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR cited with approval the decision of *Littledale v Liverpool College* [1900] 1 Ch 19, 21 which dealt with two concepts of adverse possession; possession and discontinuance of possession. In other words, dispossession was where a person comes in and drives another out of the land; discontinuance of possession is where the person in possession goes out and another person takes possession. In *Littledale* Lindley MR expressed himself as follows: -

‘The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.’

44. The plaintiff had claimed the suit property as of right and not by discontinuance of possession or dispossession of James or his heirs. This negates her claim of adverse possession. In my view, she did not satisfy this limb of adverse possession.
45. Claims of adverse possession amongst close family relations have posed and continue to pose challenges. The law is now settled that such claims amongst relatives in Kenya have to be traded with



carefully. See *Mbui v Maranya* [1993] KLR 726, *Rodgers Mwamboje v Douglas Mwamboje* [2014] eKLR, *John Baraza Ojiambo v Veronica Auma Ojiambo & 3 others* [2013] eKLR and *Samuel Kihamba v Mary Mbaisi* [2015] eKLR.

46. When confronted with an appeal concerning a claim of adverse possession between a step son and mother, the Court of Appeal in the case of *Samuel Kihamba v Mary Mbaisi* (*Supra*) expressed itself as follows;

‘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.’

47. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR the court expressed thus in its dicta;

‘...the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession...’

48. In applying the dicta of these decisions which are all from the appellate court and binding on this court, I am not satisfied the plaintiff has proved she was in adverse possession of the disputed portion.

c) Whether the plaintiff proved James held the suit property in trust for her

49. Section 28 of the *Land Registration Act* recognizes customary trust as one of the overriding interests over land. In accordance with Section 25 (b) of the same *Act*, it is an encumbrance on land.

50. The Supreme Court of Kenya in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari* (*Supra*) settled the applicability of customary trust in Kenya. I agree with the deceased defendant's counsel that the plaintiff was called upon to discharge the burden of proof. In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] the Court of Appeal stated: -

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

51. From the adduced evidence, Bonyo was a senior chief. He was obviously conversant with land adjudication process and he allocated over 40 parcels of land to all his male heirs who were then surviving him.

52. His intentions were made clear; James was not to hold the suit property in trust for the plaintiff. The plaintiff's interests could only be ventilated over Harbat's and Kennedy's parcels of land not otherwise. I need not say more. I find her claim of customary trust fails.

36. Had I not struck out the plaintiff's case, I would have dismissed her claim. It is trite law costs follow the event. The suit against the deceased defendant abated and the parties were close relatives. In the



circumstances of this case, the plaintiff shall bear her own costs. I hereby issue the following disposal orders;

- a. The plaintiff's suit is hereby struck out.
- b. The plaintiff shall bear her own costs of this suit.

DELIVERED AND DATED AT SIAYA THIS 4TH DAY OF MAY 2023.

HON. A. Y. KOROSS

JUDGE

04/05/2023

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

In the Presence of:

Mr. Magina h/b for Mr. Madialo for the plaintiff

Ms. Kariuki -Owesi for the defendant

Court assistant: Ishmael Orwa

