



**Ogwom v Juma (Environment and Land Case Civil Suit E016 of 2022)  
[2023] KEELC 18529 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E016 OF 2022  
SO OKONG'O, J  
JULY 10, 2023**

**BETWEEN**

**GILBERT OMENYA OGWOM ..... APPLICANT**

**AND**

**SILPER ADONGO JUMA ..... RESPONDENT**

**JUDGMENT**

1. The Applicant brought this suit against the Respondent by way of an Originating Summons dated July 7, 2022 seeking the following reliefs ;
  - a) A declaration that the Applicant is the rightful owner of a portion of all that parcel of land known as Title No Kisumu/Wangaya1/2616 measuring 3 hectares or thereabouts (hereinafter referred to as “the suit property”) that he presently occupies having obtained the same by way of adverse possession against the respondent who is registered as the proprietor thereof.
  - b) An order directing the Land Registrar, Nyando to issue the Applicant with a title deed for the suit property after the subdivision of Title No Kisumu/Wangaya1/2616.
  - c) An order that the order issued by the court shall be deemed as the instrument of transfer of the suit property from the Respondent to the Applicant.
  - d) Costs of the suit.

**The Applicant’s Case**

2. The Originating Summons was supported by the affidavit of the Applicant sworn on July 7, 2022 in which he stated as follows: He was a bona fide purchaser of the suit property. He purchased the suit property from one, Paulus Juma Oyugi, deceased (hereinafter referred to as “the deceased”) in 1994 at a consideration of Kshs 210,000/-. The deceased died in 2004 and his first wife one, Josephine Ade followed in 2009. The Respondent was the deceased’s second wife. The Respondent was married in



2000 while he was in possession of the suit property. The Respondent obtained a Grant of Letters of Administration in respect of the estate of the deceased and after confirmation thereof, the Respondent had Title No Kisumu/ Wangaya1/2616 (hereinafter referred to only as “the whole parcel”) transferred to her name on June 11, 2020. He had an overriding interest in the suit property having occupied the same for over 12 years. The death of the deceased did not extinguish his interest in the suit property. He had occupied the suit property since 1994 and as such had acquired the same by adverse possession. His occupation of the property was peaceful, open and uninterrupted. He had put up a permanent house on the suit property. He was also using a portion thereof for cultivation and livestock breeding. His occupation of the suit property was in total exclusion of the Respondent and was with the intention of dispossessing her of the land. The Applicant annexed to his affidavit in support of the Originating Summons, a copy of a sale agreement dated August 27, 1994, and a copy of a certificate of official search dated July 1, 2020.

### **The Respondent’s Case**

3. The Respondent did not file an affidavit in response to the Originating Summons. Instead, she filed a statement of defence on August 8, 2022. In summary, the Respondent denied the Applicant’s claim in its entirety. The Respondent denied that the Applicant purchased the suit property from the deceased. The Respondent averred that the Applicant and the deceased were good friends and the deceased gave the Applicant a portion of the whole parcel measuring about a half of an acre to put up his homestead on a temporary basis because the Applicant had a dispute with members of his family and moved out of his ancestral home. The Respondent averred that the Applicant was to vacate the said portion of land that was given to him by the deceased once he had purchased land elsewhere to settle.
4. The Respondent averred that the agreement for sale that the Applicant had relied on in support of his case was a forgery and that the same was the subject of police investigations. The Respondent averred that she was married by the deceased in 1993 and not in 2000 as claimed by the Applicant. The Respondent denied that the Applicant had occupied the suit property since 1994. The Respondent averred that the Applicant was only in occupation of a portion of the whole parcel measuring half of an acre where he had put up his home. The Respondent averred that the Applicant took possession of a portion of the whole parcel measuring 3 acres in 2006 which he started cultivating. The Respondent averred that the Applicant claimed that the deceased had leased to him the said portion of the whole parcel for a term of 6 years with effect from 2003. The Respondent averred that when the Applicant was asked to vacate the said portion of the whole parcel measuring 3 acres in 2009, he refused to do so claiming that he owned the land. The Respondent denied that the Applicant had occupied the suit property peacefully since 1994. The Respondent averred that the dispute over the suit property started when the deceased was still alive. The Respondent averred that the deceased had resisted the Applicant’s attempt to expand the boundary of the land measuring half of an acre that was given to him by the deceased.
5. The Respondent averred that in 2009, the Applicant fraudulently caused the whole parcel to be subdivided into three portions namely, Kisumu/Wangaya1/5998, Kisumu/Wangaya1/5999, and Kisumu/Wangaya1/6000 which were transferred to the Applicant, one, Tobias Okoth and the Respondent’s son, David Omondi Juma respectively. The Respondent averred that neither her said son nor herself took part in the said subdivision exercise of the family land. The Respondent averred that the Applicant and the said Tobias Okoth were forced in 2019 to surrender the title deeds that they had acquired following the purported subdivision of the whole land to the Registrar of Lands. The Respondent averred that after surrendering the said title deed, the Applicant filed a suit against the Respondent at the Resident Magistrates Court at Nyando namely; Nyando ELCC No 10 of 2020. The Magistrate’s Court delivered judgment in favour of the Applicant in that Case on September 21, 2021.



The Respondent preferred an appeal against the said judgment to this court. This court overturned the decision of the lower court in Kisumu ELC Appeal No E070 of 2021 on June 10, 2022 and declared the Respondent as the owner of the whole parcel. The Respondent averred that the grant that she had obtained in respect of the estate of the deceased was subsequently confirmed and the whole parcel was transferred to her name by transmission.

6. The Respondent averred that the Applicant's unlawful and fraudulent subdivision of the whole parcel was reported to the Police at Chemelil Police Post and when the Applicant was summoned to the said Police Post, he produced an agreement dated June 4, 2009 between him and one, Peter Ochola Okendo in respect of the whole parcel. The Respondent averred that this agreement was another forgery that was intended to be used to hoodwink the Police and to defend the illegal acquisition of the suit property. The Respondent averred that she abandoned the complaint that she had lodged with the Police when the Applicant surrendered for cancellation the title deeds that he had obtained in respect of the portions of the whole parcel following the illegal subdivision and asked for forgiveness from the Respondent. The Respondent averred that the Applicant filed the present suit after the decision he had obtained in the lower court was overturned by this court and his objection to the confirmation of the grant in respect of the estate of the deceased that was issued to the Respondent was also dismissed. The Respondent averred that the Applicant was only occupying a portion of the whole parcel measuring 3 acres while the rest was being occupied by the Respondent and his son. The Respondent averred that even for the said 3 acres, the Applicant had not occupied the same peacefully. The Respondent averred that save for his homestead which was standing on a portion of the whole parcel measuring 0.5 acres, the Applicant had not developed any other portion of the whole parcel without resistance. The Respondent averred that the Applicant was not deserving of the orders sought. The Respondent averred that the Applicant had approached the court with unclean hands. The Respondent averred that the Applicant had attempted to fraudulently acquire the suit property using three different agreements of sale and had also intermeddled with the estate of the deceased. The Respondent averred that the suit was *res judicata* and an abuse of the process of the court having been brought after the Applicant lost Kisumu ELC Appeal No E070 of 2021.

### **The Evidence**

7. At the trial, the Applicant told the court that he was claiming a portion of the whole parcel measuring 3 hectares (the suit property) by adverse possession. The Applicant adopted his affidavit in support of the Originating Summons and his witness statement as his evidence in chief and produced the documents attached to his replying affidavit as exhibits. On her part, the Respondent gave evidence and called her son, David Omondi Juma(DW2) as a witness. The Respondent adopted her witness statement as her Evidence in chief and produced the documents in her bundle of documents as exhibits. In her oral testimony, the Respondent reiterated most of what she had stated in her statement of defence and witness statement. The Respondent stated that the Applicant was given land measuring half of an acre by the deceased to occupy temporarily and that as at the time of her evidence, the Applicant was occupying land measuring 3 ½ acres. She stated that the Applicant's homestead was on land measuring half of an acre while he was cultivating another portion of the whole parcel measuring 3 acres. The Respondent's son, (DW2) reiterated the Respondent's evidence.

### **The submissions**

8. The parties made closing submissions in writing. The Applicant filed his submissions on March 24, 2023 while the Respondent filed her submissions on April 17, 2023. The Applicant submitted that he had met the threshold for an adverse possession claim. The Applicant submitted that he had proved that he had been in possession of the suit property since 1994 and that his possession and use of the



property were not contested by the Respondent. The Applicant cited several authorities in support of his submission on the issue of adverse possession some of which I will refer to later in the judgment. The Applicant submitted further that the Respondent was holding the suit property in trust for him and that the trust in his favour was an overriding interest in the suit property. In support of this submission, the Applicant cited Sections 25 and 28 of the *Land Registration Act, 2012*. The Applicant urged the court to enter judgment in his favour as prayed in the Originating Summons.

9. In her submission in reply, the Respondent submitted that a person claiming land by adverse possession must establish exclusive, open, peaceful, continuous, and uninterrupted possession of the land. The Respondent cited several cases in support of this submission some of which I will refer to later in the judgment. The Respondent submitted that the Applicant had not established that he had a peaceful and uninterrupted occupation of the suit property prior to filing the Originating Summons. The Respondent pointed out several incidences in which the Applicant was involved in disputes with the Respondent over the suit property that were inconsistent with the Applicant's claim to have enjoyed a peaceful occupation of the suit property. The Respondent submitted that the Applicant's conduct should disentitle him to the orders sought. The Respondent reiterated that the Applicant's suit was an abuse of the court process and urged the court to strike out the same.

### **Analysis and Determination**

10. From the pleadings, the following in my view are the issues arising for determination in this suit which I will consider together;

1. Whether the Applicant has proved his adverse possession claim over the suit property.
2. Whether the Applicant is entitled to the reliefs sought in the Originating Summons.
3. Who is liable for the costs of the suit?

I have considered the Originating Summons together with the evidence tendered in support thereof. I have also considered the Respondent's statement of defence and the evidence tendered in opposition to the application. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;

1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.



6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
  7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
  8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
  9. 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.
  10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
11. In *Kimani Ruchine & another v Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“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 evasion) .....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

12. In *Wambugu v Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. 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 for the requisite number of years.”

13. In *Gitbu v Ndeete* [1984] KLR 776 it was held that:

1. “Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”
2. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”



14. It is on the foregoing principles that the Applicant's claim falls for consideration. The burden was on the Applicant to establish the elements of adverse possession set out in the above cases. The Applicant has claimed to have entered and occupied the suit property around 1996 after purchasing the same from the deceased in 1994. According to the Respondent, the Applicant was given a small portion of the whole parcel measuring half of an acre by the deceased to occupy temporarily in 1998. The Applicant has claimed that he has been in possession of the suit property which measures 3 hectares since 1994. The Respondent on the other hand has claimed that the Applicant was in occupation of only the portion of the whole parcel measuring half of an acre from 1998 until 2004 after the death of the deceased when he claimed another portion of the whole parcel measuring 3 acres that he started cultivating. In the Originating Summons, the Applicant has claimed a portion of the whole parcel measuring 3 hectares which he claims to have occupied since 1994. As mentioned earlier, the burden was on the Applicant to prove that he was in possession of the said portion of the whole parcel.
15. The Applicant produced in evidence a copy of an agreement of sale dated 27<sup>th</sup> August 1994 through which the deceased is said to have sold to him a portion of the whole parcel measuring 3 hectares. The Respondent has termed this agreement of sale a forgery. The Respondent produced in evidence two other agreements dated 4<sup>th</sup> June 2009 and 16<sup>th</sup> October 2009 through which the Applicant is said to have purchased portions of the whole parcel from one, Peter Ochola Okendo. The Respondent has claimed that the Applicant produced these two agreements at Chemelil Police Post where he was summoned to explain the circumstances under which he had caused the whole parcel to be subdivided and portions thereof registered in his name. The Respondent has also produced in evidence proceedings of the lower court suit that the Applicant had filed against the Respondent in which the Applicant admitted that he had purchased portions of the whole parcel from the said Peter Ochola Okendo. The Respondent had also placed before the court evidence showing that in 2011, the Applicant had fraudulently caused the whole parcel to be subdivided into four portions and had allocated to himself two portions thereof measuring a total of 3.67 hectares. The subdivisions were subsequently declared unlawful and cancelled.
16. At the trial, the Applicant did not mention the portions of the whole parcel that he allegedly purchased from Peter Ochola Okendo neither did he comment on the two agreements of sale that were produced in evidence by the Respondents. With regard to the 2011 subdivision of the whole parcel, his response was that the Respondent's son, David Omondi Juma (DW2) was aware of the same and took an active part. The Applicant's claim was restricted to a portion of the whole parcel measuring 3 hectares that he claimed to have purchased from the deceased and had possessed since 1994.
17. It is common ground that the Applicant has a homestead on a portion of the whole parcel which he has occupied since 1996 according to the Applicant and since 1998 according to the Respondent. The Applicant has not given the court the measurement or dimensions of this homestead and has not indicated whether it forms part of the 3-hectare portion of the whole parcel that he is claiming. The Applicant told the court that a part from his homestead which stands on a portion of the whole parcel, he was also cultivating and rearing cattle on another portion. The Applicant once again did not tell the court the measurement of the portion of the whole parcel that he was using for cultivation and cattle breeding. There was also no evidence as to when he commenced the cultivation and cattle breeding. According to the Respondent, the Applicant's homestead sits on a portion of the whole parcel measuring half of an acre. The Respondent told the court that she had no problem with the Applicant retaining this portion of the whole parcel that was given to him by the deceased. The Respondent claimed that in addition to the portion of the whole parcel where the Applicant's homestead stands, the Applicant was cultivating another portion of the whole parcel measuring 3 acres. The Respondent claimed that the Applicant started using these additional 3 acres in 2004. Neither



the Applicant nor the Respondent tendered convincing evidence as regards the measurement of the portion of the whole parcel occupied by the Applicant and the period of such occupation. Apart from the conflicting oral testimony none of the parties placed any other evidence before the court that could shed light on the measurements of the portion of the whole parcel that is occupied by the Applicant and when the occupation commenced.

18. In *Miller v Minister of Pensions* [1947] 2 All ER 372, Lord Denning stated that:

“Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.

19. From the evidence adduced which I have highlighted above, the Applicant who had the burden of proof has not convinced me that he occupied a portion of the whole parcel measuring 3 hectares from 1994 up to 8<sup>th</sup> July 2022 when he brought the Originating Summons herein. The agreement for sale dated 27<sup>th</sup> August 1994 which the Applicant relied on in support of his claim to a portion of the whole parcel measuring 3 hectares was not conclusive evidence of the actual measurement of the whole parcel that was occupied by the Applicant. The said agreement was contested by the Respondent. The Applicants’ claim was also not based on the agreement but on adverse possession. It is also not lost to the court that there were other two agreements through which the Applicant was said to have acquired portions of the whole parcel. In addition, the Applicant had also at one time curved for himself a portion of the whole parcel measuring 3.62 hectares. All these create uncertainty as to the actual measurement of the portion of the whole parcel occupied by the Applicant. As mentioned earlier, the burden of proving the measurement of the land claimed by the Applicant was on the Applicant. He has failed to discharge the burden and should lose the case. However, from the admissions made by the Respondent, I find it more probable that the Applicant has occupied a portion of the whole parcel, measuring 3.5 acres. I am also persuaded that the Applicant’s occupation of the said portion of the whole parcel measuring 3.5 acres was peaceful, continuous, and uninterrupted from 1996 when the Applicant entered and occupied the same until after the death of the deceased in 2004 when a dispute arose between the Applicant and the Respondent. It is therefore my finding that the Applicant has proved that he has acquired a portion of the whole parcel measuring 3.5 acres by adverse possession.

## Conclusion

For the foregoing reasons, I hereby make the following orders;

1. I declare that the Applicant has acquired a portion of all that parcel of land known as Title No Kisumu/Wangaya 1/2616 measuring 3.5 acres (approximately 1.416 hectares) by adverse possession.
2. Once the Land Registers at Nyando Land Registration Unit that were destroyed during a fire outbreak on 18<sup>th</sup> February 2023 have been reconstructed, all that parcel of land known as Title No Kisumu/Wangaya 1/2616 shall be subdivided by a Government/Kisumu County Land Surveyor at the cost of the Applicant and a portion thereof measuring approximately 1.416 hectares shall be transferred by the Respondent to the Applicant with the Applicant paying all the charges involved in the transfer.
3. While carrying out the survey for the purposes of the subdivision, the surveyor shall ensure that the Applicant’s homestead forms part of the land measuring approximately 1.416 hectares to be curved out for him from Title No Kisumu/Wangaya 1/2616 and that the homestead of the Respondent and



that of his son, David Omondi Juma are not made part of the said parcel of land to be registered in the name of the Applicant.

4. The Land Surveyor carrying out the survey shall make provision for access roads as may be necessary in his opinion.
5. The status quo prevailing as of the date hereof as it relates to the title and possession of Title No Kisumu/Wangaya 1/2616 shall be maintained pending the subdivision thereof in terms of the orders above.
6. Either party shall be at liberty to apply with regard to order No 3 above.
7. Each party shall bear its own costs of the Originating Summons.

**DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JULY 2023**

**S. OKONG'O**

**JUDGE**

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

N/A for the Applicant

Mr.Odhiambo for the Respondent

Ms. J. Omondi-Court Assistant

