



**Obwocha v Owich (Environment & Land Case E012 of 2020)
[2023] KEELC 18691 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E012 OF 2020**

MN KULLOW, J

JULY 3, 2023

BETWEEN

JANE NYANGASI OBWOCHA APPLICANT

AND

MICHAEL OTIENO OWICH RESPONDENT

JUDGMENT

1. The Applicant herein commenced this suit by way of an Originating Summons dated 02/11/2020 against the Respondent seeking the following ORDERS;
 - i. That this Honourable Court does declare that the Applicant Jane Nyangasi Obwocha has acquired adverse possession of all that Land known as Sakwa/Kadera Kwoyo/947 previously Sakwa Kadera Kwoyo/502 measuring 8 acres or thereabout having been in occupation and uninterrupted possession of the said portion for over 12 years that is to say from 31/3/1991.
 - ii. That this Honourable Court be pleased to order that the Applicant be registered as the proprietor of all that parcel of land measuring 8 acres out of Sakwa/Kadera Kwoyo/947 previously Sakwa Kadera Kwoyo/502.
 - iii. That this Honourable Court do issue as permanent injunction restraining the Respondent by himself or his agent from interfering with the applicant's occupation and enjoyment of the said 8 acres.
 - iv. Any other relief this honourable court may deem fit to grant in the circumstances.

Plaintiff's Case

1. The Originating Summons is premised on 2 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date. The Applicant contends that her deceased husband (hereinafter referred to as Deceased 1) Eliakim Owuocha Kobe, purchased a portion of the suit land from one Owich Adera



- (hereinafter referred to as Deceased 2) measuring 8 Acres on 31/03/1991. That pursuant to the said sale, deceased 1 took immediate possession of the said portion and had been occupying and using the same with his family until the year 2016; when the Applicant was forcefully evicted from the said land.
3. It is her claim that her possession and occupation of the said portion of land has been open, continuous and uninterrupted, with full knowledge of Deceased 2 and his family; for a period exceeding the statutory period of 12 years. Thus at the time of the said eviction in 2016; she had already acquired prescriptive rights over the said portion capable of registration by virtue of adverse possession.
 4. That the original land purchased was Parcel No. 502, however, upon succession of the estate of Deceased 2, the same was subdivided and the portion occupied by the Applicant became No. 947, the suit property.
 5. During the hearing of the case, the Applicant testified and called one witness in support of her case. She also produced the following exhibits in support of her claim; A copy of the sale agreement executed before the office of the Chief North Sakwa on 31/3/1991 as Pexh 1, A copy of the limited grant ad litem issued on 10/04/17 as Pexh 2, A copy of the green card for the land Sakwa/Kadera Kwoyo/947 as Pexh 3 and a copy of the official search for the parcel No.947 as Pexh 4, in further support of her case.
 6. George Okoko testified as PW2. It was his testimony that he witnessed the sale agreement between deceased 1 and 2; for the purchase of a portion of the suit land measuring 8 Acres and the consideration price was paid in full on execution of the said agreement. He confirmed that pursuant to the said sale, deceased 1 took possession of the said portion and upon his death, he was buried on the same portion. He further stated that the Applicant was no longer occupying the suit land as at December, 2021 when he visited the land, since she had forcefully been evicted.

Respondent's Case

7. The Respondent filed a Replying Affidavit sworn on 23/11/2020 in response to the Originating Summons. It was his contention that the suit land No. 947 was registered in his name by virtue of transmission, upon the conclusion of the succession of his late father's estate (deceased 2). He however maintained that parcel No. 947 was not a subdivision of parcel No. 502 as alleged by the Applicant.
8. He dismissed the claims of adverse possession by the Applicant of a portion measuring 8 Acres and stated that the Applicant was only in occupation of a portion measuring 0.1Ha of the suit land with permission of the proprietor and she has since moved out of the said portion on his instructions.
9. It was further his contention that the suit is an attempt to enforce an agreement, if any, entered into on 05/04/1991 and that the said agreement did not confer adverse possession to the Applicant. He urged the court to dismiss the suit with costs.
10. On trial, he conceded that his brother, Daniel Owich, witnessed an agreement between his father (deceased 2) and deceased 1 in the year 1991. He further conceded that the portion sold to the plaintiff was indeed 8 Acres as pleaded. He also confirmed that Deceased 1 was buried on the suit land and had been living on the same land prior to his death. He thereafter closed his case.

Analysis and Determination

11. I have carefully considered the Originating Summons, the Replying Affidavit, the exhibits in support of rival claims and the submissions filed by both parties. In view of the same, the issues arising for determination are as follows: -
 - a. Whether the Applicant has proved her claim of Adverse Possession.



- b. Whether the Applicant is entitled to the reliefs sought.

A. Whether the Applicant has proved her claim of Adverse Possession.

12. The legal framework for adverse possession is provided in sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and section 28 (h) of the *Land Registration Act*.
13. Adverse possession has been defined as a method of acquiring title to land through actual, open, hostile and continuous occupation of the land at the exclusion of the true, registered and/or actual owner for a period of 12 years as prescribed by law.
14. The law on adverse possession is now well settled; a party claiming adverse possession must prove that his possession is peaceful, open and continuous for a statutory period of 12 years and the said possession is adverse to the rights of the true owner. Makhandia, JA in *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*, which is in these terms: -
- “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.”
15. A party claiming under adverse possession must demonstrate to the court that his possession was open, peaceful and continuous, that is, ‘nec vi, nec clam nec precario’. The Applicant contends that she has been in occupation and use of a portion of the suit land measuring 8Acres since the year 1991; the same having been purchased by her late husband (Deceased 1) from the Respondent’s father (Deceased 2). She produced a copy of the said sale agreement as Pexh 1. It is her claim that pursuant to the said sale, they took immediate occupation of the land, put up their matrimonial home and further, when deceased 1 died, he was buried on the said land.
16. She further stated that the said occupation was open, continuous, uninterrupted for a period of over 12 years and with the full knowledge of the Respondent. This assertion was confirmed by the Respondent in his testimony in court; he stated that the deceased 1 and his family had been occupying and using the suit land with his late father’s permission until the year 2016, whereupon he asked the Applicant to vacate the suit land.
17. A parcel of land in question must be registered in the name of a person other than the Applicant. The Applicant herein produced a copy of the Green Card as Pexh. 3 and a copy of the official search as Pexh. 4. From a perusal of the said exhibits, it is not in dispute that the suit land herein is registered in the name of the Respondent. The said registration was pursuant to succession proceedings by way of transmission.
18. The Respondent on the other hand confirmed that the suit land was registered in his name by virtue of transmission but maintained that the suit parcel No. 947 was not a subdivision of parcel No. 502 as alleged. I have however noted that despite denying the assertions made by the Applicant, the



Respondent did not produce any exhibits to challenge the evidence produced by the Applicant. In the absence of any proof as to the contrary, I find that the exhibits produced by the Applicant remain uncontroverted.

19. Adverse possession is a fact to be observed upon the land and not on the title. It is trite law that mere change of ownership of land which is the subject matter of a claim for title under adverse possession cannot, per se, defeat the claim. See *Gitbu v Ndeete* [1984] KLR 776. Therefore, the change in registration of the suit land from the name of deceased 2 to that of the Respondent herein does not affect the Applicant's claim on adverse possession. Further, the Applicant herein has instituted the claim on behalf of his late husband's estate.
20. As earlier pointed out, possession must be open, continuous and uninterrupted. Further, possession and occupation must also be non-permissive and/or non-consensual, with the intention to dispossess, see Court of Appeal decision in *Gulam Miriam Noordin vs Julius Charo Karisa* (2015) eKLR. The Applicant's entry into the suit land was by virtue of a sale agreement (Pexh. 1) between Deceased 1 and 2. It is therefore not in dispute that the Applicant's entry and occupation of the suit land was permissive.
21. However, despite the Applicant's entry being with the consent and permission of the Respondent's deceased father; adverse possession may still crystallize in 3 instances, that is, (i) where the vendor has failed to fulfil his duties/ obligation under the contract and to transfer the property to the buyer within the requisite period, (ii) upon payment of the final instalment of the purchase price and (iii) or upon the expiry of the license and/or contract period that is upon lapse of the 6 years period.
22. In the instant case, PW2 confirmed that deceased 1 paid the entire purchase price to Deceased 2 at the execution of the sale agreement (Pexh. 1) and thereafter took immediate vacant possession of the said purchased portion, developed the land and had been occupying the same until 2016, when the Respondent evicted the Applicant after the death of her husband. It is therefore my considered opinion that the continued occupation by the Deceased 1 together with his family, upon payment of the purchase price in full, was with the intention of dispossessing deceased 2 of his land; by asserting their rights in an adverse manner rather than a fulfilment of a contractual obligation. As a result of the said continued occupation, they acquired prescriptive rights capable of registration.
23. Madan JA in the case of *Public Trustee v Wanduru Ndegwa* [1984] eKLR stated as follows; -

“ ... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.(emphasis added)
24. Further, L. Gacheru J. in the case of *Stephen Mwangi Gatunge v Onesmus Wanjau (Suing in Her Capacity as the Administrator of the Estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased))*, ELC No 7 of 2021(OS) cited with authority the decision by Madan J A above and stated as follows:

The Applicant's mode of entry was as a result of a sale agreement which means it was a permissive one. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license ... The Applicant's occupation having been permissive, it will follow that a claim for adverse



may not issue. However, Courts have found that such claim can be sustained after payment of the last instalment.” (emphasis mine)

See also *Peter Mbiru Michuki v Samuel Mugo Michuki* Civil Appeal No. 22 of 2013.

25. Guided by the above decisions; it is evident that a claim on adverse possession may still be sustained even where the initial entry and occupation was consensual/ permissive by virtue of a sale agreement; particularly upon full payment of the purchase price. In the instant case, it is not in dispute that deceased 1 paid the full purchase price on execution of the sale agreement and thereafter took immediate possession. It is therefore my considered opinion that time for adverse possession started running in the year 1991 upon payment of the entire consideration price and materialized in the year 2003.
26. Further and without prejudice to the foregoing, upon expiry of the 6 years’ period within which a contract should be enforced, any continued occupation and use of the property thereof by the Applicant, for a period exceeding the 12 years’ statutory period, became adverse to the rights and interests of the title holder and/or his estate upon his death. Failure by the vendor to fulfil his obligations under the contract by obtaining the Land Control Board Consent and transferring the property within the requisite statutory timelines also voids the said sale agreement.
27. The Court of Appeal in the case of *Titus Ong’ang’a Nyachico v Martin Okioma Nyauma & 3 others* [2017] eKLR held as follows: -

“Secondly, although the initial entry into the suit land by the appellant was with the consent and approval of the first respondent following the aborted sale agreement due to lack of consent from the area Land Control Board, the occupation became adverse. This Court has severally held that when a purchaser of land in a controlled transaction is permitted to be in possession of the land by the vendor pending completion of the transaction, the intended sale becomes void, and the permission to occupy the land is terminated by operation of the law. Any continued occupation becomes adverse from the time the transaction becomes void.”
28. The Applicant produced a copy of the sale agreement dated 3/3/1991 as Pexh. 1. The Respondent on trial conceded that there was a sale agreement between deceased 1 and 2 and the same was duly witnessed by his brother. Thus, the time for adverse possession in this case started running from the year 1997 and by the year 2009, the Applicant acquired prescriptive and overriding rights, adverse to the Respondent’s rights over the said portion measuring 8 Acres, capable of registration.
29. Therefore, by the time the Applicant was being evicted from the suit land in 2016; the period of adverse possession had already crystallized and it cannot thus be said that there was disruption of occupation or discontinuation of use of the said portion before the statutory period of 12 years.
30. Dispossession of the actual owner goes to the root of a claim under adverse possession. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner’s enjoyment of the soil for the purpose for which he intended to use the same. It is instructive to note that the Applicant’s occupation and use of the portion of the suit land was with the intention to dispossess deceased 1 and his estate of the suit land. The Applicant and her late husband built their matrimonial home on the said portion of land and when deceased 1 died, he was buried on the said land. All these are acts which clearly show an intention to hold adversely and under a claim of right, the same are inconsistent with the actual owner’s intended use and enjoyment of the suit parcel. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR)



31. In view of the foregoing analysis, I find that the Applicant has proved her claim on adverse possession to the required threshold. She has demonstrated the date she took possession, the nature and duration of the said possession and further proved that the occupation and use was open, continuous and uninterrupted for a period of over 12 years. As a result of the said occupation and use of the portion measuring 8 Acres, she acquired prescriptive and overriding rights over the said portion capable of registration.

B. Whether the applicant is entitled to the reliefs sought.

32. Accordingly, having held that the Applicant has acquired prescriptive rights over a portion of the suit parcel measuring 8 Acres, by virtue of adverse possession, I find that she is entitled to the reliefs sought.

Conclusion

33. In the premises, I find that the Applicant has proved her claim on adverse possession to the required standard and I accordingly allow the Originating Summons dated November 2, 2020 on the following terms;

- i. A Declaration is hereby made that the Applicant Jane Nyangasi Obwocha has acquired adverse possession of all that Land known as Sakwa/Kadera Kwoyo/947 previously Sakwa Kadera Kwoyo/502 measuring 8 acres or thereabout having been in occupation and uninterrupted possession of the said portion for over 12 years.
- ii. An Order is hereby made that the Applicant be registered as the proprietor of all that parcel of land measuring 8 acres out of Sakwa/Kadera Kwoyo/947 previously Sakwa Kadera Kwoyo/502. The Respondent is hereby ordered to execute all the necessary documents to effect the said transfer and registration in the name of the Applicant within 45 days from the date of this Judgment. In default, the Deputy Registrar is hereby directed to execute the necessary transfer instruments in favor of the Applicant for a portion measuring 8 acres to facilitate the registration of the same in the Applicant's name.
- iii. Further, an order of permanent Injunction is hereby issued restraining the Respondent by himself or his agent from interfering with the Applicant's occupation and enjoyment of the said 8 acres (erroneously indicated as 4 acres)
- iv. The costs of this Application be borne by the Respondent.

DATED,SIGNED and DELIVERED Virtually at MIGORI on the 3rd day of JULY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

.....**for the Plaintiff**

.....**for the Defendant**

Court Assistant - Tom Maurice/Victor

