



Ochango (Substituted with his Son and Legal Representative Dixon Athanas Akaka) v Ojango & 2 others (Environment & Land Case 66 of 2019) [2023] KEELC 21345 (KLR) (7 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 66 OF 2019
DO OHUNGO, J
NOVEMBER 7, 2023**

BETWEEN

ANDEREYA OCHANGO OCHANGO (SUBSTITUTED WITH HIS SON AND LEGAL REPRESENTATIVE DIXON ATHANAS AKAKA) PLAINTIFF

AND

KALISTO ODEMBA OJANGO 1ST DEFENDANT

JOHN ASUTSI ODEMBA 2ND DEFENDANT

SAMUEL OKOKO NYIKULI 3RD DEFENDANT

JUDGMENT

1. Andereya Ochango Ochango moved the court through originating summons dated 24th November 2008, which he filed in the High Court. He later passed away on 29th June 2012 and was substituted with Dixon Athanas Akaka, pursuant to an order of the court made on 19th March 2014. The plaintiff later filed amended originating summons dated 17th February 2015 wherein he averred that Andereya Ochango Ochango was entitled to a 2½ acre portion of the parcel of land known as Kisa/Wambulishe/330 by adverse possession and that the parcel of land known as Kisa/Wambulishe/330 had been subdivided into Kisa/Wambulishe/2032, 2033 and 2034.
2. The matter was later transferred from the High Court to this court, hence its new case number.
3. On 16th November 2021, the plaintiff's counsel informed the court that the third defendant had passed away a while back and that the claim against him had abated. He added that the plaintiff would no longer pursue the claim against the third defendant.
4. Hearing of the suit proceeded by way of oral evidence. Dixon Athanas Akaka testified as PW1. He stated that Andereya Ochango Ochango was his father, and that the first defendant is a younger brother



to Andereya Ochango Ochango while the second defendant is a son of the first defendant. He adopted a supporting affidavit which Andereya Ochango Ochango swore on 24th November 2008 in support of originating summons dated 24th November 2008 a supplementary affidavit which Andereya Ochango Ochango swore on 9th October 2009 as well as affidavits which PW1 swore on 8th September 2014 and 17th February 2015.

5. The sum total of the affidavits and the evidence of PW1 is that as at the date originating summons dated 24th November 2008 was filed, the first defendant was the registered proprietor of the parcel of land known as Kisa/Wambulishe/330. That Andereya Ochango Ochango and the first defendant were sons of Samwel Ochango Mulima who lived with both on Kisa/Wambulishe/330 until his demise in 1988. That Andereya Ochango Ochango was allocated a 2½ acre portion of Kisa/Wambulishe/330 by his father, which portion he occupied and used during the life of his father and even after his father's death and even constructed seven semi-permanent houses thereon. That the said 2½ acre portion is distinct from a 7½ acre portion of Kisa/Wambulishe/330 which the first defendant was occupying. That another parcel known as Kisa/Wambulishe/371 which Andereya Ochango Ochango owned was not acquired from Samwel Ochango Mulima but was a acquired by Andereya Ochango Ochango personally as a first registration.
6. PW1 further stated that during the pendency of the case, the first defendant subdivided land parcel number Kisa/Wambulishe/330 into Kisa/Wambulishe/2032 which he retained in his name, Kisa/Wambulishe/2033 which he transferred to the second defendant and Kisa/Wambulishe/2034 which he transferred to the third defendant. He added that upon the demise of his father, he instructed an advocate who lodged a restriction against land parcel number Kisa/Wambulishe/330.
7. PW1 went on to testify that as of the date of his testimony he was residing on Kisa/Wambulishe/330 and that Samwel Ochango Mulima who was his grandfather gave all his four children land. That Andereya Ochango Ochango's family's inheritance is in Kisa/Wambulishe/330. He added that the third defendant passed away and that he abandoned the claim against the third defendant because the portion he is claiming is between parcel numbers 2032 and 2033 which belong to the first and second defendants while the third defendant's parcel is 2034 which is not connected to what he is claiming.
8. Next on the stand was Silas Alworah Kubati (PW2) who testified that since he was born in 1958, he had seen the plaintiff and his family occupy the land he is claiming and that there are houses occupied by the plaintiff and his family in the portion.
9. The plaintiff's case was then closed.
10. Kalisto Odemba Ojango testified next as DW1 and adopted a replying affidavit which he swore on 24th March 2009 in response to the originating summons. He stated in the affidavit that he was the registered proprietor of land parcel number Kisa/Wambulishe/330 which he was occupying entirely with his family. That Andereya Ochango Ochango who was his brother had his own separate parcel which was Kisa/Wambulishe/371 which was given to him by Samwel Ochango Mulima who was their father and that Andereya was disgruntled because their father gave DW1 a larger portion than the ones given to the other sons including Andereya.
11. DW1 further stated that their father had previously sold parcel number Kisa/Wambulishe/330 to Musa AShioya and when their father invited the sons to refund the purchase price so that the sale could be reversed, it was only DW1 who offered to refund and as a gratitude their father gave him the said parcel. That due to persistent disputes over trespass to Kisa/Wambulishe/330 by Andereya, he wrote a demand letter to Andereya on 18th February 1992 through an advocate and that the dispute had been arbitrated in various forums including family, elders and the administration resulting in an



agreement dated 23rd November 2008 pursuant to which he was to pay KShs 80,000 as compensation. That Andereya's efforts to occupy Kisa/Wambulishe/330 had neither been peaceful nor continuous for the requisite period of 12 years.

12. DW1 also stated that Andereya entered Kisa/Wambulishe/330 and built a home on it in 1992. That Andereya lived there with his children some of whom have since moved out, but Dixon Athanas Akaka is still in occupation of the parcel. That there is no boundary between the portion of Kisa/Wambulishe/330 that DW1 is occupying, and that which Dixon Ataka and his family are occupying. He added that the plaintiff's family are forcefully cultivating the land and that Andereya's wife who passed away while this case was pending was buried on the land despite a court order issued by Butere Court.
13. The defence case was then closed after which parties filed and exchanged written submissions.
14. I have considered the parties pleadings, evidence, and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
15. The law on adverse possession is straight forward. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
16. From the evidence on record, there is no dispute that Andereya and the first defendant are brothers and that they were brought up by their father on parcel number Kisa/Wambulishe/330. Thus, Andereya and by extension the current plaintiff cannot claim that they dispossessed the first defendant. If at all Andereya's family is still in possession, it is simply a continuation of the possession that he had as a son of Samwel Ochango Mulima, housed by his father as is the norm in any family. The plaintiff has not demonstrated that Andereya's stay on the parcel was anything more than that of members of a family living together.
17. While dealing with the issue of whether adverse possession could apply within families against close relatives, the Court of Appeal stated in *Samuel Kibamba v Mary Mbaisi* [2015] eKLR as follows:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. 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.
18. The present case is not different. Further, far from being a genuine adverse possession claim, the dispute seems to be essentially one of perceived entitlement to inheritance from Samwel Ochango Mulima. The upshot of the foregoing is that the plaintiff has failed to establish adverse possession. Consequently, the reliefs sought cannot issue.



19. I find no merit in the plaintiff's case, and I therefore dismiss it. In view of the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:-

Mr Nyikuli for the Plaintiff

The First Defendant present

No appearance by the Second Defendant

Court Assistant: E Juma

