



REPUBLIC OF KENYA



KENYA LAW
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Atiang (Suing as the Legal Administrator and Personal Representative of the Estate of the Late Johana Awiti Omundo (Deceased)) v Agola (Sued in her own Capacity as the Administrator of the estate of the Late William Otieno Sao (Deceased)) (Environment & Land Case 257 of 2014) [2022] KEELC 3571 (KLR) (6 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3571 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 257 OF 2014

A OMBWAYO, J

MAY 6, 2022

BETWEEN

RICHARD KINDA ATIANG APPLICANT
SUING AS THE LEGAL ADMINISTRATOR AND PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE JOHANA AWITI
OMUNDO (DECEASED)

AND

YUNIA OKO AGOLA RESPONDENT
SUED IN HER OWN CAPACITY AS THE ADMINISTRATOR OF THE ESTATE
OF THE LATE WILLIAM OTIENO SAO (DECEASED)

JUDGMENT

1. The Richard Kinda Atiang, the applicant herein approached this court by way of Originating Summons dated September 4, 2014 and filed on the same date. The application is in respect of land parcel number North Nyakach /kabodho East/2990 and the following questions were raised for determination:
 1. Whether this honourable court should declare the applicant the owner of land parcel number North Nyakach /kabodho East/2990 measuring approximately 1.9 Ha.
 2. Whether this court consequently should order the respondent to execute all relevant conveyance relating to land parcel number North Nyakach /kabodho East/2990 so as to transfer the aforesaid parcel of land to the Applicant and in default the Deputy Registrar should do so.



3. Whether the respondent should be permanently restrained from interfering with the applicant's right to quietly and peacefully occupy the suit parcel of land.
 4. Whether the respondent should be ordered to pay the applicant damages for trespass and quantum thereof.
 5. Whether the costs of this Application should be granted to the applicant.
2. The Application was supported by the affidavit of Richard Kinda Atiang who deposed and stated that he is the legal administrator and personal representative of the estate of his father the late Johana Awiti Omundo and that his late father is the registered owner of land parcel number North Nyakach / kabodho East/2990.
 3. He stated that the late William Otieno Sao passed on in 1990 and the respondent has been appointed as the Administrator of his estate. That for an uninterrupted period since 1985, he has been cultivating the suit property as he fenced it off, planted trees that are now fully grown.
 4. He further stated that he has been in continuous use of the suit property since 185 uninterrupted and has acquired prescriptive rights thereon as to amount to ownership and that he has by dint of the doctrine of adverse possession acquired ownership of the suit property. That he therefore seeks a restraining injunction against the Respondent as well as damages.
 5. Yunia Aoko Ogola, the Respondent herein filed a replying affidavit to the Application where she deposed and stated that the Applicant is not a son to the late Johana Awiti Omindo. That Johana Awiti Omindo was once the owner of the suit property who sold and transferred the suit property to her late husband William Otieno Sao in 1983.
 6. She stated that the said sale and transfer was done in accordance with the law and the applicant has never challenged the said transaction in a court of law. That after the death of her husband in 1990, she applied for grant of letters of administration. She further stated that it is not true that the applicant has been cultivating the suit property of land for an uninterrupted period since 1985 and it is not true that the applicant has fenced off the suit property or planted trees that are now fully grown.
 7. The respondent stated that after the death of her husband, the applicant filed a High Court Civil Suit No. 3737 of 1991 in Nairobi seeking a declaration of trust over the suit property and after filing the suit, he failed to set it down for hearing. That sometime in the year 1992, the applicant who is her neighbor decided to destroy the common boundary that they shared so that he could encroach on the suit property.
 8. She stated that she consequently reported the matter to Ahero Police Station where the applicant was arrested and charged in criminal case number 52 of 1992. That after the Applicant was charged, he asked for forgiveness and replaced the boundary and gave an undertaking to the police that he will not repeat the offence again and the matter was settled out of court.
 9. That sometime in the year 2002, the applicant filed SRMCC 88 of 2002 at Nyando Law Courts on the same piece of land and on July 23, 2003, the Applicant's counsel wrote a letter to have the matter stood over generally and to date, the matter is still pending at Nyando Law Courts. That in April 2003, the Applicant trespassed on the suit property and she made a report to the Provincial Administration where the Provincial Administration held several meetings to solve the dispute and the Applicant was ordered to desist from trespassing on the suit property.
 10. That the applicant stopped for a while and in 2004, she sought assistance of FIDA-KENYA who wrote a demand letter to the applicant. That the Application is made in bad faith with the sole intention of



taking away property that she is rightfully entitled. She stated that the applicant cannot claim to be in open and continuous occupation of the suit property while the documents in place clearly indicate that he has on several occasions been stopped from trespassing on the parcel of land.

11. The respondent further alleged that the applicant has taken great advantage to the fact that she is a widow and her children reside and work for gain away from the suit property and that the applicant is a violent man and has on several occasions threatened her life. That the applicant has developed a tendency of filing suits in court on the suit property and not setting them down for hearing as an attempt to threaten her into leaving him her land.
12. That the suit property is her only source of livelihood and the only place where her children can develop their homes and in the event the applicant takes away from her, she stands to suffer irreparable loss.
13. The matter came up for hearing on November 8, 2021 where the applicant upon being sworn in, he adopted his statement as evidence in chief and he stated that William Otieno Sao is not his relative and that the first registered owner of the suit property is his grandfather Omundo Nyasana. He produced PEX1 and PEX2 as Grant of Letters of Administration and a copy of confirmed Grant respectively. On cross examination, he confirmed that he is not a relative of William Otieno Sao.
14. The plaintiff closed his case and on the part of the respondent, her replying affidavit was adopted as evidence in Chief which marked close of the Defence case. The court directed parties to file and exchange submissions. I have perused the court file and do confirm that parties failed to file their submissions.

Analysis And Determination

15. It is the applicant's case that he is the Administrator and Legal Representative of the estate of Johana Awiti Omundo who was his late father and that his late father acquired the suit property in the year 1982. The applicant has also alleged that he has been cultivating the suit property for an uninterrupted period since 1985 and has been in continuous use of the suit property and therefore has prescriptive rights.
16. The respondent on the other hand has stated that she is the Administrator of the estate of her late husband William Otieno Sao. She did not dispute the fact that the late Johana Awiti Omundo was once the registered owner of the suit property who later sold and transferred it to the respondent's husband in 1983. It is the Respondent's case that the applicant has given false information that he has been cultivating the suit property, has fenced it off and has planted trees that are fully grown.
17. It is also the respondent's case that the applicant has filed numerous suits in different courts over the suit property that is Nairobi High Court Civil Suit No. 3737 of 1991 seeking a declaration of trust over the suit property, Criminal Case Number 52 of 1992 where he was charged for destroying the common boundary and SRMCC 88 of 2002 at Nyando Law Courts where he failed to prosecute the suit.
18. Section 7 of the *Limitation of Actions Act* provides that;

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 38(1) of the same Act further provides as follows;

“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."

19. The Court of Appeal in the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR held that:

"Adverse Possession is essentially a situation where a person takes Possession of land, 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 12 years."

Although the applicant claims to be in continuous and uninterrupted use of the suit property for over 12 years, this fact is not true in the sense that he was charged in Criminal Case Number 52 of 1992 for destroying the common boundary that he shared with the respondent. That in April 2003, the respondent reported the applicant to have trespassed on to the suit property where the provincial administration held meetings and it was resolved that the applicant should desist from trespassing onto the suit property as per the copy of the minutes annexed as YAA5.

20. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR Kuloba J enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;

- a) The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b) 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.
- c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
- d) The non-permissive actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by adviser possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
- g) 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.

21. The Court of Appeal in the case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf v Government of India & others* [2004] 10 SCC 779 where the court stated thus: -

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle



that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

22. Based on the above case laws, it is clear that the applicant has not met the threshold for Adverse Possession as there was no open and continuous use of the suit property based on evidence adduced before this court which clearly indicates that he has been reported to the police on several occasions for trespass and encroaching on the suit property. When this matter came up for hearing, the applicant failed to demonstrate that he was in continuous use of the suit property for a period of over 12 years as required by law. In the upshot, this suit is hereby dismissed with costs to the Respondent.

DATED AT KISUMU THIS 6TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE

