



REPUBLIC OF KENYA



**Atito v Ochiwo & another (Environment & Land Case
48 of 2020) [2022] KEELC 3757 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 48 OF 2020**

A OMBWAYO, J

MAY 6, 2022

**IN THE MATTER OF LIMITATION OF ACTIONS, CAP 22 LAWS OF KENYA
IN THE MATTER OF AN APPLICATION FOR A CLAIM OF ADVERSE POSSESSION**

BETWEEN

LUKIO ONGONDO ATITO PLAINTIFF

AND

OYOWE OCHIEWO 1ST DEFENDANT

AKUDO OCHIEWO 2ND DEFENDANT

JUDGMENT

1. Lukio Ongondo Atito (hereinafter referred to as the plaintiff) has come to this court by way of Originating summons against Oyowe Ochiwo and Akudo Ochiwo claiming to be entitled to the whole of parcel No. North Nyakach/kabodho East/1636 by adverse possession and prays for orders:
 1. An order that the plaintiff and his family have been in adverse possession of the whole of land parcel No. North Nyakach/kabodho East/1636 for a period of over 12 years.
 2. An order that upon expiry of 12 years since the plaintiff and his family have been in occupation and possession of the whole of the said parcel of land, the defendant's rights over the title have been extinguished.
 3. An order that the defendants hold the whole land in trust for the plaintiff.
 4. That an order that the whole of the said parcels of land No. North Nyakach/kabodho East/1636 be transferred to the plaintiff and the plaintiff be registered as the owner of the said parcel of land.



5. An order that the defendants do execute all the transfer documents in favour of the plaintiff and in event of default, the Deputy Registrar of this honourable court herein be empowered to execute the same to give effect to the aforesaid order.
6. An order that the defendants do meet costs of this suit.
2. In the supporting affidavit the plaintiff states that the land parcel No. North Nyakach/kabodho East/1636 is family land which he inherited from his father, the late Jacob Lukio (deceased).
3. That the plaintiff together with his entire family have been in actual and/or constructive and effective occupation of the land parcel No. North Nyakach/kabodho East/1636 since 1974 and his father before moving established his Luo traditional home therein and when he left it to establish his home in a neighbouring parcel, he continued farming on the said land up until his death in the year 1993. That after his father's unfortunate death, he continued to farm the said piece of land for his sustenance. That he has cultivated the said land planting crops like maize, beans and other subsistence crops since then, a period of over 12 years.
4. That sometimes in the year 2020 the defendants trespassed on land parcel No. North Nyakach/kabodho East/1636 and interfered with the plaintiff's peaceful and quiet possession.
5. That the defendants had fraudulently registered the land in their names in the year 1974 during the land registration and adjudication and still holds a title deed over the land.
6. That the defendants have not used this land for as long as the plaintiff can remember to date and he and the entire family have been full occupation and cultivation of the land for subsistence farming.
7. That he has enjoyed peaceful possession and occupation of the said land without the defendants' interference and with their full knowledge of his occupation, the defendants being in occupation of an adjoining land. That neither the defendants nor any other person has interfered with their occupation or use of the land.
8. That he peacefully used and been in occupation uninterrupted of the aforesaid parcel of land with the knowledge of the defendants herein and everyone is aware that the land actually belongs to him as his family have held it down through generations. That he has managed to occupy and cultivate the suit land without force, secrecy, permission and interruption for a period of over 12 years.
9. That under the circumstances he by all legal standards entitled to the suit property as an adverse possessor and he prays that he be declared as one.
10. That upon the expiry of 12 years as they have been in occupation and possession the aforesaid parcel of land the defendants' rights over the parcel of the land have been extinguished by the operation of the law. That the defendants hold the said parcel in trust for them.
11. That he is entitled to be registered as the owner of the said parcel of land and therefore pray that the defendants be ordered to transfer the land directly to them and in default the Deputy Registrar of the court be allowed to do so, on their behalf.
12. The defendants filed a replying affidavit whose gist is that it is not in dispute that they are the legal and registered owners of the suit land after the same was registered in their names by their father in 1974.
13. That in 1974 they were minors aged between 10 and 13 and thus had no ability to commit a fraudulent transaction to register the land in our names as alleged by the plaintiff.



14. That the plaintiff has come to this court with unclean hands concealing the fact that there is a suit pending at the Nyando Principal Magistrate's Court being Nyando ELC 47 of 2019 touching on the same subject matter wherein the plaintiff claims to be the legal heir of the suit land and alleges that the registrations of the land in their names was fraudulent and the defendants believe that whoever comes to equity must come with clean hands.
15. That the plaintiff cannot be approbating and reprobating at the same time alleging that he is legal heir to the said land, that the defendants hold the land in trust for him and that the land was registered in the defendant's names fraudulently as he alleges in paragraph 3 of the originating summons and paragraphs 2 and 6 of the supporting affidavit.
16. That the defendants are informed that if the plaintiff had any rightfully claim of adverse possession the same lapsed when he filed the suit at Nyando since by doing so he interfered with peaceful possession if it ever existed and as such his claims are baseless and based on greed.
17. That the plaintiff clearly lacks the locus standi to claim the suit land as an heir by claiming to be the legal administrator to the estate of Jacob Atitoo and yet he hasn't provided any letters of administration or documentation to prove the same. That further the said Jacob Atito whom the plaintiff claims to be the legal heir to is a complete stranger to the ownership of the suit land and the plaintiff obviously has provided no evidence to buttress his allegations.
18. That the plaintiff has neither occupied nor cultivated the suit land as he alleges as the defendants have been in occupation of the same since the death of their father who had registered the land in their name and his claims remain unsubstantiated since he has produced no evidence to back his allegations.
19. That by filing two different cases on the same subject matter in two different courts claiming adverse possession in one and claiming to be the rightful heir in the other and failing to provide cogent evidence to back up his claims clearly shows that the plaintiff has no respect for the court process and has resorted to playing roulette and gambling on justice.
20. The plaintiff filed a further affidavit stating that Nyando ELC 47 of 2019 was withdrawn. He reiterated that the suit land has been in his possession and has been used by the family for generation and he has been tilling the same for more than 12 years. He states that he has been planting crops on the land.
21. When the matter came up for hearing, the plaintiff relied on his affidavits on record which were adopted as evidence in chief and the annexures were admitted as exhibits. The gravamen of the plaintiffs' evidence is that the parcel of land belonged to his father but was registered in the Defendants' names by mistake. He inherited the land from his father and has been in possession since 1993. He ploughed the land last in 2019. The defendants ploughed once.
22. On cross-examination he states that he has a home a kilometre from the land and that he has no structure on the land. He has been planting maize, groundnuts on the land and has fenced the same using sisal and cactus. He states that the family has been utilising the land before and after adjudication. During adjudication his father was not available.
23. PW2 Rachier Otieno born in 1930 testified by adopting the written statement which was adopted as evidence in chief. The gist of his evidence is that the land was re-allocated to the plaintiff's father in 1974 and his family has utilised the land throughout.
24. PW3 Musa Ochola Olwa states that the land belonged to the plaintiff's father.



25. The Defendants testified as DW1 and DW2 and their evidence was that they are the registered proprietor of the land and hence been in occupation since 1974. On cross-examination, they state that in 1974 they were approximately 10 years when registered as the proprietors of the land.
26. DW1 was 18 years old in 1984 when he acquired his national identify card. According to DW1, the plaintiff has never utilised the land. DW2 testified that he has been working on the land for 48 years. The plaintiff has never tilled the land.
27. The DW2 further contradicted himself by stating that the land has never been utilised since 1979 by the parties but was being utilised by the community since 1979. He states that it is only after they got the title deed in 2021 that they utilised the land.
28. DW3, a brother to the Defendants' deceased father states that the land belonged to the defendant's deceased father before land adjudication who caused it to be registered in his sons' names during adjudication. According to DW3, the suit land has been utilised it as grazing ground for members of the family.
29. I have considered the rival submissions on record and the evidence on record and it is a fact that the parcel of land in dispute is known as North Nyakach/Kabodho East/1636 but records also indicates that it is also known as Northern Nyakach/Kabodho East/1636. The parcel of land was registered in the names fo Oyome Ochiewo and Akundo Ochiewo but later changed to Nelson Ochiewo Omollo and Jeremiah Okumu Ochiewo. The two were registered as proprietors of the land while they were under 18 years old.
30. DW2, Jeremiah Okumu Ochiewo testified on cross examination that the land has never been utilised by parties since 1979 but it has always been utilised by the community. This is an admission that the defendants have never utilised the land.
31. DW3, on cross examination appeared to contradict DW1 and DW2 by stating that no person grazed on the land other than the Ochiewos. The plaintiff and his witnesses were consistent that the plaintiff's family has always been utilizing the land before adjudication and after adjudication.
32. I do believe the plaintiff and his witnesses that he has been in possession of the land and utilising the same since 1993. There is no evidence that the defendants' father possessed and utilised the land. The defendants likewise never interfered with the plaintiff's utilization of the land since 1984 when they became adults until 2018 when they obtained titles for the land.
33. The principle of Adverse Possession is underpinned t in the *Limitations of Actions Act* Cap 22 and the Registration of *Land Act* No 6 of 2012; Section 7 states 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”

Moreover in Section 13

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date,



a right of action does not accrue unless and until some person takes Adverse Possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, Section 38(1) and (2) states;

- (1) 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

34. The ultimate import of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.
35. These sections are compounded with Section 28(h) of the *Land Registration Act*, 2012 that recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the *Land Act*, 2012 prescription is one of the ways of acquisition of land.
36. In *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.



37. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property.
38. I do find that the plaintiff has proved his case on a balance of probabilities and do grant orders:-
1. An order that the plaintiff and his family have been in adverse possession of the whole of land parcel No. North Nyakach/kabodho East/1636 for a period of over 12 years.
 2. An order that upon expiry of 12 years since the plaintiff and his family have been in occupation and possession of the whole of the said parcel of land, the defendant's rights over the title have been extinguished.
 3. An order that the defendants hold the whole land in trust for the plaintiff.
 4. That an order that the whole of the said parcels of land No. North Nyakach/kabodho East/1636 be transferred to the plaintiff and the plaintiff be registered as the owner of the said parcel of land.
39. Costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED 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 2020.

