



REPUBLIC OF KENYA



KENYA LAW
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**Okaka v Menya (Environment & Land Case 5 of 2015)
[2022] KEELC 156 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 5 OF 2015**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

MATHLIDA ODAGO OKAKA APPLICANT

AND

ISAACA ANUDO MENYA RESPONDENT

JUDGMENT

1. Mathlida Odago Okaka (hereinafter referred to as the Plaintiff) came to this court against Isaaka Anudo Menya by way of Originating Summons under Section 1, 1A, 3, 3A of the *Civil Procedure Act* and Order 37 of the *Civil Procedure Rules 2010* claiming to be entitled to a portion of the parcel of land designated as Nos Kisumu/Katieno/1846 measuring 83m long by 25 meters by adverse possession and asked for the determination of the following issues:
 1. An order that the applicant and his family have been in adverse possession of a portion of land parcel Nos. Kisumu/katieno/1846 measuring 83m long by 25 meters for a period of over 12 years.
 2. An order that upon expiry of 12 years since the applicant and her family have been in occupation and possession of a portion of the said parcel of land the respondent's rights over the title have been extinguished.
 3. An order that the respondent holds the whole portion of land in trust for the applicant.
 4. An order that a portion of the said parcel of land Nos. Kisumu/katieno/1846 measuring 83m long by 25 meters be transferred to the applicant and the applicant be registered as the owner of the said portion of land respectively.



5. An order that the respondent do execute all the transfer document in favour of the applicant 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 respondent does meet cost of this suit.
 7. Such other or further relief order of this honourable court may deem fit and just to grant in the circumstances.
2. The Originating summons was supported by the affidavit of Mathlida Odoyo Okaka sworn on 13/1/2015 wherein she states that in early 2002 her diseased husband Silvanus Okaka Ongowo purchased a portion of LR. Nos. Kisumu/katieno/1846 measuring 83m long by 25 meters width from Solomon Agelo Ogonya. That her late husband paid the consideration there of Kshs. 15,300 in full by way of instalments.
 3. That at the time of the said purchase, the land was registered in the name of Zablun Opiyi Ogonya who had died earlier in October 1997. That the said Solomon Agelo Ogonya is the next of kin of Zablun opiyu Ogonya and thereof had the capacity to sell the said parcel of land.
 4. That they took immediate possession of the parcel of land sold to them and since then she has been in actual occupation thereof.
 5. That Isaaka Onudo Menya had earlier purchased the upper portion of the said land from Zablun Opiyo Ogonya and had been using it peacefully without interfering with her lower portion. That her portion of land is below the access road and the boundaries are clearly marked on the ground.
 6. That sometime in 2013 Isaaka Anudo Menya caused the whole parcel of land to be transferred in his name without her knowledge of consent.
 7. That Isaaka Anudo Menya has started to threaten her to leave for him the whole land yet he knows that she is entitled to the lower portion that is situated below the access road measuring 83m by 23m. That the respondent has not used this portion of land because she has been in full occupation and cultivation of the land for subsistence farming.
 8. That upon expiry of 12 years as they have been in occupation and possession the aforesaid parcel of land has been extinguished by the operation of the law. That the respondent holds the said parcel in trust for the applicant.
 9. She contends that she is entitled to be registered as the owner of the said portion of land measuring 84meters by 25 meters and below the access road that cuts through the land and thereof she prays that the respondent be ordered to transfer her portion of the land directly to her.
 10. In reply to the originating Summons, the defendant states that he purchased the said land parcel number Nos. Kisumu/katieno/1846 measuring zero decimal eight Hectares (0.8)HA wholly from one Zablun Opiyo Ogonya who was the registered owner.
 11. That he purchased the said parcel of land in piecemeal until he had the entire parcel sold to him upon payment of the agreed purchase price by instalments paying the final balance on 20.8.1998.
 12. That after fully paying the purchase price he proceeded to obtain the title deed of the said parcel as the seller Zablun Opiyo Obonya had signed for him all the transfer forms and obtained the relevant land control consents.



13. That since 1979 he has been in actual occupation of the entire parcel of land and even built his homestead therein. That the applicant herein has never at any given time occupied the said parcel of land or any portion thereof whatsoever.
14. The principle of Adverse Possession is underpinned 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.

15. 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. These sections are compounded with Section 28(h) of the Land Registration Act, 2012 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.

16. In *Kasuve Vs 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”.

17. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property.

18. I have considered the evidence on record and do find that the plaintiff has proved on a balance of probabilities that she in occupation of a portion of land belonging to the defendant and has been in occupation for a period of more than 12 years before the filing of the suit. The plaintiff is therefore in adverse possession of the said portion of land. The upshot of the above is that the plaintiff is entitled to the prayers sought hence I do grant orders:

1. An order that the applicant and his family have been in adverse possession of a portion of land parcel Nos. Kisumu/katieno/1846 measuring 83m long by 25 meters for a period of over 12 years.
2. An order that upon expiry of 12 years since the applicant and her family have been in occupation and possession of a portion of the said parcel of land the respondent's rights over the title have been extinguished.
3. An order that the respondent holds the whole portion of land in trust for the applicant.
4. An order that a portion of the said parcel of land Nos. Kisumu/katieno/1846 measuring 83m long by 25 meters be transferred to the applicant and the applicant be registered as the owner of the said portion of land accordingly.

19. 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.

