



**Ouma v Ndege (Environment & Land Case 67 of 2020)  
[2022] KEELC 3215 (KLR) (4 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3215 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 67 OF 2020**

**A OMBWAYO, J  
JULY 4, 2022**

**BETWEEN**

**FREDRICK YOGA OUMA ..... APPLICANT**

**AND**

**ALLOYS JUMA NDEGE ..... RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. The Plaintiff/Applicant herein filed this Originating Summons on 23<sup>rd</sup> September 2020 under Sections 7,13,37&38 of the *Limitations of Actions Act* Cap 22 Laws of Kenya, Section 7 (d) of the *Land Act* Laws of Kenya ,Order 37 Rule 7 (1) of the *Civil Procedure Rules* for a claim to be entitled to the registration as proprietor of all that part and/or portion of Land parcel No. Kisumu/manyatta “B”/2803 being a division of the original land parcel number Kisumu/manyatta “B” /326 measuring approximately 0.07 Ha by way of adverse possession in pace of the Respondent presently registered as proprietor for orders that:
  1. The Applicant has occupied, used and enjoyed peaceably and openly as of right and without interruption the whole of parcel of land known as Kisumu/manyatta“B”/2803 being a sub division of the original land parcel number Kisumu/manyatta“B” /326 measuring approximately 0.07 Ha for a period exceeding 12 years and the Applicant acquired and is entitled by adverse possession to the said portion measuring 0.07 Ha.
  2. An order under section 38 of the Limitation of Action, Cap 22 Laws of Kenya, that the Applicant be registered as the proprietor of the whole of the said parcel land known as Kisumu/manyatta“B”/2803 being a division of the original land parcel number Kisumu/manyatta“B” /326 measuring approximately 0.07 Ha.



3. That the Respondent do sign and or execute transfer forms and the relevant transfer documents for the suit land parcel Kisumu/manyatta“B”/2803 being a division of the original land parcel number Kisumu/manyatta“B” /326 measuring approximately 0.07 Ha into the name of the Applicant failure of which the Kisumu Land registrar to do so.
  4. A permanent injunction restraining the Respondent, his servants, agents, heirs and assignees and/or any other persons acting on his behalf from interfering, selling, charging, disposing and alienating or interfering with the Applicant’s enjoyment and use of the said land parcel Kisumu/manyatta “B”/2803 being a division of the original land parcel number Kisumu/manyatta“B” /326 measuring approximately 0.07 Ha.
  5. Costs of this Originating Summons be borne by the Respondent.
  6. Such further and other orders that this Honourable court may deem fit and expedient to grant in the circumstances of this case.
2. The Application was supported by the Affidavit of Fredrick Yoga Oumawho stated that sometimes in the year 1982, he bought a portion of land parcel number Kisumu/manyatta“B”/326 from one Juma Ndege and that the Respondent’s entire family had full knowledge and consented to the sale of the said parcel of land.
  3. That upon purchase of the suit parcel, he immediately put up commercial buildings on the said portion of the land parcel comprising of residential houses with full knowledge of the Respondent. That he has been in occupation of the said portion of the land parcel to date which is now 38 years, furthermore the Respondent has grown up seeing the buildings on the land and thus he has acquired an overriding interest over the said portion of the suit property.
  4. He stated that the said buildings are occupied by his tenants and he has been collecting rent from the said tenants of the building from 1982 to date. That the Respondent without knowledge caused land parcel number Kisumu/manyatta“B” /326 to be subdivided to produce land parcels Kisumu/manyatta” B”/2801,2802,2803 and according to the area map and the survey done, the portion of land Kisumu/manyatta “B” /2803 is what lawfully belongs to him as his commercial buildings lie within the said portion of land.
  5. It was said that by occupation of the said parcel of land now known as Kisumu/manyatta“B” /2803 for over 38 years the Defendant’s right to recover the suit property expired by effluxion of time which is beyond set out by the *Limitation of Actions Act* Cap 22 Laws of Kenya. He alleged that the Defendant is threatening to recover the said land from their possession and is interfering with the buildings on the land and also the quiet occupation of his tenants and the Defendant is bringing buyers to his land with the intention of disposing off the same.
  6. It is the Plaintiff’s case that in the year 2020, the Defendant went to the said property and started destroying the rear part of the building, a destruction that he has threatened to continue with and through his Advocates on record, issued a demand letter to the said Defendant but the same was ignored and they are continuing with the threat to destroy the residential houses on the said parcel of land.
  7. It was stated that the Defendant has always been aware of the Plaintiff’s occupation which has been open, peaceful and without any interruptions since the land was acquired in the year 1982 and the Defendant’s right over and or to recover the suit property expired by effluxion of time as he has lived and physically possessed the suit property since 1982 to date which period is over 12 years threshold set out by the Limitations of Actions Act.



8. It was the Plaintiff's case that if the orders sought are granted, it will not in any way prejudice the interest of the Defendant as he has not been using or depending on the suit property as the Defendant owns and occupies the neighboring parcel of land which he has no problem with.
9. The Defendant herein filed a Replying Affidavit in response to the Application and stated that the original parcel number Kisumu/manyatta"B"/ 326 was adjudicated in his name when he was still a minor. That the Adjudication process was done when his late father Pancras Ndege Omollo was still alive and he is the one who gave him the land.
10. He stated that his late father died on 28<sup>th</sup> March 1994 and in 1982 he was 9 years old and he could not have sold the land to the Plaintiff. That the Plaintiff did not and has never been in possession of his land and the old structures were put up by his family.
11. He further stated that the Plaintiff wants to take advantage of his father's death by trying to deceive that his father gave him the land. That he formally and legally caused the sub-division of the original land parcel Kisumu/manyatta"B"/326 into Kisumu/manyatta"B"/2801,2802 and 2803 and all of them are duly registered in his name.
12. It was the Defendant's case that the Plaintiff has never occupied the Defendant's land with his permission and his interest in his parcel land number Kisumu/manyatta"B"/2803 is farfetched and imaginary and that he is total control, use and occupation of the three parcels.
13. That the Plaintiff's assertion of uninterrupted occupation for over 12 years is highly baseless and actuated by greed to land.
14. This matter came up for hearing on 10<sup>th</sup> February 2022 where PW1 Fredrick Yoga upon being sworn in, adopted his Supporting Affidavit as evidence in chief together with the exhibits. On cross examination, he confirmed that he bought the suit property from Alloys Juma Ndege through his father as Alloys Juma Ndege was of minority age and therefore a child cannot sell property. He also confirmed that when he was buying the suit property it had not ben subdivided but the Defendant later subdivided it into three parcels.
15. PW2 Perez Adoyo Laja also adopted her Supporting Affidavit as evidence in chief and on cross examination, she confirmed that the suit property belonged to the Plaintiff and the same position was confirmed by PW3.

### **Plaintiff's Submissions**

16. The Plaintiff herein filed his submissions on 2<sup>nd</sup> March 2022 and raised the following issues for determination:
  - i. Whether the Applicant has lived on the parcel for a period of exceeding 12years
17. It was submitted that the Plaintiff has lived on the suit parcel since 1982 after purchasing it from the Defendant on 7<sup>th</sup> April 1982. That the Defendant's right to recover the suit property has expired due to effluxion of time as per the provisions of section 7 of the Limitations of Actions Act and as was held in the case of *Wanyoike v Kabiri* (1979) KLR.
18. It was stated that the Plaintiff has put in evidence to show that he has been in exclusive control of the suit property and demonstrated his animus possidendi in developing the suit property through building commercial and residential buildings on the suit property as he has done the same openly and without interruption from anyone.
  - ii. Whether the occupation and use was free non-consensual actual, open, notorious, exclusive.



19. It was submitted that the Plaintiff has been in an open, free, non-consensual, actual, notorious and exclusive occupation of the suit property for over 38 years without interference from the Defendant. Reliance was placed in the case of *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others* (2018) eKLR.
20. The Plaintiff further submitted that the instant Application is merited and if it is dismissed as prayed by the Defendant, it will have the effect of denying and trampling the Plaintiff's constitutional right to own property. The Plaintiff prayed that the Application be allowed with costs.

### **Defendant's Submissions**

21. The Defendant filed his submissions on 24<sup>th</sup> March 2022 where it was stated that it is not in dispute that the suit parcel is a result of sub-division of original Kisumu/manyatta "B"/326 which was adjudicated in the name of the Defendant when he was still a minor and after the adjudication process the title was issued in the name of the minor.
22. It was submitted that the Defendant's father had no capacity to transact on behalf of the Defendant at his minority age as was held in Kisumu ELC Misc. No. 113 of 2017 In the matter of HEA(Minor) and in the matter of GAN (Applicant).
23. It was further stated that the Defendant as a minor did not consent to the Plaintiff taking possession of the suit property. That when the Defendant attained the age of majority, he differed with the Plaintiff and proceeded to have land parcel Kisumu/manyatta"B"/326 subdivided into Kisumu/manyatta"B"/281,2802 and 2803.
24. That the Plaintiff admitted that the Defendant has been hostile to him and therefore there has never been peaceful occupation between the Plaintiff and the Defendant was further stated that the Plaintiff was never given permission by the Defendant to occupy any of the resultant titles.
25. The Defendant further submitted that even though the Defendant was not given a chance to tender his oral testimony, evidence and documents tendered by the Plaintiff confirm that the Plaintiff has not proved his case on a balance of probability and therefore this suit should be dismissed with costs.

### **Analysis and Determination**

26. The Plaintiff herein has filed this suit on allegations that he has occupied, used and enjoyed peaceably and openly without interruption land parcel number Kisumu/manyatta" B"/2803 being a subdivision of the original land parcel number Kisumu/manyatta"B"/326 measuring approximately 0.07 Ha for a period exceeding 12 years. It is the Plaintiff's case that he bought a portion of land parcel number Kisumu/manyatta"B"/326 from the Defendant herein and the Defendants family had full knowledge and consented to the same.
27. It is also the Plaintiff's case that after he bought the suit property, he put up commercial buildings on the said portion of land comprising residential houses and the building is occupied by his tenants and he has been collecting rent from the tenants.
28. The Defendant on the other hand in response to the Application filed a Replying Affidavit and stated that the original land parcel number Kisumu/manyatta"B"/326 was adjudicated in his name when he was a minor and the Adjudication was done by his late father who gave him the land. That the Plaintiff's allegations that the Defendant sold the land to him are not true since in 1982 when the land was being sold to him, he was a minor.



29. It is the Defendant's case that the Plaintiff has never been in possession of the land and the old structures were put up by his family. The Defendant subdivided land parcel number Kisumu/manyatta"B"/326 into three parcels which have been registered in his name. It is the Defendant's case that the Plaintiff has never occupied land parcel number Kisumu/manyatta"B"/2803.
30. The Limitations of Actions Act provides for the statutory provisions that govern the doctrine of Adverse Possession which include the following:

section 7 states as follows;

“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 13;

- (1) A right of action to recover land does not accrue unless the land is in the possession of some persons 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 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 17;

“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.”

Section 37: -

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”



Section 38(1) and (2);

- (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 these 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 sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

31. I have looked at the Agreement for Sale and do confirm that the Defendant’s father sold to the Plaintiff a portion of land parcel number Kisumu/manyatta“B”/326 on 7<sup>th</sup> April 1982. It is clear from the evidence on record that after the suit parcel was sold to the Plaintiff, he developed a commercial building where he has been collecting rent and therefore he claims to be entitled to the orders of Adverse Possession. The question that this court needs to establish is whether the Plaintiff has met the threshold for granting the orders of Adverse Possession.

32. 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.’

33. In the case of *Gabriel Mbui Vs Mukindia Maranya* [1993] eKLR, the doctrine of Adverse Possession was defined as follows:

“...It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.’

in the case of *Mbira –v- Gachubi* (2002) IEALR 137 in which the court held that:

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

34. Although the Defendant claims to be the registered owner of the three parcels after the subdivision, he has not produced any title document to prove ownership of the three parcels of land. The Plaintiff has produced three searches which have indicated that the Defendant is the registered owner of the suit three parcels that is Kisumu/manyatta“B” /2801, 2802 and 2803.

35. I have noted that the original suit parcel number Kisumu/manyatta“B”/326 was registered in the name of the Defendant, the Defendant has failed to prove that he has been in use and occupation of the



Plaintiff's portion of land. The Defendant in his Replying Affidavit stated that the structures put up in the suit property were done by his family but has not produced any evidence to show that the same were constructed by his family. It is clear from the evidence on record that the structures put up on the suit property were for collecting rent but the Defendant herein has not proved to this court that he was in occupation of the suit property and was collecting rent from various tenants.

36. PW2 Perez Adoyo Laja upon being sworn, she adopted her Supporting Affidavit sworn on 23<sup>rd</sup> September 2020 as evidence in chief. She stated in her Affidavit that the Plaintiff was the owner/ landlord of the suit property and the Plaintiff's mother used to collect rent on behalf of the Plaintiff and later on the Plaintiff's mother tasked her with collecting rent on behalf of the Plaintiff. PW3 Dorcas Anyango Owuor being a tenant of the Plaintiff has been paying rent to the Plaintiff for over 7 years. She further stated that she was living on the suit property with 4 other tenants but 4 houses collapsed and she is the only tenant living in the suit parcel.
38. I have taken note of the fact that the suit parcel belonging to the Defendant was sold to the Plaintiff when the Defendant had not attained the age of majority. However, it is clear that after the Plaintiff bought the property from the Defendant's father, he took possession of the same and has been in open and notorious use of the property for a period of over 38 years. This court finds that the Plaintiff has proved his case on Adverse Possession on a balance of probabilities and Judgment is therefore entered his favour as follows:
  1. The Applicant has occupied, used and enjoyed peaceably and openly as of right and without interruption the whole of parcel of land known as Kisumu/manyatta"B"/2803 being a division of the original land parcel number Kisumu/manyatta"B" /326 measuring approximately 0.07 Ha for a period exceeding 12 years and the Applicant acquired and is entitled by adverse possession to the said portion measuring 0.07 Ha.
  2. An order under section 38 of the Limitation of Action, Cap 22 Laws of Kenya, that the Applicant be registered as the proprietor of the whole of the said parcel land known as Kisumu/manyatta"B"/2803 being a division of the original land parcel number Kisumu/manyatta"B" /326 measuring approximately 0.07 Ha.
  3. That the Respondent do sign and or execute transfer forms and the relevant transfer documents for the suit land parcel Kisumu/manyatta"B"/2803 being a sub division of the original land parcel number Kisumu/manyatta"B" /326 measuring approximately 0.07 Ha into the name of the Applicant failure of which the Kisumu ELC Deputy Registrar to do so.
  4. A permanent injunction restraining the Respondent, his servants, agents , heirs and assignees and/or any other persons acting on his behalf from interfering ,selling ,charging, disposing and alienating or interfering with the Applicant's enjoyment and use of the said land parcel Kisumu/manyatta"B"/2803 being a division of the original land parcel number Kisumu/manyatta"B" /326 measuring approximately 0.07 Ha.
  5. Costs of this suit be borne by the Respondent.

**DATED AT KISUMU THIS 4<sup>TH</sup> DAY OF JULY 2022.**

**ANTONY OMBWAYO**

**JUDGE**

