



**Omollo v Nyamunga (Land Case 53 of 2020)
[2025] KEELC 120 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE 53 OF 2020
E ASATI, J
JANUARY 23, 2025**

BETWEEN

DAVID AMANGA OMOLLO APPLICANT

AND

ERICK NYAMUNGA RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated 27th August 2020 David Amanga Omollo, the plaintiff/ applicant herein sought for orders that:
 - a. the Applicant be declared to have acquired prescriptive rights over the entire of parcel No. Kisumu/dago/734 by way of adverse possession.
 - b. the Respondent do sign transfer forms and obtain consent to transfer land Parcel No. Kisumu/dago/734 in favour of the applicant within 45 days of the judgment herein, failing which the Registrar of the High court be mandated to sign them.
 - c. The costs of this suit be borne by the Respondent.

2. In response to the Originating Summons the Respondent filed a Replying Affidavit sworn on 2nd October 2023. He denied the Plaintiff's claim and averred that he is the absolute legal owner of the suit land and that the plaintiff who was a trespasser on the land had not had possession of the land for 12 years.

Summary of the Evidence

3. The plaintiff testified as PW1 and adopted the contents of the Supporting Affidavit to the Originating Summons sworn on 27/8/2020 as his evidence in chief. He had deposed in the Supporting Affidavit that he is the son of John Omollo Amanga. That land parcel Number Kisumu/dago/743 (the suit land herein) is his ancestral home on which he has lived for over 47 years. That all along he had known



that the land belonged to him since it is the portion of land that his father gave him. That when he conducted search he realized that the suit land was registered in the name of his neighbour by the name of Erick Nyamunga, the defendant. That the defendant has his own land namely; parcel No. Kisumu/dago/744. That the defendant has always known that the (plaintiff) was in possession of the suit land. That registration of the suit land in the name of the defendant must have been a mistake. He produced two documents as exhibits namely; land certificate and green card in respect of the suit land both in the name of the defendant. He testified that he begun to build on the suit land in the year 1997 and had had possession of the land for more than 20 years.

4. On cross-examination, the plaintiff stated that he did not have photographs to show his developments on the land. That he did not get approval from the municipality to build the houses. That registration of the suit land in the name of the defendant was fraudulent. On re-examination he stated that the suit land shares a common boundary with the defendant's land parcel number 744. He stated further that he has built about 15 houses on the suit land. And further that he could not do succession to the estate of his father because the land had been transferred to the defendant.
5. PW2 was the plaintiff's mother. She testified that she would like the land to be transferred to the plaintiff because he was given the land by his father. That the defendant stole title deed of the land. That the plaintiff has built many houses on the suit land where he lives with his wife and children.
6. PW3 was a brother of the plaintiff who testified that his brother told him that whenever the defendant visited his land which is in the neighbourhood, he parks his car in the plaintiff's compound.
7. For the defence, the Defendant testified as DW1. He adopted the contents of his Replying Affidavit sworn on 2nd October 2023 as his evidence in chief. He stated that he was the absolute and legal owner of all that property known as EAST KISUMU/DAGO/743 which he bought and was transferred into his name on 18/02/1986. That he bought the land from a Mr. Jayakrishna Mathurada Chaganlal Morzeria who was then the registered owner. He denied that the suit land was the applicant's ancestral land. He stated that he has never noticed the applicant using the suit property for any purpose. That he had no knowledge that the applicant or any member of his family were living on any of his properties in Kisumu. That the first time he heard of the applicant is when the present suit was filed. That it was in the year 2020 during the height of Covid-19 pandemic that he was first made aware through the court proceedings herein that the applicant had trespassed onto his land, erected temporary structures and went to court to claim the land as his inherited property. That the applicant took advantage of the Respondent's absence due to the lock down and restriction of movement within the country during the Covid-19 pandemic and trespassed onto the land and filed the suit in the guise that he had lived there for over 12 years. That the applicant has not lived on the suit land for 12 years or more. That the applicant has never taken adverse possession of the suit property and if at all he has lived there since the year 2020, he has done so on his mistaken and erroneous belief of the land being owned by his late father.
8. On cross examination, the defendant stated that there are some structures on a portion of the suit land. He stated that he bought the land from J. Morzeria. That he had never met the plaintiff. That it is not true that the plaintiff had been on the suit land since birth. That he had never interrupted the stay of the applicant on the suit land. That he bought the land in the year 1986 and followed all the lawful processes. The defendant produced certificate of title, letter dated 17/2/1986, transfer of land dated 18/2/1986 and copies of receipts dated 18/2/1986 and 17/2/1986.

Submissions

9. Although directions were given that parties file submissions on the case, the plaintiff filed no submissions.



10. Written submissions were filed on behalf of defendant on 9th April, 2024.
11. Counsel submitted that the court has no jurisdiction to determine the claim which is disguised as one based on adverse possession, though its essence reveals that the applicant is claiming as a beneficiary of the estate of his deceased father. That the court lacks jurisdiction to determine ancestral land claims disguised as adverse possession claims. That under section 38 of the *Limitation of Actions Act* the Environment and Land Court lacks jurisdiction to determine ancestral land claims or succession causes. That the plaintiff's evidence was that the suit land was ancestral land, previously owned by his father John Omollo Amanga and that it is the land that his father gave him. Counsel relied on the case of Mukisa Biscuits manufacturing Ltd vs West End Distributors (1969) EA 696 on preliminary objections and submitted that the claim as drawn and the oral testimony before court are alien to the law of adverse possession. That the claim cannot found a cause of action under sections 13 and 38 of the *Limitation of Actions Act*.
12. Counsel submitted further that the jurisdiction of this court as set out under section 38 of the *Limitation of Actions Act* relates to adverse possession and not ancestral claims or claims of inheritance of estates of deceased persons. Counsel relied on the case of Mtana Lewa -vs- Kahindi Ngala Mwangandi (2050 eKLR to submit that a claim of adverse possession springs into life only where the registered owner neglects to assert his right over a given period of time. That it does not spring into action when one realises that his bequest from a deceased person has been registered in the name of another person.
13. That there can only be a claim of adverse possession where one proves non-permissive, non-consensual and undisturbed occupation for 12 years. That if at all the applicant has been living on the suit land, he has been living there on the basis of an ancestral claim and purportedly with the permission of his father.
14. Counsel submitted further that the applicant's claim is governed by the *Law of Succession Act* and not the *Limitation of Actions Act* and that the court thus lacks jurisdiction to determine the claim.
15. Counsel submitted that no claim for adverse possession has been proved. That the applicant did not show that he had taken possession of the suit land and asserted his right over it for 12 years. That nothing was presented before the court to show that he had been in occupation for 12 years. That section 13 of the *Limitation of Actions Act* spells out that a right of action will not accrue or continue unless there is adverse possession. Counsel submitted that there cannot be a claim of adverse possession where the initial entry onto the suit land was in breach of the law. Counsel relied on the case of Muhiddin Mohamed Muhiddin (Suing for and on behalf of the Estate of Mohammed Muhiddin Hatimy) -vs -Jackson Muthama & 168 others (2014) eKLR to support the submissions that where there is breach of the law, the period of adverse possession doesn't run and an illegal entry cannot confer a possession, any advantage or right. That the applicant's entry onto the defendant's land was an illegal act of trespass and that his dealings with the property of the deceased was an illegal act of intermeddling under section 45 of the *Law of Succession Act*. Counsel submitted that a right to action has not accrued to the applicant and prayed that the suit be dismissed.

Issues for Determination

16. The plaintiff's claim is based on the doctrine of adverse possession. The issues for determination therefore are whether or not the plaintiff has proved the elements of adverse possession namely:
 - a. Whether or not the plaintiff's entry and presence on the suit land was with the knowledge but without the permission and consent of the defendant as the registered owner.



- b. Whether or not the plaintiff has had open, actual, exclusive, peaceful, continuous and uninterrupted possession (*nec clam, nec vi, nec precario*) of the suit land for a period of over 12 years.
- c. Whether or not the title of the defendant has become extinguished by operation of law.

Analysis and determination

- 17. The first issue for determination is whether or not the plaintiff's entry and presence on the suit land was with the knowledge but without the permission and/or consent of the defendant as the registered owner thereof.
- 18. The plaintiff's case is that the suit land is his ancestral land on which he has lived for 47 years. In his evidence in court he stated that he had lived on the land for more than 20 years. That he was given the land by his father when he was 8 years old. His entry onto the land was therefore on the basis of his relationship with his father whom he claimed was the owner thereof. The plaintiff adduced no evidence that the defendant knew of his entry onto the suit land before the year 2020. Although both the plaintiff and PW3 alleged that the defendant knew of the plaintiff's occupation of the suit land because the defendant parked his car in the plaintiff's compound the first time he came to visit his other land parcel No. Kisumu/dago/744 in the neighbourhood, there was no evidence that the said compound was on the suit land and that this was before the year 2020. The defendant refuted the claim.
- 19. The defendant's case is that it was only in the year 2020 that the plaintiff, taking advantage of the Covid-19 lock-down, trespassed onto the suit land and filed the present suit soon thereafter.
- 20. I find that the plaintiff has not proved that his entry onto and presence on the suit land was with the knowledge but without the permission of the defendant or that his entry onto the suit land happened before the year 2020
- 21. The second issue for determination is whether or not the plaintiff had had open, actual, exclusive, peaceful, continuous and uninterrupted possession of the suit land for a period of over 12 years.
- 22. The plaintiff in paragraph of 3 in his Affidavit in support of Originating Summons deposed that he had lived on the suit land for more than 47 years. In his testimony in court he stated that he had lived on the land for more than 20 years. That since childhood they used to cultivate the land but that the land was given to him by his father when he was aged 8 and that he began to construct thereon in the year 1997.
- 23. That he had built houses thereon totalling to 15 in number. On re-examination he stated that he built the first house in the year 1999 when his father allowed him to do so. From his testimony the plaintiff was not specific as to when exactly he began occupying the land exclusively so as to be able to determine when, if at all, time began to run in his favour. He produced no evidence of the development he claims to have done on the land since entry. In a case of adverse possession photographic evidence aids the court to see the alleged developments. There was no surveyor's report to show that the alleged development particularly the alleged 15 houses were on the suit land. The plaintiff did not have approvals from the Municipal Council or County Government or any approving authority for the buildings. Although the defendant stated on cross examination that there is encroachment and some structures on apportion of the suit land, his case was that all these were done in the year 2020 during the Covid-19 pandemic when the plaintiff took advantage of the defendant's absence, trespassed onto the land, built the structures and filed the present suit.
- 24. The burden of proof was upon the plaintiff to prove that the structures on the suit land were built more than 12 years ago and that they constitute his home where he stays as claimed in his pleadings



and that he had been on the land for a period of more than 12 years. See Section 107 to 109 of the *Evidence Act* Cap 80 Laws of Kenya.

25. The doctrine of adverse possession is one of the methods vide which a person may acquire title to land in Kenya as provided in section 7 of the *Land Act*. Vide the doctrine a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period which under the *Limitation of Actions Act* is 12 years. The doctrine is anchored on Sections 7, 13, 17 and 38 of the *Limitation of Actions Act*. Section 7 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 13 of the *Limitation of Actions Act* provides:

1. A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.

The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010

In the case of *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR adverse possession was defined 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 owner’s enjoyment of land for purposes for which the owner intended to use it.”

26. And in *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor



under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

27. In the present case all the actions of the plaintiff in respect of the suit land seem to have begun in the year 2020. He stated that it was in the year 2020 that he discovered that the suit land was registered in the name of the defendant. That it was during the time of Covid-19 pandemic period that he invited the defendant for discussions concerning the suit land. The court record shows that it was in the year 2020 that he filed the present suit.
28. On the other hand, the evidence produced by the defendant shows that he became registered as owner of the suit land in the year 1986. There is no evidence that the plaintiff’s father whom the plaintiff claims to have been the owner of the land in his life time ever questioned the registration till the year 2006, when he died which was a period of about 20 years.
29. If the plaintiff’s testimony that he was given the suit land by his father were to be believed, it means that he has been on the suit land as owner, having been given the land by his father. He cannot therefore sustain a claim of adverse possession over his own land. I agree with the holding of the court in Haro Yonda Juaje –vs- Sadaka Dzenzo Mbauro & Kenya Commercial Bank (2014) eKLR where the court stated that;

“One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and the registered owner has never been in possession of that land....one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

30. The Plaintiff further claimed that registration of the suit land in favour of the defendant was by fraud and mistake. He testified in his evidence in chief that transfer and registration of the suit land to the defendant must have been a mistake. On cross-examination he stated that it was fraudulent as the land belonged to his father. PW2 stated that the defendant stole title to the land. If this be true then the plaintiff cannot also sustain a claim of adverse possession on land fraudulently registered in the name of the defendant.
31. I find no evidence that the plaintiff had had possession of the suit land for a period of 12 years. I find the defendant’s account on how the plaintiff entered the suit land namely; that the plaintiff only trespassed onto the suit land in the year 2020 credible.

The elements of adverse possession have not been demonstrated.

32. On the issue of whether or not the defendant’s title has become extinguished by operation of the Law, Section 17 of the *Limitation of Actions Act*, provides that upon the expiration of the period prescribed by the Act for a person to bring an action to recover land the title of that land is extinguished. The court has already found that the plaintiff has not proved that his entry and presence on the suit land was adverse to the title of the defendant and further that the plaintiff has not proved that he has been on the suit land for a period of 12 years.
33. The Defendant proved through the document that he produced that he was the registered owner of the suit land, He produced a land certificate issued on 21st February 1986 showing that land parcel No. EAST Kisumu/dago/743 was registered in his name. He also produced a Transfer of land executed by Jayakrishna Mathuradas Chagablal Morzeria in his favour for the transfer of the suit land for a



consideration of Kshs 8000/= on 15th February 1986. The transfer document shows that it was received at the Lands office for registration on 18/2/1986 and registered on the same date. He also produced application for registration of the said transfer form signed on 15/2/1986 and fee payment receipt numbers B23665 dated 18/2/1986 for ksh 240 and B23657 dated 17/2/1986 for ksh 345/= in respect thereof.

34. No evidence was availed whatsoever that the plaintiff's father ever owned the land.
35. The title held by the defendant to the suit land is protected by the provisions, inter alia, of article 40 of *the Constitution* of Kenya 2010 and the provisions of sections 24, 25 and 26 of the *Land Registration Act*. It can only be impeached upon proof, to the required degree, of the grounds for impeachment or cancellation of title to land as provided in law. The plaintiff having failed to prove adverse possession of the suit land has no basis on which to impeach the title. Mistake and fraud which were alleged in the plaintiff's testimony have not been proved and cannot form the basis for a declaration that the defendant's title is extinguished under section 17 of the *Limitation of Actions Act*.
36. I find no evidence to hold that the defendant's title ever became extinguished in accordance with the provisions of Section 17 of the *Limitation of Actions Act* or that the plaintiff is entitled to the relief sought.
37. Regarding costs, under the provisions of Section 27 of the *Civil Procedure Act*, costs of any action follow the event.
38. In conclusion I find that the plaintiff has not proved his claim on a balance of probabilities. His entry onto the suit land was an act of trespass. The suit vide the Originating Summons dated 27th August 2020 is hereby dismissed. Costs to the Defendant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 23RD DAY OF JANUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Maua h/b for Nyamweya for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

