



Aroko v Mandavia & 3 others (Environmental and Land Originating Summons E024 of 2023) [2025] KEELC 4886 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2023**

E ASATI, J

JUNE 30, 2025

IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF TITLE BY ADVERSE POSSESSION OF THOSE PARCELS OF LAND DESCRIBED KISUMU/DAGO/603

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

BETWEEN

HABIL OKELO AROKO APPLICANT

AND

HARENDRAKUMAR DAMJI MANDAVIA 1ST RESPONDENT

STANDARD CHARTERED BANK, KENYA LIMITED 2ND RESPONDENT

LAND REGISTRAR – KISUMU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction

1. Habil Okelo Aroko, the Plaintiff, who claims title to land parcel known as Kisumu/Dago603 by adverse possession sued the Defendants vide the Originating Summons dated 31st May, 2023 for the following orders;
 1. A declaration be issued that the Applicant has been in adverse possession of the whole of land parcel number Kisumu/Dago603 for a period of over 12 years.
 2. A declaration be issued that the Applicant has acquired title to 1.33 hectares comprised in land parcel Kisumu/Dago603 by adverse possession.



3. An order be issued that the 1st Respondent holds the title to Kisumu/Dago603 in trust for the Applicant.
 4. An order be issued cancelling the charge registered against the title or parcel of land No. Kisumu/Dago603 on 21st July, 1997 in favour of the 2nd Respondent, Standard Chartered Bank Kenya Limited.
 5. An order that the land parcel number Kisumu/Dago603 be transferred to the Applicant/Plaintiff and the Applicant/Plaintiff be registered as the owner of the land parcel Kisumu/Dago603.
 6. An order that the 1st Respondent do execute all the transfer documents in favour of the Applicant and in the event of default the Deputy Registrar of the court do execute the same documents for transfer.
 7. Cost of this suit to the Applicant.
2. It was the Applicant's case that he has had exclusive occupation, use and possession of land parcel known as Kisumu/Dago603 (the suit land) since the year 2005 which is a period in excess of 12 years. That the suit land was registered in the name of the 1st Respondent as proprietor thereof through misrepresentation, fraud and/or deceit and that he (1st Respondent) therefore holds the land in trust for the Applicant. The Originating Summons was supported by the averments in his Supporting Affidavit sworn on 31st May, 2023 and the annexures thereto.
 3. A response to the Originating Summons dated 13th June, 2023 was filed by the Attorney General on behalf of the 3rd and 4th Defendants (the Land Registrar – Kisumu and the Attorney General). The 3rd and 4th Defendants denied the Plaintiff's claim and averred that the suit does not disclose any cause of action against them.
 4. The 1st Respondent who was served with the Originating Summons by substituted service by advertisement in the daily newspaper did not respond to the claim.
 5. The 2nd Respondent filed a Replying Affidavit sworn by Mary Owiti on 18th October, 2023. The case of the 2nd Respondent was that after conducting due diligence it found that the suit land belonged to the 1st Respondent and advanced the 1st Respondent financial facility on the strength of the title deed in respect of the suit land.

The evidence

5. Pursuant to directions taken on 29th January, 2024, the matter was heard by way of oral evidence.
6. The Plaintiff/Applicant testified as PW1. He adopted the contents of his witness statement dated 31st May, 2023 as his evidence in chief. He had stated in the said witness statement that the suit land was his ancestral land which was registered in the name of his uncle by the name of Ogilo Ogelo. That the land was given to them by his uncle to build a home sometime in the 1980s and that in the year 2005 he moved into the land together with his family to build his home.
7. That he had been in constant, exclusive occupation, use and possession of the land since the year 2005 to date without interruption of his occupation for a period of over 12 years.
8. That on 21st May, 2023, he discovered that the land was registered in the name of the 1st Defendant. That the said registration was my misrepresentation, fraud and/or deceit.



9. That the 1st Respondent charged the land to 2nd Defendant bank to secure a loan so as to illegally benefit from the suit land. That the 1st Respondent has never physically occupied or used the suit land and has never been to the suit land. That the Respondents hold the title to the suit land in trust for him.
10. That he has planted trees and done cultivation on the suit land openly and adversely and without interruption from anybody including the Respondents. He produced exhibits namely; Chief's letter dated 15th January, 2023, certified copy of green card for the suit land, photographs and certificate of electronic evidence.
11. On cross-examination, PW1 stated that he was not aware that Ogilo Ogelo sold the land to the 1st Respondent. He stated further that Ogilo Ogelo gave him the land as a gift although he did not give him the title deed in respect thereof.
12. That in the year 2007 the 1st Respondent came to the land and informed him that the land was his and that he should move out.
13. He stated further that the land was registered in the name of the 1st Respondent by fraud because there were no transfer documents.
14. For the defence, one witness by the name of Mary Atieno Owiti testified for the 2nd Defendant. She adopted the contents of her witness statement dated 24th May, 2024 as her evidence in chief. She had stated in the witness statement that she was the 2nd Defendant's Branch Operations Manager in its Kisumu Branch where the transaction giving rise to the claim arose. That from the records held by the 2nd Defendant, the 1st Defendant is the registered owner of the suit land. That the 1st Defendant charged the property to the bank in his capacity as guarantor to Auto Shark Limited to secure the repayment of a loan or financial accommodation advanced to the said company by the 2nd Respondent vide a legally binding registered Charge.
15. That the 2nd Respondent is a stranger to the Plaintiff/Applicant's allegation that he has occupied the suit property from the year 2005.
16. No evidence was adduced by the 3rd and 4th Defendants.

Submissions

17. Written submissions dated 24th January 2025 were filed on behalf of the Applicant by the firm of O.J. Okoth & Company Advocates. Counsel submitted that the Applicant had acquired title to the suit land by adverse possession because he had been in exclusive possession and use of the suit land since the year 2005 when he built his home thereon. That the occupation was open and uninterrupted. That the photographs produced showed this.
18. On whether the charge registered on the suit land should be cancelled, Counsel relied on the case of Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees (2015)eKLR and submitted that adverse possession is an overriding interest in land that the Applicant has acquired. That the 2nd Respondent has various ways of recovering the loan including the option to sue the 1st Respondent for the outstanding amount.
19. Counsel submitted further that the Applicant's claim was based on adverse possession and not fraud. That the mere mention of fraud in the Applicant's documents does not achieve the threshold for the claim based on fraud as established by law.
20. That the Applicant's claim is against a registered owner who is not in any way related to the Applicant. Counsel urged the court to allow the Applicant's claim.



21. On behalf of the 2nd Respondent, written submissions dated 8th May, 2025 were filed by the firm of Owiti, Otieno & Ragot Advocates. Counsel submitted that the Applicant had failed to demonstrate the essential legal requirement to sustain a claim of adverse possession.
22. That the charge in favour of the 2nd Respondent was created in the year 1998 and there was no evidence produced to challenge the validity of the charge on the suit property. That the legal charge was registered long before the Applicant's alleged entry onto the suit land. That consequently the Applicant's occupation of the suit land was subsequent to and therefore subordinate to the bank's registered interest.
23. That when the 1st Respondent lawfully charged the property to the 2nd Respondent, there existed no overriding interest or registered adverse claim that would have invalidated or affected the creation and registration of the Charge.
24. Counsel relied on the authority in the case of *George Muli Mutua & 19 Others v David Waweru Ndungu & 3 Others* [2021]eKLR where it was held inter alia that the rights of squatters entering a property that had been charged cannot defeat the right of a chargee whose charge was created before such entry or after such entry but before the squatter's adverse possession claim had crystalized.
25. Counsel submitted that the Applicant's claim of adverse possession cannot take precedence over the 2nd Respondent bank's registered charge. That a Charge duly registered under the [Land Registration Act](#) enjoys statutory protection and confers proprietary rights that are indefeasible except as provided under Section 26(1) of the Act.
26. On behalf of the 3rd and 4th Respondent, written submissions dated 5th November, 2024 were filed by Callen Masaka Principal Litigation Counsel- for the attorney General.
27. Counsel submitted that the Plaintiff failed to meet strict legal criteria for a successful claim of adverse possession. Counsel submitted that the land has been under a charge since 22nd January, 1991 over a loan and that there is caution placed on the property.
28. That the principle of adverse possession does not apply to government.

Issues for determination

29. From the pleadings, evidence and submissions on record, the following emerge as the issues for determination herein;
 - a. whether or not the Plaintiff has acquired title to the suit land by adverse possession;
 - b. whether the Plaintiff is entitled to the relief sought in the Originating Summons;
 - c. who pays the costs of the suit?

Analysis and determination

30. The starting point for the Plaintiff's case is that the suit land which belonged to his late uncle Ogilo Ogelo was given to him in the 1980s by the said uncle as a gift. That on the basis of that gift, he proceeded to enter the land in the year 2005 together with his family to build his home his home thereon and that he has since enjoyed open and continuous occupation, use and possession of the land to date. If this account be true, then the doctrine of adverse possession will not apply. It means the Applicant entered the land as owner (having been given the same as a gift) and occupied it as such. Adverse possession is a doctrine of law vide which 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. Under section 7 of the *Limitation of Actions Act* the prescribed period is 12 years. Section 7 (d) of the *Land Act* recognizes adverse possession/prescription as one of the methods of acquisition of title to land in Kenya. Section 28 (h) of the *Land Registration Act* recognizes adverse possession as an overriding interest to which all registered land is subject. The doctrine is available to one who enters another's land and occupies it with the knowledge but without the permission, license or consent of the owner for the prescribed period.

31. In the case of *Gabriel Mbui v Mukindia Maranya* [1993]eKLR adverse possession was described 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.”
32. This description does not apply to the Plaintiff herein who entered the land as owner and/or relative of the owner.
33. The applicant also pleaded and testified that the registration of the suit land in favour of the 1st Defendant was on the basis of misrepresentation, fraud and/or deceit. The Applicant tried to disown these pleadings and testimony by submitting that the mere mention of the word fraud in his pleadings did not mean that his claim was based on fraud. However, the legal position is that parties are bound by their pleadings and neither pleadings nor evidence adduced on oath can be amended or changed through submissions. Order 2 Rule 6 (1) provides that “No party may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading in the same suit.
34. The court record shows that one of the grounds on the face of the Originating Summons upon which the suit was brought was that the 1st Respondent was registered as proprietor of the said land through misrepresentation, fraud and/or deceit. This assertion was also repeated in paragraph 7 of the Supporting Affidavit and paragraph 7 of the applicant's witness statement dated 31st May 2023 adopted as the applicant's evidence in chief.
35. A claim based on adverse possession cannot succeed where the claimant alleges that the title in the name of the registered owner was procured by fraud. In a claim of adverse possession, the claimant must first acknowledge the legality of the title of the registered owner.
36. In *Haro Yonda Juaje & Sadaka Dzenge Mbauro v Kenya Commercial Bank Ltd* [2014] eKLR it was held that “one cannot succeed in a claim of adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land...”
37. Similarly the Court of appeal in *Catherine Koriko & 3 others v Evaline Rosa* [2020] held inter alia that

“A claim of adverse possession is inconsistent with the claim of being a beneficiary of the estate of a deceased person.”
38. Lastly, the time the Applicant alleges to have taken possession of the suit land in the year 2005, the land was already charged to the bank. The bank's rights take precedence over the claim by the Applicant.



39. I find that the Applicant has not demonstrated that he has acquired title to the suit land by adverse possession.
40. On whether or not the Applicant is entitled to the relief sought
41. Having found that the Applicant has not proved adverse possession, there is not basis upon which to award the relief sought in the Originating Summons.

Conclusion

42. On the basis of the foregoing determinations, the court finds that the Plaintiff has failed to prove his case on a balance of probabilities. The suit is hereby dismissed. Each party to bear own costs of the suit.
Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30TH DAY OF JUNE, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

N/A for the Plaintiff/Applicant.

N/A for the 1st Defendant.

Anuro h/b Oduor for the 2nd Defendant.

Kajo for the 3rd and 4th Defendants.

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