

THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC OS CASE NO. E002 OF 2023

RACHEL NYAMUSI OMWEGA..... PLAINTIFF

VERSUS

HENRY NYABUTO OGUTU..... 1ST DEFENDANT

MARGARET GESARE NYABUTO.....2ND DEFENDANT

JUDGMENT

1. Vide an originating summons dated 9th March, 2023, and amended on 22nd December, 2023. The Applicant raised the following questions:

a. Has the Applicant herein been in open, continuous, and uninterrupted possession over occupation of Land Parcel; No. Wanjare /Bogiakumu/9579 for a period of 12 years?

b. If so, has the said open, continuous and an uninterrupted occupation/possession been adverse to the registered owner of the said Land Parcel No. Wanjare /Bogiakumu/9597/9579?

- c. Has the Applicant therefore acquired title to the said Land Parcel No. Wanjare / Bogiakumu/9597/9579 by adverse possession under the Law of Limitations of Actions Act against the 2nd Defendant?**
- d. Can the 2nd Respondent now be compelled to transfer the said Land Parcel No. Wanjare /Bogiakumu/9597/9579 to the Applicant and/or in default can the Deputy Registrar of the court sign necessary transfer documents to effect the said transfer?**
- e. Who shall bear costs of this suit?**

2. The originating summons did not plead any grounds on which it is based, nor did it set out the final reliefs sought. The Applicant swore the affidavit dated 9th March 2023 in support of the O.S. She deposes, inter alia, that she is the registered owner of L.R No. Wanjare/Bogiakumu/1394, which she inherited from her husband. She further states that, according to the Registry Index Map, this land shares a common boundary with Wanjare/Bogiakumu/1385.
3. The Applicant deposes that the 1st Respondent inherited the land Wanjare/Bogiakumu/1385 from his deceased father. Subsequently, he subdivided it into 4 portions and caused one of those portions, Wanjare/Bogiakumu/9579, to be registered in the name of his wife, who is sued as the 2nd Respondent.

4. The Applicant avers that although the land is now registered in the name of the 2nd Respondent, the said portion has been in exclusive continuous and open use by the Applicant and her family members. She is claiming a portion measuring 176ft by 35ft on the lower roadside and 176ft by 28 ft on the upper side, where they have always planted annual crops and have also planted mature trees.
5. She concluded by deposing that she is advised by her advocates that the Respondents' title to the said land was extinguished by operation of law and that she has acquired the land under the doctrine of adverse possession.
6. The suit was opposed by the Respondents through the replying affidavit of Henry Nyabuto sworn on 9th June, 2023 and response to the amended originating summons dated 26th July 2024. He deposes that the O.S. is misconceived because the Applicant is a resident of Nairobi and has not at any given time been in open continuous and uninterrupted possession of Wanjare/Bogiakumu/9579 for a period of 12 years as alleged.
7. The 1st Respondent stated that the Applicant has never had presence on the suit land and does not merit acquiring the suit title by way of adverse possession. The Respondents assert that they do not hold any land that belongs to the Applicant and any attempt to deprive them any of their land should be refused.

8. Directions were taken for hearing through calling of oral evidence and with the Applicant calling four witnesses while the Respondents called three witnesses. The Applicant testified as PW1, stating that she lives in Ongata Rongai, Nairobi. She avers that she got married to Dr Maragia James Omwega and the land in issue is ancestral land where she is married. She adopted her written statement dated 29th December, 2023 as part of her evidence.
9. The Plaintiff stated that the land title Wanjare/Bogiakumu/1394, previously registered in her husband's name, was transferred to her by way of transmission following his death. She averred that her husband used to visit this land frequently and that it remained intact. She further averred that the 1st Defendant's family owns land parcel 1385, which neighbours theirs. Her complaint was that the Defendants have taken away her land and apportioned it to themselves.
10. It is her further evidence that the Defendants subdivided parcel no. 1385 into 9579-9581, and the portion in dispute is now Wanjare/Bogiakumu/9579. She said that her brother-in-law, Dr Solomon Omache, has been using the suit land, which is located at the top where the road intersects. Currently, the suit title is registered in the name of Margaret (2nd Defendant), who is the wife of the 1st Defendant.
11. In cross-examination, the Plaintiff stated that she worked in various sectors before retiring in 2005 and is now evangelising the gospel by

selling books. She affirmed that the 1st Defendant is a cousin of her late husband and that he worked for them in the 1980s, caring for their home. However, she does not know the 2nd Defendant and has never met her.

12. She did not know the registered acreage of L.R. No. 1394 but estimated it at ½ an acre. She asserted that she acquired ownership of parcel number 9579 by succession. PW1 averred that Dr Solomon Omache has always used the suitland, with their permission, planting maize and trees on it. She also averred that her father-in-law, Isaiah Omwega Nyamache, was the initial owner before she got married. She could not state the year the 1st Defendant put up a mabati structure on the suit parcel 9579. The witness was shown the green card of 1385, with the entry number showing Joseph Nyabwari as the first registered owner in 1974.

13. Zacharia Nyiroria gave evidence as Pw2, introducing himself as a stepbrother of the 1st Defendant. He stated that the land belonged to Isaiah Omwega Omache, who then gave it to the Plaintiff. He described the suit land as bordering theirs, L-shaped, with a road cutting across it, and stated that there was no dispute on the lower side.

14. He was cross-examined and stated that his father had three wives and that he comes from the first house. He could not confirm that Isaiah's land is L.R 1394. He confirmed that his father gave each of his three wives land, and that he lives near where the 1st Defendant and his mother live. Later, he said the land allocated to their house was in Mosando,

while the suit land is in Nyorendo. According to Pw2, it's the Plaintiff who has planted napier grass on the land. He also stated that Rachel leased the land to a Mr Mbaka.

15. Dr Solomon Omwega Omache testified as Pw3. He lives in Botori, a suburb of Kisii town, and has a home in Bogiakumu. Pw3 stated that the Plaintiff is his sister-in-law and that the 1st Defendant is a cousin. He did not know the 2nd Defendant. He avers that, because his elder brother and his wife (Plaintiff) had been out of the country most of the time, he was the one using the land. He states that he uses it by planting napier and trees with his brother's permission.

16. Pw3 confirms that the 1st Defendant are their neighbours and averred that while growing up, the 1st Defendant would cultivate their portion, while Pw3's family would also plant their portion, and they peacefully co-existed. A dispute arose during succession when they learnt from the mutation that the portion they had been using was registered in the name of the father of the 1st Defendant. He visited the survey office to have the RIM amended, but the Surveyor informed him that the amendment could not be effected without the consent of the registered owner.

17. According to him the land which annexed their portion is now registered as Wanjare/Bogiakumu/9579. That the land did not belong to the 1st Defendant and he decided to take it up only after discovering the title was in their name. Under cross-exam, Pw3 stated that he has known Henry

from childhood. He was aware succession was undertaken in respect of L.R 1385 and that is what made them (and Plaintiff) become aware that 9579 had been taken.

18. Pw3 said the land in dispute does not belong to him but to the Plaintiff.

In re-exam, the witness said he was aware Henry's mother was using parcel 1385 but the area from below the road. Previously, the road was not there when they were working on the lands. That he is the one who has been in possession of the suit land with permission of his late brother.

19. The Defendants also called three witnesses with Esther Kwamboka Bonda testifying as Dw1. She said that she is the eldest in their family and the 1st Defendant is her brother in-law. It is her evidence that L.R. No Wanjare/Bogiakumu/1385 is their parcel of land which was being cultivated by their mother in law. Upon her death, the witness avers she continued cultivating it.

20. She also knew the Plaintiff but denied the Plaintiff has ever cultivated the suit land. She also denied that Dr Solomon Omache has been tilling this land. In cross-exam, she stated that she was married to Shem Ogutu in 1980. She confirmed that Henry's land borders the Plaintiff's land. She confirmed she usually see people cultivating Rachel's land and planting for Rachel but she could not confirm if they are workers of Dr Omache or the Plaintiff. Dw1 insisted she is the one using the land immediately after the road.

21. Johnson Omache Onguso (Dw2) stated that it is the mother of Henry and Esther Shem who has been tilling the land. He did not know the Plaintiff but knew Dr Solomon Omache. He contended that he has never seen him (Pw3) till the disputed land.
22. The 1st Defendant, Dw3, testified that the 2nd Defendant, his wife, is the current registered owner of the suit land. He further stated that after their parents died, the one left tilling the suit land was Esther Kwamboka, who has continued to till the land to date. This witness denied that the suit portion belongs to the Plaintiff, stating that each of them has their respective parcels. Dw3 also denied that he started using the suit portion after carrying out succession with respect to the estate of the owner of 1385.
23. During cross-examination, the 1st Defendant admitted that parcel 9579 is a subdivision of number 1385. He affirmed that the land was registered in the name of Joseph Nyabwari (the 1st Defendant's brother) in 1974 before it was subdivided and shared amongst the beneficiaries. When shown a picture of a structure, he confirmed that it is his and that it is built on the disputed portion. He denied that napier grass shown in the pictures produced by the Plaintiff is planted on the suit portion.
24. At the close of the pleadings, the parties filed their respective written submissions which I have read and considered.

Analysis and Determination:

25. I have analysed the pleadings, the evidence adduced, and the submissions rendered in regard to this dispute. I find the following questions arise for determination;

a. Whether the Applicant has proved the ingredients of adverse possession.

b. Who bears the costs of the suit?

26. The burden of proof as per the law lies on the Applicant to prove that she is entitled to the portion of the land Wanjare/Bogiakumu/9579 measuring **176ft by 35 ft by 176ft by 28ft** as pleaded. Section 109 of the Evidence Act Cap 80 provides thus;

”The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

27. The principles to be proved in a claim for adverse possession was laid out in the case of **Sisto Wambugu vs. Kamau Njuguna (1983) KLR 172** where Chesoni JA held thus;

“The general principle appears to be that until the contrary is proved, possession in law follows the right to possess: Lindley

MR in *Littledale v Liverpool College* [1900] 1 Ch 19, 21 put it in these words:

“In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it ...”

“The same point was made by Bramwell LJ in *Leigh v Jack* (1879) 5 Ex D 264, 272, where he said referring to the Statute of Limitations: ‘Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession.’ If this is the right way to approach the problem, the question becomes ‘Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?’ rather than ‘Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?’ It certainly makes it easier to understand the authorities if one adopts the first formulation.”

28. In the written witness statement, the Applicant stated that since she got married, her husband’s family had been in open, uninterrupted and

exclusive occupation of the suit property. At the time the Defendants started laying claim to the suit portion, her brother-in-law, Dr Solomon Omwega Omache, was utilising the suit land/portion albeit with her permission.

29. The Applicant brought this suit in her own name and not on behalf of the estate of her late husband or his family. In the opening statement of the originating summons, she pleaded thus, “***on the application of Rachel Nyamusi Omwega who on her own behalf claims to have acquired L.R. No Wanjare/Bogiakumu/9579***” by way of adverse possession.
30. She had a duty to demonstrate the activities she had undertaken on the land which constitutes dispossession, for a period exceeding 12 years and without the consent of the land owner. In her oral testimony, it appears that she has not personally utilised the suit portion. Second, a copy of the title deed presented in evidence shows that she became the registered owner of L.R. No. Wanjare/Bogiakumu/1394 on 27th March, 2018.
31. Section 24 of the Land Registration Act states that registration confers rights and interests on a person over land. Thus, the Applicant was conferred individual rights to title 1394 when she became the registered owner in 2018. It was her evidence that the family was in exclusive use of the land number 9579, which shared a common boundary with L.R. No. 1394. Hence, in her individual capacity, she could only grant her brother-in-law permission to use the suit property from the time she acquired title

to the land attached to the suit portion. Probably, the possession would be different if the claim was brought on behalf of the estate of the Plaintiff's late husband.

32. Be that as it may, assuming the 12 years had expired by the time this suit was brought, has the Applicant demonstrated possession and use to the exclusion of the registered owner? During cross-exam, Pw1 admitted that she has always lived in Ongata Rongai, Nairobi, and the person using the land is her brother-in-law, Dr Omache. Pw1 stated that Dr Omache has planted maize and mostly trees on the suit land. The witness added that it was Dr Omache who knew this land inside out and had been dealing with it more than her.

33. The Applicant called Zacharia Nyiroria Ogutu, who testified as Pw2 and described the location of the land. In terms of use, Pw2 stated that the person who had been utilising the land was Isaiah-deceased. Since Isaiah's death, his family members have been utilising the suitland. In cross-examination, this witness, stated that in 1973-1974 the land was leased to Mbaka, who planted napier grass. He did not know who leased the land to Mbaka. Pw2 insisted that the land belonged to the Applicant and averred that it was the Applicant who had leased the land to Mbaka.

34. This evidence of leasing to Mbaka to plant nappier grass, in my view, contradicts the Applicant's own evidence that it is her brother-in-law, Dr Omache, who is using the land. The Applicant did not mention leasing

the land to any party. Therefore, for purposes of proof of adverse possession, I do not find the evidence of Pw2 was not reliable and or useful to the Applicant's case.

35. The Applicant's brother-in-law, Dr Solomon Omache, gave his testimony as Pw3, stating that because his elder brother and his wife (the Applicant) had been out of the country most of the time, he is the one who has been using the land in dispute. That he used to plant maize and napier grass on the land with their permission. According to this witness, they peacefully co-existed with the Respondents as neighbours until the 1st Defendant did succession and got the suit title in his name.

36. Pw3 stated that it was after the succession and subdivision process that they examined the mutation and discovered that the portion they had been using above the road did not form part of L.R No. 1394. Therefore, he visited the survey office to have the map amended to include the suit portion in their title. However, the surveyor advised that the map could not be amended unless the person in whose name the piece is registered gave consent.

37. According to Pw3, even the 1st Respondent did not know this piece of land belonged to them and only built a small house on it after the discovery during subdivision of 1385. This raises the question of when the registered owners of the land became aware that the suit land belonged to them, so that the previous occupation and use by the

Applicant and/or her representative became adverse to the interest of the registered owner.

38. The evidence on record is that the Applicant took two years after her husband to administer her estate and transfer L.R 1394 into her name, that is around 2015. The period between 2013 and 2023, or between 2015 and 2023, is less than 12 years. Further, the Applicant's land has a distinct title from the portion being claimed. Pw3 needed to state clearly what was planted on parcel 1394 (which is not in dispute) and what was planted in the disputed portion. This distinction is missing in the evidence presented on behalf of the Plaintiff.
39. Pw3 also said she did not know Esther Bwondo Kwamboka nor could he tell where her house is located/built. The witness denied that the Respondents have been living on the land under dispute and denied that Esther (Dw1) was using this land. Dw1 in her evidence asserted that she is the one using the disputed portion which according to her belonged to the 1st Respondent.
40. The Respondents also relied on the evidence of one of their neighbours, Solomon Mache Onguso, who was defence witness number 3. According to this witness, he had never seen Dr Solomon Omache till this land or plant any maize on it. Instead, he asserted that it was Esther and the 1st Respondent's mother (before she died) who were farming the suit land.

41. Since both sides are claiming they have been in occupation and use of the suit land, the Applicant needed to establish with precision the usage that specific to the portion now registered as Wanjare/Bogiakumu/9579. Further, the evidence did not bring out the fact that the Respondents were aware this suit portion comprised part of their land (pw3 stating they co-existed peacefully).
42. This clarification was necessary in view of the Respondents' assertion that they were also using the land in dispute and had been using it for a long time. In my view, Pw3 may have discovered that this portion did not form part of 1394 only when the suit title was created following the subdivision of L.R. 1385 in the year 2022 and not when the Applicant undertook succession in the year 2015. Hence, time in my view ought to run from the time of such discovery.
43. Therefore, it is my considered opinion and I so hold that the Applicant has failed to establish the ingredients of a claim for adverse possession which leads me to the conclusion that the originating summons is not proved and is hereby dismissed for want of merit.
44. Costs of the suit to the Respondents.

Dated, signed and delivered at Kisii this 23rd day of April, 2026

A. OMOLLO
JUDGE